

STATE OF SOUTH CAROLINA  
In the Court of Appeals

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Appeal from Lexington County  
The Honorable Eugene C. Griffith, Circuit Court Judge

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THE STATE,

Respondent,

v.

MARION C. WILKES,

Appellant.

Appellate Case No. 2018-0001556

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INITIAL BRIEF OF RESPONDENT

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## APPELLANT'S STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court err in analyzing the admissibility of a DVD copy of the film Where the Lilies Blume (1974) when the court failed to screen the film, either in whole or in part, prior to ruling on the films admissibility?
- II. Did the trial court err in excluding a DVD copy of the film Where the Lilies Blume (1974) when testimony reflected the alleged victim told Appellant she wished to be buried in a manner consistent with the film and for her death to be concealed from the public?
- III. Did the trial court error in charging the jury that malice may be inferred from the use of a deadly weapon when the trial court substantially deviated from the charge set forth in Elmore by admitting the charges permissive inference instruction?

## RESPONDENT'S COUNTER STATEMENT OF ISSUES ON APPEAL

- I. I. The trial court's analyzation of the film prior to ruling on its admissibility is not preserved for this Court's review. Even so, the trial court acted within its discretion to rule on the admissibility of evidence based on its context.
- II. The trial court acted within its discretion to find the film irrelevant and therefore inadmissible when the movie was not probative of any of the events surrounding the victim's death.
- III. The trial court's use of the standard implied malice charge was not error given the facts of the case because no evidence mitigated the crime to manslaughter, accident, or self-defense. Even if the court erred, the instruction was harmless because malice was not an issue in dispute under any theory of the case.

## STATEMENT OF THE CASE

In November of 2014, a Lexington County Grand Jury indicted Appellant, Marion C. Wilkes, for murder. (Indictment.) Appellant proceeded to a jury trial on February 26, 2018, before the Honorable Eugene C. Griffith. (Transcript, Feb. 26, 2018.) Appellant was represented by Wayne Floyd, Esquire, and Colin Spangler, Esquire. (T. p. 1.) Assistant Solicitors Rhonda Patterson and Gill Bell, of the Eleventh Circuit Solicitor's Office, represented the State. (T. p. 1.)

The jury found Appellant guilty of murder. (T. p. 511, lines 13-15.) Judge Griffith sentenced Appellant to forty-five years' imprisonment. (T. p. 518, lines 6-7.) This appeal follows.

## STATEMENT OF FACTS

Marion Wilkes reported his wife, Susan Wilkes, missing on Saturday, June 14, 2014. Investigator Thomas Griffin was assigned to the missing person's case. (T. p. 126, line 22 – p. 127, line 15.) Upon receiving the report, Griffin went to the Wilkes home to interview Wilkes along with his son, Joseph Wilkes. (T. p. 127, line 15 – p. 128, line 4.) Griffin was told Susan disappeared after going for a walk Thursday morning. Her cell phone, purse, and vehicle were left behind at the house, however. (T. p. 128, line 9 – p. 129, line 1.) Griffin reviewed Susan's phone and realized there was no activity after June 8, 2014. (T. p. 129, lines 3-11.)

Griffin also examined Susan's vehicle. When he opened the trunk of the car, he noticed the carpet that would ordinarily cover the spare tire was missing. (T. p. 130, lines 1-7.) Griffin requested assistance from other law enforcement agencies, who brought dogs to search the area Wilkes reported as his wife's last known route. (T. p. 130, lines 11-24.) Marion Wilkes mentioned to Griffin that if anyone took his wife, it would have required more than one person because she would have put up a fight. (T. p. 131, lines 3-9.) Griffin created a bulletin to disseminate to the media and other law enforcement agencies detailing Susan's disappearance. (T. p. 131, lines 14-20.)

On Sunday, June 15, Griffin returned to the Wilkes home to find Marion, Joseph, Susan's sisters, and local news outlets gathered there. (T. p. 132, lines 11-21.) Susan's sister, Patti Smith, learned Susan was missing when Marion Wilkes called her Saturday morning, asking her, "What's going on in the 'Boro?" and then explaining about her sister's disappearance. (T. p. 118, line 19 – p. 119, line 8.) Smith said Wilkes did not seem concerned about his wife. (T. p. 119, lines 9-17.) Smith traveled to West Columbia in an effort to learn more information. Smith said she had trouble talking to Joseph without Marion interrupting their conversation. (T. p. 120, lines

1 – 23.) When the television station arrived to do an interview about Susan Wilkes, Marion insisted he do all the talking to the weekend reporter for WACH Fox 57 news. (T. p. 112, line 19 – p. 113, line 18; p. 116, lines 8-12; p. 121, lines 2-15.) The reporter later testified she found Wilkes' demeanor odd because he did not seem concerned about his wife. (T. p. 115, lines 2-10.)

