

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Spartanburg County
The Honorable J. Derham Cole, Circuit Court Judge
Appellate Case No. 2017-001974

THE STATE,

Respondent,

vs.

HOLMES ANDREW SIMPSON-DAVIS,

Appellant.

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in failing to instruct the jury on voluntary manslaughter, a lesser included offense of murder, where the undisputed evidence, including the deceased physically and verbally threatening Appellant, indicated Appellant acted in the sudden heat of passion based upon sufficient legal provocation?

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STATEMENT OF THE CASE

On July 25, 2015, appellant, Holmes Andrew Simpson-Davis, murdered Robert Hull in Spartanburg County by shooting him with a pistol. Appellant also attempted to murder Bruce Brewton and James Kilgore at the same time by use of the same pistol. Appellant was arrested on July 31, 2015 and charged with murder and attempted murder (2 counts). On March 25, 2015, the Spartanburg County grand jury indicted appellant for murder, two (2) counts of attempted murder, and three (3) counts of possession of a weapon during a violent crime. (R. pp. 10-106; 107-152; 153-174; 176-307; 309-331; 332-355; 357-458; Indictment #s 2016-GS-42-1735, 1734, 1736 / Counts 1 & 2 of each indictment).¹

Appellant proceeded to a jury trial before the Honorable J. Derham Cole, Circuit Court Judge, on September 5-8, 2017. Appellant was represented by Christopher P. Thompson, Esquire. At the conclusion of the trial, the jury found appellant guilty of murder, two (2) counts of attempted murder, and three (3) counts of possession of a weapon during the commission of a violent crime. (R. pp. 451-52).

Judge Cole sentenced appellant to life imprisonment for murder, thirty (30) years for each attempted murder, and five (5) years on two (2) of the weapon charges. (R. pp. 457-58).² Judge Cole did not sentence appellant on the weapon charge accompanying the murder charge (Count 2). (R. p. 457). Judge Cole ordered one (1) thirty (30) year sentence and one (1) five (5) year

¹ Each indictment for murder and attempted murder contained an accompanying count for possession of a weapon during a violent crime.

² Appellant had a prior criminal record for felonies. He was convicted in 2009 of 3 counts of burglary 2nd degree, 2 counts of grand larceny, and 1 count of petit larceny. In 2011, he was convicted of possession of marijuana and his probation was revoked. In 2013, he was convicted of possession with intent to distribute (PWID) crack cocaine and possession of a stolen pistol which actually belonged to the Spartanburg County Sheriff's Office. He was on YOA parole at the time of these offenses. (R. pp. 455-56).

sentence to be served consecutively to the other sentences. (R. p. 457-58; Sentence sheets). In summary, appellant was sentenced to life for murder, no sentence on count 2 of the murder indictment, thirty (30) years on each attempted murder consecutive to each other and five (5) years on one weapon charge concurrent and five (5) years on another weapon charge consecutive. Appellant's aggregate sentence was life imprisonment [for murder] and a concurrent sixty (65) year's incarceration [for 2 counts of attempted murder and the accompanying weapon charges].

Appellant appeals only the murder conviction, accompanying life sentence, and the accompanying weapon conviction on the murder indictment. He does not challenge his convictions or sentences for attempted murder and possession of a weapon during a violent crime on the other indictments. (IBOA, pp. 4-22).

RESPONDENT'S STATEMENT OF FACTS

On July 25, 2015, appellant Holmes Simpson-Davis (hereinafter "appellant") murdered Robert Hull (hereinafter "the victim" or "deceased victim") at 1066 Howard Street in Spartanburg. Appellant used a .45 caliber semi-automatic pistol to murder the victim. Appellant then turned and also shot at two (2) other individuals, as they attempted to flee after appellant shot and killed the deceased victim, and those individuals were wounded. The motive for the murder and attempted murders resulted from an earlier altercation at another location in which appellant was neither present nor involved. (R. pp. 10-106; 107-152; 153-174; 176-307; 309-331; 332-355; 357-458; Ind. #s 2016-GS-42-1735, 1734, 1736 / Counts 1 & 2 of each indictment).

Background

The Liquor House

Shortly before midnight, July 24, 2015, the deceased victim and four (4) friends/relatives [cousins] were at a liquor house [a bootlegger's] at 1070 Howard Street in Spartanburg drinking and having a good time. The men with the victim were James Kilgore ("Kilgore"), Bruce Brewton ("Brewton"), Travious Young ("Red") and Christopher Brannon ("BooBee"). Neither the victim nor any of his friends/relatives were armed with any firearms. While there, there was an altercation inside the liquor house between a person known as "Junior" and his parents, who owned the house. None of the men with the deceased victim were involved in this altercation. In fact, the deceased victim tried to calm the situation down by telling "Junior" to stop disrespecting his mother. Kilgore also attempted to calm the situation down by grabbing "Junior," who he knew, and escorting him outside the liquor house. (R. pp. 107-152; 273-308; 236-38).

Once outside the liquor house, there was an altercation involving two (2) individuals, Felshunti Clark ("Clark")³ and "Pee Wee",⁴ and Kilgore. Apparently, Clark and Pee Wee were associates of Junior and took offense to Kilgore escorting Junior out of the liquor house.⁵ This altercation between Clark, Pee Wee, and Kilgore was brief and ended when Kilgore pushed both men [Clark and Pee Wee] stating "get up off me." The deceased victim was not involved in this altercation outside the liquor house. Appellant was not even there. Clark and Pee Wee then left the liquor house on foot after this brief altercation. (R. pp. 107-152; 273-308; 82-87; 101-06).

