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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
APPEAL FROM HORRY COUNTY
Court of General Sessions
Honorable J. Cordell Maddox, Jr., Circuit Court Judge

Opinion No. 5631 (S.C. Ct. App. filed February 27, 2019)

Appellate Case No. 2019-000840

THE STATE, ... PETITIONER,

v.

HEATHER ELIZABETH SIMS,.....RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

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II. The Court of Appeals erred in finding Petitioner unable to retry Respondent on the charge of involuntary manslaughter because the jury, presumed to have followed the trial judge's instructions, found Respondent guilty of voluntary manslaughter and did not rule on the involuntary manslaughter charge

STATEMENT OF THE CASE

On November 21, 2013, Respondent was indicted for murder. (2013-GS-26-05243). On November 9–20, 2015, Respondent proceeded to a jury trial before the Honorable J. Cordell Maddox, circuit court judge. L. Morgan Martin, Esquire represented Respondent; Assistant Solicitor Nancy Livesay represented the State. The jury found Respondent guilty of voluntary manslaughter. The trial judge sentenced her to twenty-five years' incarceration, suspended to ten years' incarceration and five years' probation. Respondent then timely filed and perfected an appeal.

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

STATEMENT OF FACTS

The State's Case

At trial, the State focused a large portion of its case unraveling Sims's varying narratives of the shooting. As early as her 9-1-1 call, Sims would give differing, often contradictory descriptions of the events surrounding Victim's death. She initially told the 9-1-1 operator she and Victim got into an argument, then he "had a wrench in his hand and he **tried** to stab [Sims] but [she] shot him." When the dispatcher asked Sims what she used to shoot Victim, she again stated she grabbed a "nine millimeter" from a drawer and shot him because "he was coming at [her]." Throughout the call, Victim made additional, often inconsistent statements about the attack, including: (1) Victim went after her with both a knife and wrench in his hands; (2) he stabbed her before she shot him; (3) Sims had not initially noticed it, but Victim "barely got [her]" with the knife before she shot him; (4) Victim slapped her; (5) she "didn't mean" to shoot Victim; and (6) the knife was "laying [on] the floor where . . . [Victim] dropped it." (State's Exhibit 4).

Ronnie Causey, Sims's father, arrived while Sims was on the phone with the 9-1-1 operator. He noted the knife was **in** Victim's hand. Both Sims and Causey told the operator Sims was performing CPR on Victim. The operator warned both of them to not touch the knife; which Causey repeated to Sims several additional times. Causey also told Heather to stop wiping up blood. The call ended when the first officers arrived at the scene. (State's Exhibit 4).

Sims also gave varying descriptions of the attack in her hospital interview performed hours after the shooting. Her most notable claims were: (1) she grabbed the gun because Victim was in her face and she felt threatened; (2) when she grabbed the gun, Sims did not know whether she actually needed it because she felt only "a little threatened"; (2) Victim walked

toward her with the knife only after seeing her grab the gun; (3) Victim started swinging the knife after seeing her grab the gun; (4) Sims fired the fatal shot without knowing whether Victim had actually "hit her"; (5) she did feel Victim stab her, and shot him afterwards; (6) she grabbed the gun after Victim cut her arm while swinging the knife **or** the pliers; (7) Victim instigated the situation when he held the knife in her face and called her names; (8) Victim was holding a knife and Sims's phone in her hands; (9) Sims grabbed the gun only after Victim went after her with the knife; (10) Victim threatened to "knock the teeth" out of Sims; (11) Sims could, and should, have left the home; and (12) Sims could not have escaped, because Victim was fast and she feared she would get stabbed in the back if she turned her back. (State's Exhibit 2; App.pp.1765–1811).

Allyson Brown, a friend and employee of Sims's, testified Sims described the attack to her within days of the event and included a demonstration of the event in the same bathroom she shot Victim. She recounted Sims claimed the physical confrontation with Victim occurred when he attempted to take her cell phone. Sims also told Brown: (1) Victim put his arms around her trying to get her phone; (2) Victim bit Sims's finger to force her to drop the phone; (3) Sims dropped the cell phone and it slid across the floor; (4) when Victim walked over to the phone to retrieve it, Sims realized she had been cut and retrieved the gun from the bathroom drawer; (5) Victim turned around and realized Sims was armed; (6) Sims asked Victim what he was "going to do" with the knife, to which he replied he was not "going to do anything"; (7) Victim asked Sims what she was "going to do" with the gun, to which she only replied, "I want you to stop what you are doing right now"; and (8) Victim lunged at her with a knife in his hands, at which point Sims shot him. (App.p.951, line 17–p.959, line 5).