The following day, on June 16, Griffin asked the men to return for another interview, but this interview took place at SLED. (T. p. 134, lines 17-25.) While Griffin transported the men to SLED, other SLED agents executed a search warrant for the Wilkes home. (T. p. 134, lines 4-15.) Agents found female walking shoes and a purse on top of a dresser in one bedroom. Inside the purse was Susan's wallet with her identification. (T. p. 155, line 1 – p. 156, line 1.) Agents also discovered Susan's phone in a jewelry box on the dresser. (T. p. 156, lines 4-15.) A weekly medication container indicated pills had been taken for the days of Sunday through Wednesday, but Thursday through Saturday's medications remained in the container. (T. p. 156, line 16 – p. 157, line 10.) In Marion's bedroom and bathroom, the shower curtain was missing. (T. p. 157, lines 16-18.) In the kitchen of the home, there were blood stains on the door leading to the garage and on the kitchen floor. (T. p. 158, lines 14-23; p. 160, lines 9-18.) Agents also observed what appeared to be blood on the passenger side frame of Susan's car, which was parked in the garage. (T. p. 161, lines 10-21.) Several other bloodstains were found inside the car. (T. p. 172, lines 2-11.)

At SLED, Marion and Joseph were interviewed separately and the men gave similar statements. After the interviews, however, agents placed the men together in the same room and observed their interaction from behind a two way mirror in the next room. (T. p. 135, lines 3-22.) Marion asked Joseph, "You didn't change up on me, did you?" and also commented that the

police needed physical evidence. (T. p. 136, lines 16-19.) Marion looked around and then said, “I ain’t changing up.” (T. p. 136, lines 18-21.)

On June 18, 2014, Patti Smith and Joseph Wilkes met at the police station to talk, and Joseph agreed to lead officers to the location of his mother’s body. (T. p 137, lines 1-20.) Joseph told officers the body was in Little Mountain, South Carolina, about a thirty-five minute drive away. (T. p. 137, line 22 – p. 138, line 3.) Joseph led police to the burial site, which was in the back corner of a residential property owned by a man named Eric Bassett. (T. p. 138, lines 13-25.) After determining where the grave site was, the crime scene team began to remove the loose dirt from the area. (T. p. 166, lines 2-11.) The grave site was approximately three and one-half feet long by one and three-quarters feet wide by two feet deep. (T. p. 169, lines 21-23.) Under some of the dirt was a cement block, and below the block was the body of Susan Wilkes, wrapped in a comforter and a brown tarp. (T. p. 166, line 9 – p. 167, line 9.) The tarp was wrapped with duct tape, and inside the tarp, Susan’s head was wrapped with a yellow towel. (T. p. 167, line 21 – p. 168, line 2.)

After Joseph revealed the death of his mother on June 18, Marion Wilkes changed his story and told investigators his wife committed suicide by stabbing herself in the heart. Wilkes claimed his wife wanted to be buried somewhere natural. (T. p. 359, lines 7-23.) Wilkes also claimed his wife had fallen and hit her head, which is why they wrapped her head in a towel. (T. p. 360, lines 2-4.) Marion claimed he and Susan had been to the place he buried her body, and Susan told him it was a favorite place of hers and that she wanted to be buried there. (T. p. 361, lines 1-21.) Wilkes said Susan stabbed herself in the chest with the knife, pulled the knife out and put it in the sink, then fell backward and hit her head on the oven handle. After collapsing on

the ground, Susan had a five minute conversation with Marion.<sup>1</sup> (T. p. 363, lines 8-22.) Wilkes claimed Susan told him to get a tarp from the backyard and bury her in it. (T. p. 364, lines 2-7.)

The pathologist found multiple blunt force injuries to Susan's head and one stab wound to the torso, just below the chest. (T. p. 231, lines 14-22.) She had five injuries, at least, that caused lacerations on the skin and she had an underlying fracture of the skull. (T. p. 232, lines 1-4.) The pathologist opined that a straight object, consistent with a frying pan, could have caused the injuries. Dr. Ross also testified the injuries could not have been self-inflicted because of the number of the injuries and the location about the head. (T. p. 233, lines 4-20.)

The stab wound was just beneath the sternum. The wound continued upward and backward and penetrated the heart. (T. p. 234, lines 20-25.) The weapon that caused the wound would have been two to four inches long to travel into the heart. (T. p. 236, lines 5-10.) Dr. Ross examined the rest of Susan's body and found no evidence of damage to any other organs or damage resulting from any natural disease processes. (T. p. 237, line 11 – p. 238, line 3.) The cause of death was homicide due to exsanguination from the stab wound, contributed by the blunt force injury to the head. (T. p. 238, lines 21-25.) The toxicology report showed sub-therapeutic levels of Butalbital, a sedative, and Trazodone, an antidepressant. (T. p. 263, line 8 – 271, line 12.)

Susan's family doctor of five years testified Susan was prescribed medication for her high blood pressure and headaches. (T. p. 283, line 16 – p. 284, line 25.) Susan never complained of depression to her doctor. (T. p. 285, lines 8-11.) Several years before, Susan was prescribed a low dose of Elavil, an antidepressant, in an effort to relieve her headaches triggered by muscle

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<sup>1</sup> The Wilkes home was located approximately one-half of a mile from Lexington Hospital, and typical emergency response time is two minutes of less from the time of the 911 call. (T. p. 382, line 22 – p. 383, line 23.)

tension. (T. p. 287, lines 1-8.) In 2013, the Elavil was replaced by Trazodone because Trazodone had fewer side effects. (T. p. 288, lines 2-8.) Susan was additionally prescribed Fiorinal with codeine to relieve her headaches. One of the active ingredients in Fiorinal is the sedative Butalbital. (T. p. 289, lines 4-17.)