Eyewitnesses who lived in the neighborhood testified that around this time they saw two (2) men walking down Howard Street coming from the direction of the liquor house and headed in the direction of downtown Spartanburg. These two (2) men were Clark and Pee Wee who had just been in the brief altercation outside the liquor house with Kilgore. Clark was speaking with someone on a cell phone. (R. pp. 82-87; 101-02; 39-50; 107-152; 273-308; 29-37; States' Ex. 16, 17, & 18).

The Crime Scene

1066 Howard Street

Shortly after midnight, and around the same time that Clark and Pee Wee were walking down the street, the victim and his friends/relatives, including Kilgore, decided to leave the liquor house and go home. Brewton agreed to give the men, including the deceased victim, a ride home in his car. Most of the men got in Brewton's car, parked nearby, and rode a short distance down Howard Street to the home of the victim's girlfriend's sister, Anitra Geter, located

³ Clark is also known by the nickname "Little Man."

⁴ Pee Wee's real name is unknown.

⁵ Kilgore testified he had seen Junior, Clark, and Pee Wee hanging around together earlier at the liquor house. Kilgore testified Clark and Pee Wee misinterpreted what he [Kilgore] was doing when he escorted Junior outside the liquor house. They thought he was assaulting Junior.

at 1066 Howard Street, and parked in the driveway. The victim had left a change of clothes at Ms. Geter's residence and he actually walked from the liquor house to Ms. Geter's residence while the other four (4) men rode in Brewton's car. (R. pp. 107-152; 273-308; 80-87; 101-106).⁶

While there, the victim went inside Geter's home to change his shoes and grab his belongings. The victim's girlfriend, Angela Geter, and her sister, Anitra, were sitting on the porch drinking. The other men with the victim stayed in Brewton's car parked in Geter's driveway. Brewton got out of the car to smoke a cigarette and was standing in the driveway near the porch talking to Ms. Geter and her sister on the porch while the victim got his things. (R. pp. 107-152, 273-308; 80-87; 101-06).

The evidence at trial proved that just a few minutes after the altercation at the liquor house between Clark, Pee Wee, and Kilgore, Clark called appellant two (2) times on his cell phone and appellant eventually called Clark back and the two (2) men spoke for several minutes. Appellant did not live on Howard Street or in the surrounding area. After the phone calls, appellant then showed up on Howard Street minutes later with a loaded handgun in his possession. (R. pp. 29-37; States' Ex. 16, 17, & 18; pp. 39-50; 80-87; 101-06; 107-152; 273-308).⁷

⁶ There is a vacant lot between the liquor house at 1070 Howard Street and Ms. Geter's house at 1066 Howard Street. The victim walked across the vacant lot to his girlfriend's sister's home while his friends/relatives rode over in Brewton's car.

⁷ After Clark's arrest for his role in these crimes, police discovered Clark had attempted to delete only three (3) phone calls from his cell phone. The three (3) calls Clark attempted to delete were the two (2) he made to appellant and the one (1) call he received from appellant shortly after the altercation at the liquor house and shortly before appellant arrived on Howard Street armed with a pistol and the murder and attempted murders occurred. (R. pp. 29-37; State's Ex. 16, 17, & 18; pp. 207-10).

Appellant arrived on Howard Street in a white Lexus automobile. The car was parked down the street from Ms. Geter's residence in the direction of downtown Spartanburg, where Clark and Pee Wee had been seen walking earlier after the initial altercation. After appellant arrived on Howard Street, appellant, Clark, and at least three (3) other men were seen walking back toward the liquor house and Ms. Geter's residence at 1066 Howard Street. At least two (2) of this gang of men were armed with loaded pistols. (R. pp. 39-50; State's Ex. 1; pp. 80-87; 101-06; 107-152; 273-308).⁸

Moments later, Clark, appellant, and at least the three (3) unknown men came walking up Howard Street from the direction of Spartanburg and walked up behind Brewton's car parked in Ms. Geter's driveway at 1066 Howard Street. Two (2) of this gang of men at the back of Brewton's car were openly or visibly carrying pistols. At least one (1) of the men in Brewton's car, "Boobee," fled from the car when he saw the gang of men and went in or behind Geter's house. At this point, "Red" also got out of Brewton's car and crept behind Geter's house. Appellant was one (1) of the gang of men visibly armed with a handgun and another of the men, one (1) of the three (3) unknown men, was also visibly armed with a handgun. Clark, who was not displaying a firearm, "called Kilgore out" and Kilgore got out of Brewton's car. Kilgore was unarmed. Clark immediately started talking to Kilgore about the earlier altercation outside the liquor house. The deceased victim was still inside his girlfriend's sister's house changing his shoes and grabbing his things. (R. pp. 107-152; 273-308; 80-87; 101-06; 39-50, State's Ex. 1).

⁸ An eyewitness who was visiting a home nearby saw five (5) men walking up Howard Street toward the liquor house and Ms. Geter's home. Another witness told police there were more than five (5) men total in this gang of men, perhaps seven (7) or eight (8). (R. pp. 107-152; 273-308; 80-87, 101-06, 39-50; Defendant's Ex. 1). It is undisputed there were at least five (5) men.