Dr. Werner Spitz, an expert in forensic pathology, reviewed Sims's case and testified: (1) Sims was at least two feet away from Victim when she shot him; and (2) Sims's injuries were self-inflicted, and he determined such based on the presence of a "hesitation mark,"[1] along with the location and superficial nature of Sims's wounds. (App.p.644, line 7–p.662, line 7).

Additionally, the State presented evidence Victim was not holding the knife at the time of the shooting. Officers Pete Cestare and Jill Domogauer testified the knife in Victim's hands was "upside down," with the blade pointing "up" towards Victim. Additionally, the hand holding the knife was covered in Victim's blood, which likely came from him grabbing his wound after the shooting. Predictably, the side of the knife handle resting in the hand was covered in Victim's blood. However, the side of the handle facing up was not. According to SLED agent Teresa Sutton, an expert in blood stain pattern analysis, the "clean" side of the handle should have been covered in blood had Victim held the knife in his hands from the time of the attack to the moment he lost consciousness. Given the orientation of the knife, Officer Sutton concluded Victim was likely not holding the knife at the time he touched his chest wound. (App.p.283, line 15–p.284, line 17; p.317, line 8–p.323, line 13; p.483, line 21–p.487, line 12; p.742, line 22–p.764, line 22).

Sims's Case

Sims testified she and Victim had experienced marital difficulties for the last year of their marriage. She claimed their arguments included yelling and threats of violence, including an altercation the year before the shooting during which Sims and Victim hit each other. The fight ended with both parties placing calls for help: Sims called 9-1-1 and Victim called Causey.

[1] As explained by Dr. Spitz, a "hesitation mark" is a self-inflicted cut or scratch common in suicide victims and other self-harm scenarios. When a person attempts to cut herself, such efforts conflict with her natural aversion to injury. As a result, the first cut is relatively minor. Dr. Spitz explained hesitation marks are critical evidence in suicide investigations. (App.p.652, line 21–p.656, line 10; p.661, line 12–p.662, line 7).

During the last few weeks of their marriage, she and Victim sought marriage counseling in an attempt to rebuild their relationship. (App.p.1346, line 12–p.1353, line 1; p.1356, line 21–p.1358, line 18).

Sims explained Victim was in a foul mood on the day of the shooting, arguing with her throughout the day. The fighting escalated when Sims was in the bathroom and Victim entered to fix a toilet chain. Victim, still angry from their earlier arguments, initiated another altercation. He accused Sims of avoiding appointments with their marriage counselor, accusing Sims of wanting to separate and claiming he did not want "to be married to a damn liar." Sims grabbed her phone to prove scheduling conflicts with a counseling appointment, at which time Victim and Sims fought for physical control of the phone. Victim won control over the phone, and began yelling at her and calling her names. While holding both the phone and a knife, Victim threatened to "knock the teeth" out of Sims's head. Scared, Sims backed away from Victim and grabbed the gun stashed in the bathroom drawer. She claimed the presence of the gun only further enraged Victim, who made additional threats and then lunged at her. Sims "shot [Victim] out of a reaction." She claimed she "didn't think, nor did [she] ever want to do that, but it was a reaction because [she] was scared." After shooting Victim, she called 9-1-1 and began CPR. She admitted to wiping up some of the blood, but claimed it was a reflex and she failed to appreciate the consequences of such action. She also conceded she may have picked up the knife and placed it back into Victim's hand, and that she removed his cell phone from his pocket, attempted to use it, and moved it out of the bathroom. (App.p.1366, line 25–p.1381, line 6).

Trial counsel also sought to introduce evidence the toilet chain in Sims's bathroom was, in fact, in need of repair around the time of shooting to further support his theory of the case. The State acknowledged that officers, on a trip to Sims's home days after crime, noticed the

toilet chain was in need of repair. The parties stipulated the toilet was in need of repair and such stipulation was presented to the jury. (App.p.1480, line 15–p.1484, line 19; p.1537, line 11–p.1538, line 4; p.1552, lines 13–21).