After confirmation that the body was recovered, Griffin arrested Marion and Joseph Wilkes for murder. (T. p. 139, lines 2-11.) After he was arrested and Mirandized, Marion Wilkes changed his story again and gave a statement to police in which he confessed to killing his wife. (T. p. 341, line 11 – p. 346, line 1.) In his interview with police, Wilkes mentioned his wife's brokerage account with approximately \$120,000, of which he was the beneficiary, as well as a life insurance policy. (T. p. 346, lines 16-24.) Wilkes also described his wife as gaining weight, having an affair, and being an alcoholic. (T. p. 347, lines 3-5.) Wilkes also said there was a "confrontation" between him and his wife. (T. p. 359, lines 2-6.)

#### **Marion Wilkes' Version of Events**

Marion Wilkes testified his wife was depressed at the time of her death because she had been laid off from her job of thirty years. (T. p. 417, line 14 – p. 418, line 21.) Defense counsel asked Wilkes if Susan had a favorite movie, and Wilkes said they would watch *Where the Lilies Bloom* several times each year in the winter. (T. p. 419, lines 1-17.) Marion explained that in the movie the a father of several young children dies of black lung, but tells the children before he dies that he wants to be buried in the mountains. The children bury their father and follow his wishes not to tell anyone about his death. (T. p. 420, line 20 – p. 421, line 4.) Wilkes said Susan was a loner who wanted to be somewhere quiet after her death and wanted a natural burial. (T. p. 421, lines 5-17.)

Counsel questioned Wilkes about Susan's demeanor in the year after she lost her job. (T. p. 422.) Wilkes claimed Susan was depressed about not finding a job and hurting her back, so he and his son would try to do "the best [they] could to keep her going." Wilkes claimed Susan was also depressed because Joseph intended to join the military but no recruits were being admitted to the Air Force at the time. (T. p. 425, lines 8-18.)

Wilkes said that on the day of her death, Susan first fell when she was trying to fix her breakfast at 9:00 in the morning. (T. p. 425, lines 22-24.) Wilkes said she hit her head again later that day when they were making sandwiches for lunch. Susan was reaching for salt on the top cabinet when she fell off a two-step stool and hit her head on the seat of a chair. (T. p. 425, line 25 – p. 426, line 7.) Marion claimed he left to go move his car to prepare to take her to the hospital, but when he returned, Susan had stabbed herself with a paring knife she kept in the kitchen drawer. (T. p. 426, lines 9-25.) Wilkes said Susan told him she wanted Joseph to go to college. (T. p. 427, lines 4-8.) Wilkes claimed Susan had the duct tape and the brown tarp ready, told him how deep to bury her, and where to put her body, so she could "be out there with God." (T. p. 428, line 23- p. 429, line 5.)

Wilkes said after Susan killed herself, he wrapped up her body and slid it out into the garage. (T. p. 429, lines 7-19.) Wilkes left the body there until the next morning, when he told Joseph his mother had been euthanized because she had cancer. Susan did not have cancer, but told Marion to tell Joseph that to "let him get over it." (T. p. 430, lines 6-10.) Around 10:00 am, the men put Susan's body in the trunk and drove the 40 miles to Little Mountain to bury Susan under a hickory tree. (T. p. 430, line 17 – p. 431, line 21.) Wilkes claimed he tried to position the body on its side, and put a concrete block in the grave "as a marker." (T. p. 432, lines 2-17.)

When he returned to Columbia, he did not tell anyone about Susan's death because "she didn't want nobody to know nothing." (T. p. 432, line 21 – p. 433, line 6.)

Wilkes said he was in shock when he spoke to police about his wife's supposed disappearance. (T. p. 434, lines 3-8.) He only changed his story to confess to the killing after he learned Joseph was being charged with murder. (T. p. 435, lines 5-22.) On cross-examination, Wilkes acknowledged he heard rumors his wife was having an affair with one of her co-workers. (T. p. 440, lines 4-14.) Wilkes denied telling investigators his wife had a gambling problem, claiming the captain made him say things about his wife that were not true. (T. p. 443, lines 3-22.)

**I. The trial court's analyzation of the film prior to ruling on its admissibility is not preserved for this Court's review. Even so, the trial court acted within its discretion to rule on the admissibility of evidence based on its context.**

Appellant sought to introduce evidence that Susan Wilkes wanted a natural and secretive burial in the woods; in part because of her interest in one of her favorite films, *Where the Lilies Bloom*, and in part because of her "loner" personality. (See IBOA, p. 8; T. p. 421, lines 5-20.) The trial judge, acting within his discretion, found some of that information relevant while properly excluding other offers of evidence as not probative of any the events surrounding Susan's death. The trial court's refusal to admit the film into evidence is an issue wholly without merit.

#### **STANDARD OF REVIEW (ISSUES I AND II)**

In criminal cases, the appellate court only reviews errors of law. *State v. Jacobs*, 393 S.C. 584, 586, 713 S.E.2d 621, 622 (2011). "[T]he admission of evidence is within the discretion of the trial court and will not be reversed by this Court absent an abuse of discretion." *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000) (citing *State v. Smith*, 337 S.C. 27, 34, 522 S.E.2d 598, 601 (1999)). "An abuse of discretion occurs when the trial court's ruling is based on an error of law." *Id.* (citing *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)).