Clark told Kilgore he wanted his "one." Kilgore thought Clark was challenging him to a fist fight and agreed to the same. Kilgore believed he and Clark were going to fist fight until appellant, who was still openly armed with a gun and standing next to Clark, said to Kilgore "Nah, it ain't going to happen like that, get back on. ... That's my partner."⁹ Kilgore backed away trying to reach Brewton's car after appellant made this statement while displaying the firearm. Anitra Geter told the gang of armed men at the end of her driveway to leave and she was calling the police. She got up off her porch and went in her home and called 911.¹⁰ Brewton, who was also unarmed, then walked up to the gang of men [Brewton had been standing near the front porch talking to Anitra and Angela Geter] and attempted to break up the situation by stating "look man that's my cousin." "Whatever ya'll got going on, y'all handle it another day." "I'm taking these boys home." Brewton believed he had calmed the situation, when Clark stated: "alright Little Bruce." (R. pp. 107-152; 273-308; 80-87; 101-06).

At approximately the same time as the above was occurring, the deceased victim walked out on the porch of his girlfriend's sister's home and saw the gang of men, two (2) of whom were openly displaying handguns, surrounding his relatives at the end of the driveway behind Brewton's car while his girlfriend Angela was still seated on the porch. The victim yelled out a question: "Are you going to fight or shoot?" The victim stated out loud he was not afraid of the gang of men and their guns. The victim walked off the porch and approached the men including appellant. The victim, who was unarmed, came face to face with Clark and appellant and was

⁹ At trial, appellant admitted into evidence Kilgore's recorded statement to police given after the crimes. (R. pp. 176-77; Defendant's Ex. 1). In that statement, Kilgore told police that when he went to fight Clark behind Brewton's car and appellant told him no, appellant stated: "Um, this is boss shit, he's a boss, that's a folk [Folk] there, he's a boss." Kilgore explained to police that "folk" or "[Folk]" is a gang that appellant or Clark was in. (Def. Ex. 1; Statement of James Kilgore' R. pp. 176-77).

¹⁰ By the time Ms. Geter got 911 on the phone, the victim had been shot and killed. (State's Ex. 52, 911 call).

cursing. Kilgore testified the victim was not afraid of people with guns if someone was messing with his family. Brewton testified the victim would take up another family member's dispute, even if they were going to lose. The victim said to the gang of men that he wasn't afraid of the men and their guns and that "they had guns too." At this point, according to only one (1) witness [Brewton], appellant and the victim bumped up against each other or bumped chests several times.¹¹ According to the same witness, the deceased victim then stated that he was going to go get his gun too. Appellant, who still had his gun at his side, then raised his .45 caliber semi-automatic pistol and shot the victim in the face, killing him. According to another eyewitness [Kilgore], the victim was face to face with Clark, not appellant, and said "F y'all's guns." According to this witness, appellant then took a step to the side, raised his gun that he already had out, and shot the victim in the face killing him instantly. (R. pp. 107-152; 273-308; 80-87; 101-06; State's Ex. 52; pp. 309-27; 39-50).¹² The victim was shot dead standing in the driveway of his girlfriend's sister's home. (State's Ex. 57 & 14).

Appellant then turned and fired on the other friends/relatives of the deceased victim who had turned and were fleeing beside Brewton's parked car in the driveway. Appellant fired at least six (6) shots total with his .45 caliber handgun at the victim, his friends/relatives, or in the general direction of the 'Geter' home while standing at the end of the driveway or in Howard Street. Another armed man with appellant and Clark also fired his 9mm pistol at least sixteen (16) times at the victim's friends/relatives or at the 'Geter' home after appellant shot and killed

¹¹ According to the other eyewitness, Kilgore, the victim and **Clark** were facing each other but there was no physical contact between the two. And, there was no physical contact between appellant and the victim. (R. pp. 107-152; 80-87).

¹² The pathologist testified the victim was shot one (1) time in the head with a firearm with the bullet eventually striking the cervical spine killing the victim. The pathologist testified the victim would have been incapacitated immediately upon being shot. A .45 caliber bullet was removed from the victim's cervical spine. (R. pp. 309-27; 89-101).

the victim. Kilgore and Brewton were both struck in the leg or foot as they fled from appellant and the group of men with him shooting at them. Kilgore was shot once and Brewton twice. Hence the two (2) attempted murder charges. (R. pp. 107-152; 273-308; 80-87; 101-06; 39-50, State's Ex. 1, State' Ex. 41-46 & 57).¹³

The perpetrators [the gang of armed men including appellant] then fled on foot back toward downtown Spartanburg on Howard Street; and, before leaving the area, stopped and fired more shots at the surviving victims who were hiding behind Brewton's car in the driveway and behind Ms. Geter's house. This was witnessed by the surviving victims and the eyewitness who was in the direction of travel of the fleeing perpetrators. The victim's friend "Red" eventually came from the back side of Ms. Geter's house where he had been hiding and drove the two (2) wounded survivors [Kilgore and Brewton] to the hospital. (R. pp. 107-152; 273-308; 80-87; 101-06; 39-50, State's Ex. 1 & 12).¹⁴

When the perpetrators [the gang of men including appellant] reached appellant's Lexus, a concerned citizen traveling in a vehicle directly behind them, saw the white Lexus parked and