Voluntary Manslaughter Charge

At the close of the State's case, trial counsel made a motion for directed verdict claiming the State failed to provide evidence of malice aforethought. The trial judge denied the motion, believing the evidence, viewed in the light most favorable to the State, supported murder. At the close of Sims's case, trial counsel renewed his motion for a directed verdict on the murder charge. He argued the State failed to charge Sims with voluntary manslaughter and involuntary manslaughter and claimed the State failed to present any evidence of malice aforethought. Again, the trial judge denied the motion. (App.p.1003, line 14–p.1017, line 5; p.1478, line 13–p.1480, line 9).

Shortly thereafter, the trial judge initiated a discussion on proposed jury charges and the parties argued the propriety of charging voluntary and involuntary manslaughter. The State argued involuntary manslaughter should not be charged because it believed no evidence was presented "that would suggest this was in any form or fashion accidental." Trial counsel claimed he could not find evidence in the record supporting the lesser-included charges, but stated "[he] under[stood] [the trial judge's] ruling." (App.p.1489, line 7–p.1490, line 4; p.1540, line 13–p.1541, line 25; p.1543, lines 7–23; p.1631, lines 5–16).

The trial judge found the charges were proper, claiming there was evidence at trial supporting both. After both parties presented their closing statements, trial counsel again requested the trial judge to abstain from charging voluntary manslaughter and involuntary manslaughter. The State disagreed, arguing there was evidence in the record supporting both

charges. The trial judge charged murder, voluntary manslaughter, involuntary manslaughter, and self-defense. (App.p.1542, lines 1–19; p.1631, lines 5–21; p.1633, line 2–p.1653, line 20).

After the jury found Sims guilty of voluntary manslaughter, trial counsel filed a motion for a new trial, arguing there was insufficient evidence supporting the verdict. He argued the evidence presented at trial supported self-defense but not manslaughter because there was no evidence of sudden heat of passion. He claimed evidence of her fear was not enough, noting fear "does not end the inquiry because the fact that someone was afraid does not necessarily constitute evidence that they lost control and succumbed to an uncontrollable impulse to do violence." He argued the State focused its case on the theory that she planned the murder and acted with malice aforethought, and therefore the jury was forced to either find her innocent or guilty of murder. He emphasized Sims testified she shot the gun out of reaction because she was scared. (App.p.1709, line 18–p.1730, line 4).

The State disagreed with trial counsel's analysis. The State admitted its dominant theory of the case was murder, but there was evidence in the record justifying the manslaughter charge and thus the charge was proper. It pointed out Sims testified to a heated argument with Victim throughout the day of and immediately before the shooting. It noted Sims admitted in several of her statements that she grabbed the gun before Sims lunged at her with the knife and Sims's actions immediately after the shooting, including her 9-1-1 call and attempts to perform CPR were evidence she acted in a heat of passion and immediately regretted her decision to shoot Victim. (App.p.1732, line 16–p.1740, line 1; p.1751, line 21–p.1752, line 14).

The trial judge denied the motion for a new trial. (App.pp.10–12).

CERTIORARI

Pursuant to Rule 242(b), SCACR, this Court may, in its sound judicial discretion, grant a writ of certiorari for any "special and important reasons" found within the case or the opinion of the South Carolina Court of Appeals. While not an exhaustive list, the rule mentions five situations which support this Court's review of a case: (1) novel questions of law; (2) the decision of the Court of Appeals included a dissent; (3) the decision of the Court of Appeals is in conflict with a prior decision of this Court; (4) substantial constitutional issues are directly involved; and (5) a federal question is included and the decision of the Court of Appeals conflicts with a prior decision of the United States Supreme Court.