"A trial [court's] decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." *State v. Huckabee*, 419 S.C. 414, 423, 798 S.E.2d 584, 589 (Ct. App. 2017). The Court of Appeals must review a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated

to give great deference to the trial court's judgment. *State v. Collins*, 409 S.C. 524, 534, 763 S.E.2d 22, 28 (2014); *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003)).

### HOW THE ISSUES AROSE AT TRIAL (ISSUES I AND II)

Following the Court's colloquy with Wilkes concerning his right to testify, the State alerted the Court to the intention of the defense to introduce a movie, to which the State objected. (T. p. 400, lines 7-11.) The State objected on the grounds the introduction of the movie, *Where the Lilies Bloom*, was calculated to arouse the sympathy of the jury, was irrelevant or did not substantiate material facts, and suggested an opinion of the jury based on an improper basis. (T. p. 400, line 13 – p. 401, line 6.) The State also argued that only Marion Wilkes would testify the movie had some relevance to the crime itself, and that relevance was only minimal because the facts of the case differed from the events depicted in the movie. (T. p. 403, lines 2-15.) The court reserved its ruling until the defense sought to admit the film into evidence. (T. p. 403, lines 16-24.)

During direct examination of Wilkes, when he testified Susan wanted a natural burial, defense counsel asked to publish the first thirty-five minutes of the movie to the jury, saying:

Your Honor, we'd like to introduce the movie into evidence. We would only like to publish about 35 minutes of it, the first 35 minutes. Then, of course, if the jury wants to watch it all later, but that's got the significant part of it.

(T. p. 421, line 24 – p. 422, line 3.) The State objected again, saying the evidence was cumulative to Wilkes' testimony and prejudicial. (T. p. 422, lines 4-8.) The Court ruled: "Since it's a favorite movie of the family, but it's not directly probative of the events, I'm going to not allow it. But you can crave [sic] reference to it, the story line or whatever, just as you've done. I'm not going to allow it. Number 7 will not be admitted." (T. p. 422, lines 9-13.) Defense counsel said,

“Thank you, Your Honor.” (T. p. 422, line 15.) Appellant did not object to the Court’s failure to review the movie before making its ruling, nor did he explain the why he sought to introduce the entirety of the movie into evidence.

The court took a break following direct examination, and the State renewed its motion to introduce statements made by Wilkes at bond court. (T. p. 436, lines 20-25.) The defense also again argued its position in favor of publishing the video to the jury. The Court declined to change its ruling and said the video was not admissible. (T. p. 437, lines 3-19.) Again, Wilkes did not argue the trial court should have viewed the video before making the ruling.

### ARGUMENT

As a stand-alone issue, the trial court’s failure to preview the film *Where the Lilies Bloom* before ruling on its admissibility is not preserved for this Court’s review. Defense counsel moved to admit the film into evidence and publish the first thirty-five minutes to the jury. (T. p. 422.) The trial court declined to admit the film based on counsel and Appellant’s representations of the film’s relevance. Appellant did not object to the court’s ruling on the basis the court failed to review the movie before making its finding. Further, Appellant did not specify why the entirety of the movie was relevant and should have been admitted into evidence. He only argued the relevance of the first thirty-five minutes he sought to publish.

It is incumbent on Appellant to explain to the court the specific relevance of the evidence he seeks to introduce. “The objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error.” *State v. Johnson*, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005). “Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review.” *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342,

373, 628 S.E.2d 902, 919 (Ct.App.2006). It is “axiomatic that an issue cannot be raised for the first time on appeal.” *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Imposing such a requirement on the appellant “is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.” *I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). A party is not required to use the exact name of a legal doctrine in order to preserve the issue. *See State v. Russell*, 345 S.C. 128, 546 S.E.2d 202 (Ct.App.2001) (finding issue was preserved even though defendant did not use exact words “corpus delicti” in his request for a directed verdict). Nonetheless, the issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge. *Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733.

In the instant case, Appellant should have objected to the trial judge’s method for determining admissibility and given the judge a fair opportunity to consider the objection, preview the film if he thought it necessary, and modify his previous ruling if his view of the film changed his mind. Appellant did not make this particular argument to the court, however. Appellant also sought to introduce the entirety of the film, Exhibit 7, without arguing the relevance of the entire film, only the first thirty-five minutes. Appellant did not sever the arguably relevant portion from the remainder of the movie and specifically request the trial court view this portion before ruling.

Even if Appellant had properly preserved this issue with the trial court, the court was still within its discretion to rule on the admissibility of the movie without stopping to preview the movie and unnecessarily delaying the progress of the trial. “A trial judge is vested with a wide discretion in the conduct of a trial. He has the duty to see that the trial proceeds in an orderly fashion and should prevent unnecessary repetition, working to the end that the time of the court

be preserved.” *State v. DeBerry*, 250 S.C. 314, 322, 157 S.E.2d 637, 641 (1967). In this case, even accepting Appellant’s argument the movie was a favorite of Susan’s and she had expressed an interest in a natural burial, perhaps as a result of watching this movie, the film was not relevant to the circumstances of Susan’s death. Marion Wilkes testified his wife told him where she wanted to be buried, as she’d seen in the movie. That information was presented to the jury. The trial court was certainly within his discretion not to delay the proceedings by reviewing a film that had no relevance to Susan’s death.