¹³ After the crimes, police found six (6) fired .45 caliber shell casings in Howard Street near the crime scene. These shell casings were all fired from the same gun. A fired .45 bullet was recovered from an oak tree in the front yard of 1066 Howard Street. This bullet was fired from the direction of the end of the driveway or Howard Street toward Ms. Geter's home. A fired .45 caliber bullet jacket and bullet core were recovered from Geter's driveway and yard. The bullets from the victim's spine, the tree, and the driveway/yard were all fired from the same gun, a .45 caliber pistol. Geter's home was struck by at least one (1) bullet next to the front porch. (State's Ex. 8). A fired bullet jacket was recovered from her front porch which could have come from a .38, 357, .380 or 9mm. A fired bullet was found in Geter's yard in front of the front porch consistent with a .40 mm or 10mm auto. Sixteen (16) fired 9mm shell casings were recovered in Howard Street near the end of Geter's driveway and back toward downtown Spartanburg. (R. pp. 2-3, 89-101; State's Ex. 57 [Crime Scene Diagram]).

¹⁴ Four (4) more fired 9mm shell casings were found in the middle of Howard Street closer to downtown Spartanburg. These four (4) casings are not shown on the crime scene diagram [State's Ex. 57]. They are shown in a photograph. In total, twenty (20) fired 9mm shell casings were recovered at the crime scene or further down Howard Street toward downtown Spartanburg. (R. pp. 2-3, 89-101; State's Ex. 1, 12, & 57).

men getting into the car. This concerned citizen had seen the victim lying dead at the end of the driveway of 1066 Howard Street and Kilgore standing near the body attempting to call 911 on his cell phone. This concerned citizen obtained the Lexus' license plate number and called police or 911 and related the same to authorities. Some of the perpetrators [the gang of men including appellant] then fled the area in the white Lexus that was identified by the concerned citizen. Others fled on foot through a wooded area. (R. pp. 177-90; 164-74; State's Ex. 53; pp. 190-93; 39-50, State's Ex. 1).

The license plate on the Lexus eventually came back to appellant's girlfriend. Police later interviewed appellant's girlfriend, who eventually informed police she drove appellant to a location near the crime scene shortly before the murder and attempted murders. She also informed police that before taking appellant to a location near the crime scene, appellant received a phone call and then asked her to take him to the north side of Spartanburg. [Howard Street is on the north side of the City of Spartanburg.] According to appellant's girlfriend, after the crimes, appellant later got in the car after she left the liquor house and she drove away. The State introduced appellant's girlfriend's written statement at trial as substantive evidence and also as a prior inconsistent statement. (R. pp. 197-201; 246-64; State's Ex. 60; pp. 265-73).¹⁵

As the case was approaching trial, appellant made four (4) phone calls to his girlfriend from the Spartanburg County Jail. These phone calls were introduced into evidence and played for the jury. In the phone calls, appellant instructs his girlfriend to "take the 5th Amendment" if called to testify. Appellant instructs his girlfriend that if she does not place him at the scene then

¹⁵ Appellant's girlfriend initially told police she had gone to the liquor house alone. After being confronted with phone records showing Clark called appellant to the scene, and an eyewitness had seen several men getting in her car after the murder, appellant's girlfriend admitted she dropped appellant off near the liquor house and then picked him up after the shootings. (R. pp. 197-201; 246-64; State's Ex. 60; pp. 265-73).

only Brewton and Kilgore can place him there. Appellant also tells his girlfriend to say her written to statement to police in which she admitted dropping him off near the crime scene was a false statement induced by a threat of one (1) to three (3) years in jail. (R. pp. 10-15; State's Ex. 51 [Jail Phone Calls] pp. 209-31).

Appellant's defense

Appellant's defense at trial was alibi, even though he claimed it wasn't. [Appellant had not disclosed his alibi defense to the State as required by Rule 5, S.C.R.Cr.P.]. Judge Cole found the defense was alibi and granted a short recess in which defense counsel was required to inform the Solicitor of what his witnesses would testify to. (R. pp. 332-37).

Appellant then called family members [his father and also the mother of his children] to testify he was at home around the time of or at the time of the murder and attempted murders. And, his sister testified she had appellant's phone, so Clark could not have called appellant to come to Howard Street with a gun. Appellant also called a SLED agent to testify the deceased victim tested positive for gun primer residue on his hands; however, the agent also testified this was consistent with the victim being shot at relatively close range as testified to by the eyewitnesses. The SLED Agent also testified neither Brewton nor Kilgore tested positive for gun primer residence. Appellant chose not to testify. (R. pp. 337-55).

Appellant's girlfriend denied appellant had her car [the Lexus] or that she took him to Howard Street. She said police coerced her into giving her 2nd statement that she drove appellant to near the crime scene. She claimed at trial her 2nd statement was false. (R. pp. 197-201; 246-64; State's Ex. 60; pp. 265-73).

Appellant now argues his murder conviction and sentence and his accompanying conviction on the weapon charge on the same indictment should be reversed because Judge Cole did not instruct the jury on the lesser included offense of voluntary manslaughter. (IBOA, 4-22).

ARGUMENT

Judge Cole did not err in denying the request to charge voluntary manslaughter as there was neither sufficient legal provocation nor adequate heat of passion.