The State notes that the Court of Appeals' opinion presents one such substantial reason for this Court to grant certiorari: it appears to directly contradict prior decisions by this Court. The Court of Appeals reviewed the evidence presented at trial in the light most favorable to Sims, not the State. When considering the propriety of charging a lesser-included offense, trial judges must consider the evidence in the light most favorable to the non-moving party. See, e.g., State v. Pittman, 373 S.C. 527, 572–73, 647 S.E.2d 144, 168 (2005) (stating that, when a defendant requests a lesser-included charge, all the evidence must be viewed in a light most favorable to him); cf. State v. Hepburn, 406 S.C. 416, 429, 753 S.E.2d 402, 409 (2013) ("On appeal, '[w]hen reviewing a denial of a directed verdict, this Court must view the evidence and all reasonable inferences in the light most favorable to the State.'" (citing State v. Cherry, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004)).

Further, the Court of Appeals' opinion focused on Sims's trial testimony and ignored her prior statements to the 9-1-1 operator and investigating officers; when considering the merit of charging a lesser-included offense such a voluntary manslaughter, a court must review all the

evidence in the record. See, e.g., State v. Lowry, 315 S.C. 396, 399–400, 434 S.E.2d 272, 274 (1993) ("To warrant a court's eliminating the offense of manslaughter, it should very clear appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter.")

ARGUMENT

I.

The Court of Appeals erred in finding the trial judge improperly charged the jury on voluntary manslaughter because: (1) the Court of Appeals, by viewing the evidence in the light most favorable to Respondent, applied the incorrect standard of review; (2) the court erroneously found the existence of "four walls and a door" between a defendant and the victim are required for a finding of voluntary manslaughter, rather than considering the totality of the facts of the case; (3) the court failed to consider Respondent's inconsistent statements to the 9-1-1 operator and police officers, both occurring within hours of the shooting; and (4) the testimony of Brown, in which the victim initiated a physical altercation but Respondent armed herself and caused the fatal shooting was "any evidence" justifying the voluntary manslaughter charge.

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

The State notes that South Carolina appellate courts have repeatedly held that, when determining whether evidence requires a charge on voluntary manslaughter, the court must view the facts in the light most favorable to defendant. E.g., State v. Pittman, 373 S.C. 527, 572–73, 647 S.E.2d 144, 168 (2005). However, in each of those cases, the State opposed the requested voluntary manslaughter charge. Because Sims is the party opposing the charge, all facts and inferences should be viewed in the light most favorable to the State. Cf. State v. Hepburn, 406 S.C. 416, 429, 753 S.E.2d 402, 409 (2013) ("On appeal, '[w]hen reviewing a denial of a directed verdict, this Court must view the evidence and all reasonable inferences in the light most favorable to the State.'" (citing State v. Cherry, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004)).

Such a standard is also in accord with our courts' rulings involving jury charges, which requires juries be instructed on any charge supported by any evidence in the record. See State v. Wharton, 381 S.C. 209, 216, 672 S.E.2d 786, 789 (2009) ("If there is any evidence warranting a charge on involuntary manslaughter, then the charge must be given." (emphasis added)); State v. Shuler, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001) ("If there is any evidence to support a charge, the trial judge should grant the request." (emphasis added)); State v. Condrey, 349 S.C. 184, 194, 562 S.E.2d 320, 325 (Ct. App. 2002) ("A trial court has a duty to give a requested instruction that correctly states the law applicable to the issues and which is supported by the evidence. If any evidence exists to support a charge, it should be given." (emphasis added)).

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

Evidence of Voluntary Manslaughter

In Sims's case, the trial judge properly instructed the jury on the lesser-included offense of voluntary manslaughter because evidence and testimony was presented during trial from which the jury could have concluded Sims was guilty of that offense. Looking to the elements of the offense, voluntary manslaughter is "the unlawful killing of a human being in sudden heat of passion upon a sufficient legal provocation." State v. Gardner, 219 S.C. 97, 104, 64 S.E.2d 130, 134 (1951). In order for a killing to constitute voluntary manslaughter, both heat of passion and

sufficient legal provocation must exist at the time of the killing, and the heat of passion must result from the legal provocation. State v. Starnes, 388 S.C. 590, 596–97, 698 S.E.2d 604, 608 (2010). Sudden heat of passion resulting from sufficient legal provocation in the context of voluntary manslaughter "need not dethrone reason entirely, or shut out knowledge and volition[.]" State v. Smith, 391 S.C. 408, 413, 706 S.E.2d 12, 15 (2011). However, it "must be such as would naturally disturb the sway of reason, render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence." Id. "In determining whether the act which caused death was impelled by heat of passion . . . , all the surrounding circumstances and conditions are to be taken into consideration, including previous relations and conditions connected with the tragedy, as well as those existing at the time of the killing." State v. Norris, 253 S.C. 31, 35, 168 S.E.2d 564, 566 (1969).