Appellant’s reliance on *State v. Goss*, 425 S.C. 101, 830 S.E.2d 373 (2018) is misplaced. In *Goss*, the PCR court was tasked with making credibility findings about witnesses the court elected not to hear, but took judicial notice of their testimony. In finding error, the court said the PCR court’s actions “diluted the process” of its fact findings. *Goss*, at 108, 820 S.E.2d at 376. In *Goss*, the Supreme Court found fault in the PCR court’s factual findings, which it is obligated to do under the PCR statutes. *See* S.C. Code Ann. § 17-27-80 (“The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented.”) In a criminal trial, however, the judge is not the fact finder, but the gatekeeper of evidence presented to the jury. In that role, the trial judge must frequently exercise his discretion in the midst of trial to determine whether evidence is properly admissible. Indeed, Rule 103, SCRE, titled “Rulings on Evidence” states:

- a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence **unless a substantial right of the party is affected**, and
  - (1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

- (2) Offer of Proof. In case the ruling is one excluding evidence, **the substance of the evidence** and the specific evidentiary basis supporting admission were made known to the court by offer or **were apparent from the context**.

Rule 103, SCRE (emphasis added). It was apparent from the context of Marion Wilkes' testimony,<sup>2</sup> in which he described the substance of the plot of the movie, that viewing the film would not assist the factfinders in their assessment of Marion Wilkes' credibility because the movie had no rational relationship the circumstances of Susan's death and burial, other than that which had already been communicated to the jury. Because the jury was already aware of Susan's interest in the film, the screening of the movie affected no substantial right of Wilkes. The trial court's ruling was properly in accordance with the Rules of Evidence.

**II. The trial court acted within its discretion to find the film *Where the Lilies Bloom* Irrelevant, and therefore inadmissible, when the movie had no bearing on the events surrounding the victim's death.**

Marion Wilkes sought to introduce a copy of the film *Where the Lilies Bloom* into evidence because it was a favorite of Susan Wilkes and because the film allegedly explained why Wilkes concealed his wife's death from law enforcement. The trial court allowed into evidence testimony from Marion Wilkes about the film. That testimony – that the movie was a favorite of Susan's and inspired her desire for a secret, natural burial – was admitted as relevant. The thirty-five minute movie itself, however, was not relevant. The court properly distinguished between information about the movie, which arguably made a matter at issue more probable, and the movie itself, which served no probative value.

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<sup>2</sup> (T. p. 420, line 9 – p. 422, line 4.)

Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Rule 401, SCRE. The trial court has broad discretion in determining the relevancy of evidence and its decision to admit or exclude evidence will not be reversed on appeal absent an abuse of that discretion and a showing of prejudice. *State v. Holder*, 382 S.C. 278, 288, 676 S.E.2d 690, 696 (2009). Stated another way, “evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy.” *State v. Salley*, 398 S.C. 160, 169, 727 S.E.2d 740, 744 (2012) (citing Rule 401, SCRE). Only relevant evidence is admissible. See *State v. Petit*, 144 S.C. 452, 142 S.E. 725 (1928).

Moreover, the right to present a defense is not unlimited, but must “bow to accommodate other legitimate interests in the criminal trial process.” *Rock v. Arkansas*, 483 U.S. 44, 55 (1987) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973)). While defendants are entitled to a fair opportunity to present a defense, that right does not encompass the right to present any evidence, regardless of its admissibility under the rules of evidence. See *United States v. Lancaster*, 96 F.3d 734 (4th Cir.1996). In the case before the Court, Appellant presented the trial judge with evidence purporting to corroborate his version of the events surrounding Susan’s death and burial. The trial court, acting within its discretion, determined information about Susan’s interest in the film was relevant, but the film itself was not properly admissible under the rules of evidence.

Appellant offered the film during the direct examination of Marion Wilkes. (T. p. 421, line 24 – p. 422, line 3.) The State objected on the grounds the video was cumulative, a waste of time, and prejudicial. (T. p. 422, lines 4-8.) Appellant argues the trial court was unclear as to

“which type of unfair prejudice that the court perceived as substantially outweighing any probative value.” That is a misreading of the court’s finding, however. Although the State might have objected based upon Rule 403, SCRE, the trial court’s ruling was based upon Rule 402, SCRE, finding the movie “was not directly probative of the event” surrounding Susan’s death. (T. p. 422, lines 9-11.) Thus, in finding the film “not probative,” the trial court found the evidence was not relevant and therefore not admissible. *See* Rule 402, SCRE.<sup>3</sup> Appellant’s Rule 403 analysis is misplaced because irrelevant evidence never progresses to a Rule 403 consideration. It simply is not admissible regardless of any prejudicial impact and no matter how wasteful of the jury’s time.