What Occurred Below

At the end of the State's and appellant's case, appellant requested a charge on ABHAN as a lesser included offense of attempted murder. The State did not object, as attempted murder requires a specific intent to kill, and Kilgore and Brewton were shot in the legs. Judge Cole charged the jury on ABHAN as a lesser included offense of attempted murder. (R. p. 361). Appellant was subsequently convicted of attempted murder on both attempted murder indictments. The jury found appellant acted with both malice and a specific intent to kill. (R. pp. 432-38, 442, 451-53).

Appellant also requested the court instruct the jury on the defense of self-defense. The State did object, and Judge Cole ruled that the elements of self-defense had not been met so he would not instruct the jury on self-defense. Appellant has not appealed that ruling and it is the law of the case. (R. pp. 357-61).

Appellant also requested an instruction on voluntary manslaughter as a lesser included offense of murder arguing as follows:

MR THOMPSON: And then on the murder, I just argue that there's sufficient evidence on the record, based upon the actions of Mr. Hull reengaging the situation, that a manslaughter charge, could be – it is proper. It's just without malice. This happened, boom. It happened real quick. Again, there's no malice aforethought involved in that quick time period that he reproaches that crowd.

MR. HUNTER: Your Honor, we, also, object to that charge as to the voluntary manslaughter under the murder charge. Your Honor, for that, you must

show heat of passion and sufficient legal provocation. Words alone are not sufficient for legal provocation. And that's all we have here are words.

So we'd ask that that charge not be given.

MR. THOMPSON: And I'd argue that the testimony is that there was physical contact between the parties. And that it took place out there. And that it would be the heat of passion, based upon the fight - - or the interaction of the parties at that time.

(R. pp. 361-62).

Judge Cole declined to instruct the jury on voluntary manslaughter finding there was no sufficient legal provocation nor was there heat of passion.

THE COURT: Well, even if the evidence would give rise to a reasonable inference of heat of passion, there's not in my view, evidence to support a sufficient legal provocation. I'm not certain that there's any evidence of heat of passion. But giving you the benefit of the doubt on that issue, there is not sufficient legal provocation.

Therefore, an instruction on voluntary manslaughter is not appropriate. That is, also, declined.

MR. THOMPSON: Thank you, Your Honor.

(R. p. 362).

Appellant did not object to the Court's declining to instruct the jury on voluntary manslaughter. Thereafter, Judge Cole instructed the jury on the law and did not instruct the jury on the lesser included offense of voluntary manslaughter. At the conclusion of jury instructions, outside the presence of the jury, when asked if there were any objections to the Court's instructions on the law or any additional instructions, the following took place:

THE COURT: Are there any exceptions taken to the instruction, or requests for additions to the instruction by the State?

MR. HUNTER: None from the State, Your Honor.

THE COURT: By the Defendant?

MR. THOMPSON: No, Your Honor.

(R. p. 448).

Waiver of issue on appeal

As shown above, at no time did appellant object to Judge Cole's not instructing the jury on the lesser included offense of voluntary manslaughter on the murder indictment. Appellant did not object when Judge Cole declined to instruct the jury on voluntary manslaughter at the charge conference. (R. p. 362). Appellant did not object after Judge Cole instructed the jury on the law. (R. p. 448). In fact, when asked if there was any objection or addition to the charge, appellant stated there was none. (R. p. 558). By failing to object to the jury charge at any time, appellant waived his right to allege error on appeal and/or acquiesced to Judge Cole's ruling. See Rule 20(b), SCRCrimP ("Failure to object in accordance with this rule shall constitute a waiver of objection."); State v. Rios, 388 S.C. 335, 696 S.E.2d 608 (Ct. App. 2010) ("Even after the trial court specifically asked if there were any objections to the charges given, Rios responded, 'None.' By failing to contemporaneously object to the jury charges, Rios has waived his right to allege error on appeal.") (citing State v. Johnson, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005)); State v. Price, 400 S.C. 110, 732 S.E.2d 652 (Ct. App. 2012) referencing Rule 20(b), SCRCrimP ("[T]he parties shall be given the opportunity to object to the giving or failure to give an instruction before the jury retires, but out of the hearing of the jury... Failure to object in accordance with this rule shall constitute a waiver of objection."); See also State v. Johnson, 315 S.C. 485, 445 S.E.2d 637 (1994) as explained in Keaton v. Greenville Hosp. Sys., 334 S.C. 488, n. 2, 514 S.E.2d 570 (1999) (that case "simply holds that the complete failure to object to a jury charge prevents review on appeal); Ex parte McMillan, 319 S.C. 331, 461 S.E.2d 43 (1995) (a party cannot acquiesce to an issue at trial and then complain on appeal); *But see contra*

Keaton v. Greenville Hosp. Sys., 334 S.C. 488, 514 S.E.2d 570 (1999)(party need not renew objection after jury instruction to preserve issue for appeal); State v. Johnson, 333 S.C. 62, 508 S.E.2d 29 (1998)(party need not object after instruction if request to charge denied or prior objection made, explaining holding in State v. Whipple, 324 S.C. 43, 476 S.E.2d 683 (1996) in face of clear wording of Rule 20(b), SCRCrimP); Price, *supra*; Huff, J., dissenting.¹⁶