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

This Court found the trial court erred in failing to charge voluntary manslaughter because, in murder cases, a trial court should provide the charge unless it "very clearly appear[s] there is no evidence whatsoever tending to reduce the crime from murder to manslaughter." Id. at 399, 434 S.E.2d at 274. This Court noted the voluntary manslaughter charge was required because evidence was presented showing defendant and victim were in a heated argument and the victim was about to initiate a physical altercation when the shooting occurred. Id. Moreover, the Court noted the failure to charge voluntary manslaughter was not harmless because even though the jury rejected the defendant's self-defense claim and found defendant guilty of murder, "the jury could have discerned, consistent with the evidence, that there was sufficient legal provocation and heat of passion to find [defendant] guilty of voluntary manslaughter." Id. at 399–400, 434 S.E.2d at 274.

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

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

of passion as would produce an 'uncontrollable impulse to do violence,'" only evidence that Niles's actions constituted either murder or self-defense. Id.

In Cook v. State, 415 S.C. 551, 784 S.E.2d 665 (2015), the Court found the trial court erred in charging the jury with the lesser-included offense of voluntary manslaughter because there was no evidence Cook acted in a sudden heat of passion when he killed his victim. Id. at 557, 784 S.E.2d at 668. The Court, after reviewing its prior decisions in Starnes, Niles, and Lowry, noted the evidence showing: (1) Cook was in fear; (2) Cook shot victim twice; and (3) "before [he] knew it, [he] fired a shot," were, without more insufficient to establish a sudden heat of passion. Id. at 557–59, 784 S.E.2d at 668–69. The Court specifically distinguished the case from Lowry, noting: (1) Lowry involved both a physical and verbal altercation, as opposed to the brief verbal altercation in Cook; (2) the witnesses in Lowry testified the altercation between Lowry and his victim was obvious, in contrast to the witnesses in Cook who "could hardly tell" there was an argument. Id. at 559, 784 S.E.2d at 669. Further, Lowry "actively pursued" his victim, whereas Cook attempted to walk away and disengage from the situation. Id. Considering these facts, the Court found "Lowry's actions suggest[ed] that he was acting in a sudden heat of passion," but Cook's actions "d[id] not do the same." Id. (emphasis added).

In the instant case, the State presented substantial evidence Sims acted in a sudden heat of passion when she shot Victim. Notably, the State's evidence was similar to that presented in Lowry, including the portions of Lowry discussed within Cook. Both the State and Sims provided significant evidence Sims acted in a sudden heat of passion when she shot Victim. The undisputed evidence showed Victim and Sims's marriage was deteriorating; they were constantly fighting and attending marriage counseling. According to Sims's trial testimony and various pretrial statements, Victim was agitated the day of the attack and started their final, explosive

argument. He hurled insults at Sims and threatened to leave her, claiming he did not want "to be married to a damn liar."

Brown testified Sims and Victim were in a verbal altercation which progressed into a physical struggle for the former's cell phone. The physical altercation included Victim putting his arms around Sims and biting her finger to force her to drop the phone. Sims told Brown she received a stab wound to her arm during that struggle. Victim ended the struggle after Sims released her phone and it slid across the bathroom floor. Further, after Victim disengaged from the Sims, then later decided to arm herself with a gun rather than make any attempt to leave the situation. When Sims asked Victim what he was "going to do" with the knife in his hand, he informed her he was not "going to do anything." When he asked her the same, she declined to State whether or not she planned to shoot him. To paraphrase the Cook court, "Collectively, [Sims's] actions suggest that [s]he was acting in the sudden heat of passion."