As for the substance of Appellant’s claim, that the jury should have seen *Where the Lilies Bloom* because the film made Appellant’s version of events more probable, a review of the film leaves no rational relationship between the plot of the movie and Marion Wilkes description of his wife’s final moments. In the first thirty-five minutes of *Where the Lilies Bloom*, the jury would have seen the following: An impoverished family of four children and their father, Roy Luther, stricken with black-lung, try to survive by sharecropping off the land of their mountain home before the man who bought their foreclosed property in a tax sale evicts them. While their father is dying, the children care for the landlord, who also almost dies of pneumonia, but agrees to sign over the land back to the children in exchange for nursing care. Meanwhile, townsfolk warn the children they will be institutionalized when orphaned if their father dies. The children decide to research medicinal herbs and to treat their father naturally. Unfortunately, they are too

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<sup>3</sup> Rule 402, SCRE reads: “All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible.”

late, and Roy Luther dies. The children then bury their father on the mountain where their family has lived for 200 years. (See Defense Exhibit 7.)

The only factual similarity between the movie and the circumstances surrounding Susan's death involve the burial of the body in natural setting, as opposed to a cemetery. In the film, the father is buried in a wooden coffin he built himself, not in a tarp with duct tape wrapped around his head. In the film, the children are afraid of being institutionalized because they are minors. Marion Wilkes cannot claim such a fear. In the film, the father dies of a terminal illness. According to Marion Wilkes, Susan committed suicide after a nasty fall. In the film, the children bury their father on family property. Marion and Joseph put Susan's body in the trunk of a car and drove her to a secluded piece of property owned by a friend. In sum, virtually nothing about the movie tends to make Marion Wilkes' version of event more probable. The only evidence of relevance, that Susan liked the movie and expressed an interest in natural burial, was presented to the jury. The movie itself was not relevant. The trial court committed no error in excluding the film from evidence.

#### **Harmless Error**

Even assuming the film was relevant under the Rules of Evidence, any error in its exclusion would be harmless beyond a reasonable doubt. Appellant cannot show how he was prejudiced by the jury's failure to view the film. The State presented direct evidence of Appellant's guilt when he confessed to killing his wife in their kitchen. Marion Wilkes admitted he fabricated his wife's missing person's story, and then changed his version of events multiple times. Further, there was significant circumstantial evidence of his guilt: the injuries to Susan's body were not consistent with Wilkes' description of how Susan died; Lexington Hospital was within a few minutes' drive of the Wilkes' home, yet Wilkes did not seek medical help; Susan's

family doctor reported no history of depression; Wilkes appeared unaffected by his wife's disappearance to her sister and a reporter; Wilkes made incriminating comments to Joseph about changing his story to investigators; Wilkes was aware of Susan's investments and believed he would inherit the money after her death; and Wilkes made many disparaging comments to investigators about his wife's fidelity and gambling habits. The jury heard that *Where the Lilies Bloom* was one of Susan's favorite films and that in the film a character has a natural burial. Viewing the film would not have imparted the jury with any more knowledge or insight into Susan's death. The jury determined Wilkes' claim his wife committed suicide not credible in light of the overwhelming evidence against him.

Even if the trial court erred by refusing to admit the film into evidence, any error was harmless beyond a reasonable doubt.

**III. The trial court's use of the standard implied malice charge was not error given the facts of the case because no evidence mitigated the crime to manslaughter, accident, or self-defense. Even if the court erred, the instruction was harmless because malice was not an issue in dispute under any theory of the case.**

Marion Wilkes either murdered his wife, or he had nothing to do with her death. There was no lesser included offense charged, and there was evidence of accident or self-defense. In his appeal, however, Wilkes contends the trial court erred in giving an abbreviated version of an approved charge on the inference of malice from the use of a deadly weapon. Wilkes argues two seminal cases in South Carolina jurisprudence support his position. A closer reading of those cases, however, indicates an unsettled area of law concerning the permissive inference of malice under facts in which no mitigation evidence is presented. Nevertheless, regardless of whether the instruction was error, any error was harmless in light of the overwhelming evidence of malice presented during trial and because the issue of malice was not in dispute. Wilkes' conviction should be affirmed.

#### **STANDARD OF REVIEW**

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. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 604 (2011). A jury charge is correct if, when read as a whole, the charge adequately covers the law. *Id.* "A jury charge that is substantially correct and covers the law does not require reversal." *Id.* (citing *State v. Foust*, 325 S.C. 12, 16, 479 S.E.2d 50, 52 (1996)).

#### **HOW THE ISSUE AROSE AT TRIAL**

Following the defense's presentation of its case, the trial court elected to take a ten minute break to have a charging conference off the record. (T. p. 466, line 15 – p. 467, line 4.)

Appellant indicated to the court he had some proposed charges, but the record is not clear what was discussed in the charging conference. (T. p. 467, lines 1-4.)

When the trial resumed, the parties gave their closing arguments to the jury (T. pp. 467 – 494.) Before the court gave its instruction to the jury, Appellant told the trial court he objected to any charge on accomplice liability and “the hand of one charge.” (T p. 495, lines 6-7.) The court noted Appellant’s objection. Appellant did not object to the inference of malice charge prior to the court giving the instruction.

During the charge, the court instructed on the State’s burden of proof at the beginning of the instruction, and then more thoroughly just before its instruction on criminal intent. (T. p. 500, line 10 – p. 501, line 7.) The court also cited to the State’s burden to prove their case beyond a reasonable doubt on numerous occasions throughout the charge. During its explanation of express and inferred malice, the court said the following:

Malice may also be inferred from conduct showing a total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon. A deadly weapon is any article, instrument which would likely cause death or great bodily harm.