Lack of preservation of new arguments in support of jury charge

Regardless, appellant makes numerous factual arguments on appeal in support of his claim Judge Cole erred in declining to instruct the jury on voluntary manslaughter; however, these factual arguments were not made to Judge Cole below, therefore they are not preserved for appellate review. State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691 (2003); State v. Prioleau, 345 S.C. 404, 548 S.E.2d 213 (2001)(a party may not argue one ground at trial and a different ground on appeal); State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000)(defendant argued one ground in support of circumstantial evidence charge at trial and another ground in support of the charge on appeal; therefore argument on appeal was not preserved for appellate review); *see also* State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005)(holding argument advanced on appeal was not raised to and ruled on below and therefore was not preserved for appellate review); State v. Dickman, 341 S.C. 293, 534 S.E.2d 268 (2000). *See* I'On L.L.C. v. Town of Mt. Pleasant, 308 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)(noting longstanding rule that losing

¹⁶ Respondent would also note that appellant only mentioned physical contact was legal provocation without any argument on the facts and circumstances that place that contact (if believed) in context. *See* Gilchrist v. State, 364 S.C. 173, 178, 612 S.E.2d 702, 705 (2005)(“When given the opportunity, counsel must articulate a reason for the requested charge.”). Further, appellant’s argument there was no malice because of the time period involved is simply an incorrect statement of the law. As this Court is well aware, malice need only exist at the time the fatal blow is struck. [numerous citations omitted.]

party must present his issues and arguments to the circuit court and have them ruled upon before appellate court will review those issues and arguments)

Appellant argues that because the victim had gun primer residue (GSR) particles on his hands, this indicates he may have had a weapon, therefore, voluntary manslaughter should have been charged.¹⁷ As shown, this argument was not made to Judge Cole in support of the request for voluntary manslaughter. It cannot be made for the first time on appeal. Dunbar, 356 S.C. 138, 587 S.E.2d 691; Prioleau, 345 S.C. 404, 548 S.E.2d 213; Benton, 338 S.C. 151, 526 S.E.2d 228; Freiburger, 366 S.C. at 134, 620 S.E.2d at 741; *See I'On L.L.C.*, 308 S.C. at 422, 526 S.E.2d 716, 724 (2000). Appellant argues that one (1) of the victims may have had a gun because a fired bullet was found in front of Ms. Geter's porch and a fired bullet jacket was found on the porch. Again, these arguments were not raised to Judge Cole in support of an instruction for voluntary manslaughter; therefore, they are not preserved for appellate review and may not be argued for the first time on appeal. Id. Appellant also argues on appeal that Kilgore had a gun because of an alleged statement Kilgore made in a tape recorded interview and as a result, he [appellant] should have received a voluntary manslaughter charge. As shown, this argument was also not raised or made to Judge Cole and is therefore not preserved for appellate review. Id.

Standard of Review

(Appellate)

In criminal cases, this Court sits to review errors of law only and is bound by the trial court's factual findings unless they are clearly erroneous. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). Thus on review, the appellate court is limited to determining whether

¹⁷ As will be shown, the expert testified that the victim's hands containing GSR was consistent with his being shot at close range as described by the eyewitnesses. And, Kilgore and Brewton tested negative for GSR. (R. pp. 337-47).

the trial court abused its discretion. Wilson, 345 S.C. at 6, 545 S.E.2d at 829. An abuse of discretion occurs when the trial court's decision is unsupported by the evidence or controlled by an error of law. State v. Garrett, 350 S.C. 613, 619, 567 S.E.2d 523, 526 (Ct. App. 2002).

(Of the Trial Judge)

The conduct of a criminal trial is left largely to the discretion of the trial judge, and this Court will not interfere unless the rights of the appellant were prejudiced. State v. Bridges, 278 S.C. 447, 298 S.E.2d 212 (1982). Therefore, this Court reviews errors of law only and is bound by the trial court's factual determinations unless they are clearly erroneous. State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (2006). A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied. State v. Rye, 375 S.C. 119, 651 S.E.2d 321 (2007). If the instructions given to the jury afford the proper test for determining the issues, the failure to give one side's requested instructions is not prejudicial. State v. Hughey, 339 S. C. 439, 529 S.E.2d 721 (2000).

Jury Charges

"The law to be charged must be determined from the evidence presented at trial." State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 512 (2000); State v. Goodson, 312 S.C. 278, 440 S.E.2d 370 (1994); State v. Lee, 298 S.C. 362, 380 S.E.2d 834 (1989). "An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010). "To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." Mattison, 388 S.C. at 479, 697 S.E.2d at 583; State v. Gaines, 380 S.C. 23, 31, 667 S.E.2d 728, 732 (2008); State v. Huckabee, 388 S.C. 232, 694 S.E.2d 781 (Ct. App. 2010), *cert. denied*. See Smith v. Winningham, 252 S.C. 464, 166 S.E.2d 825 (1969).

If there is any evidence to warrant a jury instruction, a trial court must, upon request, give the instruction. State v. Smith, 391 S.C. 408, 706 S.E.2d 12 (2011). The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand constitutes an error of law. State v. Bryant, 391 S.C. 225, 705 S.E.2d 465 (Ct. App. 2011). A trial court commits error when it fails to give a requested charge on an issue raised by the evidence presented. Lee, 298 S.C. 362, 380 S.E.2d 834. The court has a duty to charge the jury as to the law applicable to the facts brought out in the testimony. State v. West, 138 S.C. 421, 136 S.E. 736 (1927). A trial judge is bound to lay before the jury the principles of law as are applicable to the case as made by the evidence. State v. Blackstone, 157 S.C. 278, 154 S.E. 161 (1930); State v. Faulkner, 151 S.C. 38, 149 S.E. 108 (1929); State v. Dodson, 16 S.C. 453 (1881). The purpose of jury instructions are to enlighten the jury and to aid them in arriving at a correct verdict. State v. Hewitt, 205 S.C. 207, 31 S.E.2d 257, 259 (1944).