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

Further, other evidence at trial, ignored in the Court of Appeals' opinion, supported both a jury charge and a verdict of voluntary manslaughter. During her 9-1-1 phone call, Sims claimed Victim had slapped her. Further, during her hospital interview which occurred within

hours of the shooting, Sims told officers: (1) she grabbed the gun because Victim was in her face and she felt threatened; (2) when she grabbed the gun, Sims did not know whether she actually needed it because she felt only "a little threatened"; (3) Victim walked toward her with the knife only after seeing her grab the gun; (4) Victim started swinging the knife after seeing her grab the gun; (5) Victim instigated the situation when he held the knife in her face and called her names; (6) Victim threatened to "knock the teeth" out of Sims. The State also presented expert testimony indicating Victim never stabbed Sims, which included expert testimony noting that based on the shallow depth of the wounds, "hesitation marks," the position of the knife in Victim's hand, and the absence of blood on the portion of the knife which should have touched his gunshot wound, all contradict Sims's trial testimony and support the possibility that she wrongfully killed him. From this evidence, the jurors could have concluded Sims did not act in self-defense: she either created the situation requiring the need for force, did not believe she was in actual danger, or that, after sufficient legal provocation, Sims killed Victim. See Starnes, 388 S.C. at 598–99, 698 S.E.2d at 609; State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999) ("Any act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars the right to assert self-defense").

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

As to the merits of such a requirement, the Court of Appeals' opinion renders voluntary manslaughter an inappropriate charge any time "four walls and a door" exist between an initial altercation and a fatal shooting. South Carolina law requires a look at the totality of the facts surrounding a violent attack to determine the propriety of a manslaughter charge. See State v. Norris, 253 S.C. 31, 35, 168 S.E.2d 564, 566 (1969) (stating whether an accused "cooled off" prior to a violent act must be determined by evaluating all of the circumstances surrounding the event and the people involved). In fact, the separation of time and location between an initial altercation and a killing will often factor against a finding of voluntary manslaughter. See Cook, 415 S.C. at 557, 784 S.E.2d at 668 (stating defendant's attempt to walk away "does not suggest [he] was incapable of cooling off"); State v. Hernandez, 386 S.C. 655, 661, 690 S.E.2d 582, 585–86 (Ct.App.2010) (affirming the trial court's decision not to charge the jury on voluntary manslaughter because the evidence demonstrated defendant "cooled off" between his physical ejection from a party and the shooting at issue, which occurred after he returned to the party).

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

II.

The Court of Appeals erred in finding Petitioner unable to retry Respondent on the charge of involuntary manslaughter because the jury, presumed to have followed the trial judge's instructions, found Respondent guilty of voluntary manslaughter and did not rule on the involuntary manslaughter charge.

In its opinion, the Court of Appeals found that because the jury checked "not guilty" on the verdict form for both murder and involuntary manslaughter, it acquitted Sims of both offenses. However, this finding ignores several critical considerations: (1) all three verdicts were on the same form; (2) all three verdicts had only two options from which to choose, guilty and not guilty; (3) the trial judge instructed the jury that it could only consider the offense of voluntary manslaughter if it found Sims not guilty of murder, and that it could only consider involuntary manslaughter if it found Sims not guilty of voluntary manslaughter. Given these facts, including the instruction by the trial judge, the court incorrectly found the jury acquitted Sims of involuntary manslaughter and that this case cannot be remanded for a trial on such offense. See State v. Grovenstein, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) (jurors are presumed to follow the law as instructed to them).

CONCLUSION

Based on the foregoing reasons, Respondent submits this Court should grant the petition for a writ of certiorari. In requesting this relief, counsel for Petitioner certifies a petition for rehearing was made and finally ruled upon by the Court of Appeals.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

May 20, 2019

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ON WRIT OF CERTIOTARI TO THE COURT OF APPEALS
APPEAL FROM HORRY COUNTY
Court of General Sessions
Honorable J. Cordell Maddox, Jr., Circuit Court Judge

Opinion No. 56321 (S.C. Ct. App. filed February 27, 2019

Appellate Case No. 2019-000840

THE STATE, ... PETITIONER

v.

HEATHER ELIZABETH SIMS,..... RESPONDENT

PROOF OF SERVICE

I, Shana Montgomery, Legal Assistant, hereby certify that I have served the Petition for Writ of Certiorari dated May 20, 2019 c t by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Blake Hewitt, Esquire
Post Office Box 7965
Columbia, SC 29202

I further certified that all parties required by Rule to be served have been served. This 20th day of May, 2019.

Shana Montgomery
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