(T. p. 503, lines 4-9.) Following the jury instruction, Appellant renewed its objection to the hand of one, hand of all instruction and also objected “to a portion of your malice instruction which deals with the inference of malice that can be implied,” arguing the language was a burden shift.<sup>4</sup> (T. p. 510, lines 2-6.) The court responded, “And your objection on both of those is noted but I am not going to change them. We talked about that in pretrial.” (T. p. 510, lines 7-9.) The court did not elaborate on what was discussed among the parties.

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<sup>4</sup> Respondent agrees with Appellant’s contention to word “burden-ship” reflected in the transcript is likely a transcription error.

## ARGUMENT

Appellant argues<sup>5</sup> the trial court's instruction on the permissive inference of malice from the use of a deadly weapon was error because it deviated from the charge given in *State v. Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983). Appellant argued the charge shifted the burden on Appellant in the element of malice. Appellant did not argue the charge was confusing or prejudicial. The trial judge did give an abbreviated version of the *Elmore* charge, but whether that charge was error is not clear, in light of the Supreme Court of South Carolina's comments in *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009), and because this case only involved a charge of murder, not any lesser included offenses or self-defense or accident.

Until 1983, the instruction routinely given on the use of a deadly weapon included a presumption of malice. *Belcher*, at 608, 685 S.E.2d at 807. In *State v. Elmore*, the Supreme Court of South Carolina found the presumption unconstitutional, in light of the Supreme Court of the United States decisions on mandatory presumptions as violative of Due Process. Those cases

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<sup>5</sup> It is questionable whether Wilkes' objection to the jury instruction is preserved for this Court's review. "If a party fails to properly object, the party is procedurally barred from raising the issue on appeal." *State v. Johnson*, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005). The South Carolina Rules of Criminal Procedure provide specific guidance in regards to raising and preserving an objection to a jury charge. See Rule 20, SCRCrimP. A defendant must object to the jury charge as given or request an additional charge when afforded the opportunity to do so in order to properly preserve an objection to a charge. *State v. Stone*, 285 S.C. 386, 387, 330 S.E.2d 286, 287 (1985); "The rule in this State is firmly established that failure to object to a charge, or failure to request an additional charge when the opportunity is afforded, constitutes a waiver of any right to complain on appeal of an alleged error in the charge." *State v. Williams*, 266 S.C. 325, 335, 223 S.E.2d 38, 43 (1976).

Here, Wilkes arguably failed to preserve his objection to the inference of malice jury charge by not timely and contemporaneously objecting to the jury charge during the charge conference. The record indicates the parties discussed the proposed charges in an off the record conference, and at the conclusion, Wilkes noted an objection only to the hand of one charge. (T p. 495, lines 6-7.) Only after the charge was given, did Wilkes object to the inferred malice instruction on the grounds of burden shifting. Because he did not object to the charge at his first opportunity to do so, this issue is arguable unpreserved for review.

forbade “burden-shifting presumption[s]” or “conclusive presumption[s]” by the state because the presumption placed the burden on the accused to prove his actions or intent reduced the crime to a lesser charge. See *Mullaney v. Wilbur*, 421 U.S. 684, 703–704 (1975); *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979). With little elaboration, the *Elmore* Court fashioned a jury charge it felt comported with the Due Process Clause.

The law says if one intentionally kills another with a deadly weapon, the implication of malice may arise. If facts[ ] are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive.

*Elmore*, at 421, 308 S.E.2d at 784. The Court noted that “only slight deviations from this charge will be tolerated.” *Id.*

In 2009, *Belcher* overruled *Elmore* by holding the permissive inference of malice charge was error when there was evidence mitigating the crime to manslaughter, self-defense, or accident. *Belcher* addressed the confusion caused by the permissive inference charge when mitigation exists, saying, “instructing a jury that ‘malice may be inferred by the use of a deadly weapon’ is confusing and prejudicial where evidence is presented that would reduce, mitigate, excuse or justify the homicide. A jury charge is no place for purposeful ambiguity.” *Belcher*, at 611, 685 S.E.2d at 809. In effect, *Belcher* says the *Elmore* charge, regardless of its addition of the permissive inference language, is not permissible in some circumstances. For example, if the charge presented a mandatory presumption of malice, the charge could never be harmless in accordance with *Sandstrom* and its progeny. However, if the charge contains a permissive inference, and is absent evidence mitigating the crime to a lesser offense, the charge can be harmless.

*Belcher* indicates the *Elmore* court sought only to rectify the unconstitutional **mandatory** presumption of malice while *Belcher* sought to rectify the **confusion** caused by the inference in **cases of mitigation**, but neither *Belcher* nor *Elmore* addressed the permissive inference of malice instruction when no mitigation evidence existed. The only indication of the Court's opinion of such a scenario can be found in *Belcher's* footnote 9, which says the following:

**The standard implied malice charge remains valid, as does the general permissive inference instruction:** "If facts, are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive."