When reviewing a jury charge for alleged error, the charge must be considered as a whole in light of the evidence and issues presented at trial. State v. Huckabee, 388 S.C. 232, 694 S.E.2d 781 (Ct. App. 2010); Daves v. Cleary, 355 S.C. 216, 224, 584 S.E.2d 423, 427 (Ct. App. 2003). A judge's charge to a jury is sufficient if, as a whole, it is substantially correct and covers the law applicable to the case. State v. Burton, 302 S.C. 494, 397 S.E.2d 90 (1990); State v. Jackson, 297 S.C. 523, 377 S.E.2d 570 (1989); State v. Rabon, 175 S.C. 459, 272 S.E.2d 634 (1980). A jury charge which is substantially correct and covers the law does not require reversal. State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996); State v. Hoffman, 312 S.C. 386, 440 S.E.2d 869 (1994).

Lesser included offenses

The trial court is required to charge a jury on a lesser included offense if there is evidence

from which it could be inferred that the defendant committed the lesser, rather than the greater offense. State v. Drafts, 288 S.C. 30, 340 S.E.2d 784 (1986); Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005). To warrant the court in eliminating the offense of manslaughter, it should very clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter. State v. Pittman, 373 S.C. 527, 572, 647 S.E.2d 144, 168 (2007). See State v. Byrd, 323 S.C. 319, 322, 474 S.E.2d 430, 432 (1996)(holding that where death is caused by the use of a deadly weapon, words alone, however opprobrious, are not sufficient to constitute a legal provocation, but words accompanied by hostile acts may, according to the circumstances, reduce a charge from murder to voluntary manslaughter); Pittman, 373 S.C. at 573, 647 S.E.2d at 168 (recognizing that both heat of passion and sufficient legal provocation must be present at the time of the killing). When determining whether the evidence requires a charge on voluntary manslaughter, the court must view the evidence in the light most favorable to the defendant. State v. Niles, 412 S.C. 515, 772 S.E.2d 877 (2015); Pittman, 373 at 572-73, 647 S.E.2d at 168.¹⁸ To receive a voluntary manslaughter charge, there must be evidence of sufficient legal provocation and sudden heat of passion. Niles, 412 S.C. at 522, 772 S.E.2d at 880; State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000). “The trial court may and should refuse to charge on a lesser-included offense where there is no evidence that the defendant committed the lesser than the greater offense.” Niles, 412 S.C. at 524, 772 S.E.2d at 881, *quoting* State v. Smith, 315 S.C. 547, 549, 446 S.E.2d 411, 412-13 (1994). “Declining to charge the lesser included offense is warranted when it ‘very clearly appear[s] that ... no evidence whatsoever [exists] tending to

¹⁸ The fact that the defendant offered a different defense at trial, such as alibi, does not affect the analysis of whether the defendant was entitled to an instruction on a lesser included offense such as voluntary manslaughter as the defendant is entitled to the benefit of all inferences from the evidence. State v. Knoten, 347 S.C. 296, 555 S.E.2d 391 (2001). Therefore, *in conducting the analysis of whether appellant was entitled to an instruction on voluntary manslaughter*, Respondent has not considered the fact appellant’s defense at trial was alibi.

reduce the crime from murder to manslaughter. State v. Gibson, 390 S.C. 347, 355-56, 701 S.E.2d 766, 770-71 (Ct. App. 2010), *quoting* State v. Brayboy, 387 S.C. 174 179, 691 S.E.2d 482, 485 (Ct. App. 2010); Cole, 338 S.C. at 101, 525 S.E.2d at 513.

The Merits

Judge Cole did not abuse his discretion

Appellant argues his murder and corresponding weapon conviction and life sentence should be reversed because he alleges he was entitled to an instruction on voluntary manslaughter. Appellant is wrong. State v. Starnes, 388 S.C. 590, 698 S.E.2d 604 (2010).

As previously stated: “The trial court must determine the law to be charged based on the evidence at trial.” State v. Smith, 363 S.C. 111, 609 S.E.2d 528 (2005); State v. Crosby, 355 S.C. 47, 51, 584 S.E.2d 110, 112 (2003). “When the record contains no evidence to support it, a voluntary manslaughter jury charge should not be given. Smith, 363 S.C. at 115, 609 S.E.2d at 530; *referencing* State v. Cooley, 342 S.C. 63, 67-68, 536 S.E.2d 666, 668-69 (2000).

In determining whether the evidence requires a charge of voluntary manslaughter, the Court views the facts in the light most favorable to the defendant. State v. Byrd, 323 S.C. 319, 321, 474 S.E.2d 430, 431 (1996). “However, an instruction should not be given unless justified by the evidence.” State v. Moultrie, 273 S.C. 532, 534, 257 S.E.2d 730, 731 (1979). “If a jury instruction is provided to the jury that does not fit the facts of the case, it may confuse the jury.” State v. Blurton, 352 S.C. 203, 208, 573 S.E.2d 802, 804 (2002). This Court will not reverse the trial court’s ruling regarding jury instructions unless the trial court abused its discretion. State v. Williams, 367 S.C. 192, 195, 624 S.E.2d 443, 445 (Ct. App. 2005).