*Belcher*, at 612, 685 at 810 (emphasis added). The footnote suggests **the standard implied malice charge**, the charge given in the instant case, remains valid when no mitigation evidence is presented. Thus, Respondent reads *Elmore* and *Belcher*, the same cases cited by Appellant, as finding the trial court's instruction in the instant case a "valid" charge. In sum, Appellant's argument the charge constituted a burden shift is not supported by the case law because the charge gave a permissive inference of malice, not a mandatory presumption. Further, Appellant does not argue the charge is prejudicial and confusing, as addressed in *Belcher*, because there is no mitigation. It is incumbent on Appellant to bring attention to the exact error he alleges the trial court to have made. *Johnson*, at 58, 609 S.E.2d at 523.

Moreover, despite Appellant's arguments to the contrary, *Gibson v. State*, 416 S.C. 260, 786 S.E.2d 121 (2016), does not clarify the propriety of the instruction given in this case because although the instruction is similar, the facts of the case are not. In *Gibson*, the abbreviated instruction was given even though there was mitigating evidence of accident or involuntary manslaughter. *Gibson*, at 266, 786 S.E.2d at 124. ("[T]he only evidence of petitioner shooting

the gun indicated he shot his weapon in the air after other shots were fired. Petitioner admitted in one of his statements that it was possible his gun ‘may have dropped down’ toward the victim while he was driving away and shooting in the air.”). *Gibson*, in which the defendant could have accidentally or recklessly killed the victim, is not on point with the facts of this case, in which Wilkes either maliciously killed his wife or had nothing at all to do with her death.

### **Harmless Error**

As noted earlier, and critical to the Court’s analysis in *Belcher*, Susan’s death was either a murder or Wilkes was innocent. Even assuming, arguendo, the instruction was error, any error was harmless beyond a reasonable doubt. In *Belcher* the Court subjected the erroneous instruction to a harmless error analysis. *Belcher* at 611, 685 S.E.2d at 809. The Court said that the evidence of self-defense presented highlighted the prejudice of the charge. *Id.* at 612, 685 S.E.2d at 810. In *Gibson*, as part of its prejudice analysis of the ineffective assistance of counsel claim, the Court cited Petitioner’s admission of how he handled his gun while shooting into the air. *Gibson*, at 266, 786 S.E.2d at 124. The harmless error and prejudice analysis in both cases illustrate the differences between these cases and in the instant case.

Here, the State theorized Wilkes murdered his wife in their kitchen because he wanted to inherit her money and because he thought she was having an affair. (T. pp. 491-494.) The defense’s theory of the case was that Susan committed suicide after hitting her head. (T. pp. 484-485.) Either Marion Wilkes was guilty of murder or he was innocent of the crime. Marion Wilkes gave a statement to police saying he and his wife had a confrontation in the kitchen and he killed her. Susan had multiple blunt force injuries to her head and one stab wound to the torso, just below the chest. (T. p. 231, lines 14-22.) She had five injuries, at least, that caused lacerations on the skin and she had an underlying fracture of the skull. (T. p. 232, lines 1-4.)

Wilkes sought no medical treatment for his wife, despite the close proximity of a hospital. These facts constituted evidence of malice. On the other hand, there was no evidence presented mitigating the murder charge to voluntary or involuntary manslaughter, accident, or self-defense. The element of malice was not an issue in dispute if the jury did not believe Marion Wilkes' version of events when he testified on the stand. It was not the instruction on malice that contributed to the verdict of guilt. It was the implausibility of Wilkes' story in light of the evidence against him.

### CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the appeal must be dismissed and the judgment, conviction, and sentence of the trial court should be affirmed.

Respectfully submitted,

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Attorney General

DONALD J. ZELENKA  
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ATTORNEYS FOR RESPONDENT

April 22, 2019.

STATE OF SOUTH CAROLINA  
In the Court of Appeals

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Appeal from Lexington County  
The Honorable Eugene C. Griffith, Circuit Court Judge

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THE STATE,

Respondent,

v.

MARION C. WILKES,

Appellant.

Appellate Case No. 2018-0001556

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**PROOF OF SERVICE**

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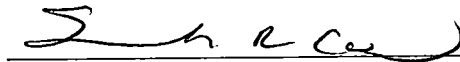
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APR 22 2019  
SC Court of Appeals

I, Susannah Cole, counsel for Respondent, certify that I have served the within Initial Brief of Respondent on Appellant by depositing two (2) copies of the same via U.S. postal service, postage paid, first class, and addressed to the attorney of record at:

H. Wayne Floyd, Esquire  
Wayne Floyd Law Office, P.A.  
1611 Augusta Road  
West Columbia, SC 29169

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

This 22nd day of April, 2019.



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Susannah R. Cole.  
Assistant Attorney General  
SC Bar No. 68383



ALAN WILSON  
ATTORNEY GENERAL

April 22, 2019

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

Re: *The State v. Marion C. Wilkes*  
Appeal from Lexington County  
Appellate Case No. 2018-001556

Dear Ms. Kitchings:

Enclosed please find the original and one (1) copy of the ***Initial Brief of Respondent and Designation of Matter***, dated today, along with proof of service, in the above-referenced case.

By copy of this letter, I am serving opposing counsel with same. Thank you for your consideration in this matter.

Sincerely,

Susannah R. Cole  
Assistant Attorney General

SRC:

Enclosures

cc: H. Wayne Floyd, Esq. (w/two copies of encls.)  
The Honorable S.R. Hubbard, III, Solicitor, Eleventh Judicial Circuit  
Trisha Allen, Victim Advocacy Division

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