In State v. Cole, 338 S.C. 97, 525 S.E.2d 511 (2000), the Supreme Court provided the following definition of voluntary manslaughter:

Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. Heat of passion alone will not suffice to reduce murder to voluntary manslaughter. Both heat of passion and sufficient legal provocation must be present at the time of the killing.

Cole, 338 S.C. at 101, 525 S.E.2d at 513. (internal citations omitted).

The sudden heat of passion, upon sufficient legal provocation, which mitigates a felonious killing to manslaughter, while it need not dethrone reason entirely, or shut out knowledge and volition, must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence.

Cole, 338 S.C. at 101-02, 525 S.E.2d at 513 (quoting State v. Byrd, 323 S.C. 319, 474 S.E.2d 430 (1996). See also State v. Starnes, 388 S.C. 590, 698 S.E.2d 604 (2010).

“Mere words, no matter how opprobrious, are insufficient to constitute adequate legal provocation when death is caused by the use of a deadly weapon.” State v. Rogers, 320 S.C. 520, 525, 466 S.E.2d 360, 362 (1996). Further, merely displaying a willingness to fight, unaccompanied by any overt threatening act toward a defendant, does not constitute sufficient legal provocation. See State v. Johnson, 324 S.E. 38, 40-41, 476 S.E.2d 681, 682 (1996) (holding the trial properly refused to charge voluntary manslaughter despite testimony that individuals approached the defendant as they were “trash talking” and that one of the individuals removed his hat and “stepped out a little bit,” demonstrating a willingness to fight, because there was no evidence that anyone made an overt threatening act toward the defendant).

“Moreover, ‘the exercise of a legal right, no matter how offensive to another, is never in law deemed provocation sufficient to justify or mitigate an act of violence’” State v. Holland,

385 S.C. 159, 682 S.E.2d 898 (2009), *quoting* State v. Ivey, 325 S.C. 137, 142, 481 S.E.2d 125, 127 (1997). “A victim’s attempts to resist or defend himself from a crime cannot satisfy the sufficient legal provocation element of voluntary manslaughter.” State v. Shuler, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001). Nor does a third party’s physical attempts to stop a defendant from committing an assault constitute sufficient legal provocation to reduce murder to manslaughter. Holland, 385 S.C. at 168-79, 682 S.E.2d at 902 (3rd party’s attempt to protect victim of assault by physically trying to stop defendant from committing assault could not constitute legal provocation as 3rd party was acting lawfully), *referencing* Ivey, 325 S.C. at 142, 481 S.E.2d at 127.

And, engaging in a physical struggle with someone who instituted a physical assault or a threatened physical assault will not constitute sufficient legal provocation to reduce murder to voluntary manslaughter. Holland, 385 S.C. at 169, 682 S.E.2d at 903 (victim’s struggle or wrestling with assailant did not constitute sufficient legal provocation reducing murder to voluntary manslaughter as the victim was acting lawfully in resisting and defending himself from defendant’s aggression.), *quoting* Ivey, 325 S.C. at 142, 481 S.E.2d at 127 (“The exercise of a legal right, no matter how offensive to another, is never in law deemed a provocation sufficient to justify or mitigate an act of violence.”) *and* Shuler, 344 S.C. at 632, 545 S.E.2d at 819 (“A victim’s attempts to resist or defend himself from a crime cannot satisfy the sufficient legal provocation element of voluntary manslaughter.”); *and referencing* State v. Tyson, 283 S.C. 375, 379, 323 S.E.2d 770, 772 (1984)(holding the trial court properly refused to charge the jury on voluntary manslaughter because evidence of a struggle as the victim resisted a crime showed the victim was defending himself).

“Whether or not the facts constitute a sudden heat of passion is an appropriate question

for the court.” Niles, *supra*; State v. Hernandez, 386 S.C. 665, 662, 690 S.E.2d 582, 586 (Ct. App. 2010)(citation omitted). “In determining whether an act which caused death was impelled by heat of passion or by malice, 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.” Pittman, 373 S.C. at 575, 647 S.E.2d at 169 (citation omitted)).

Analysis

Appellant called no witnesses at trial who were present when the crimes were committed. Appellant did not call Clark or Pee Wee or any of the other gang of armed perpetrators. Appellant did not call any friends or relatives of the deceased victim such as “Red” or “BooBee” as witnesses. Appellant did not testify at trial.

The State called the only eyewitnesses at trial. The State called Kilgore, Brewton, and Angela Geter. [Anitra Geter did not actually witness the murder having gone in the house to call police after telling the gang of armed men to leave.] None of these witnesses provided evidence of sufficient legal provocation or heat of passion to justify an instruction on voluntary manslaughter. Starnes, 388 S.C. 590, 698 S.E.2d 604.

Angela Geter testified she saw two (2) men walking down Howard Street and they “called out” Kilgore. The two (2) men kept walking, and a few minutes later the two (2) men returned with three (3) additional men with them. They came into the end of her sister’s driveway and “called out” Kilgore again. Kilgore approached the gang of men. Kilgore and the men were arguing. Then Brewton got involved in the discussion. Then the victim came out of the house and he went out and confronted the gang of men. Angela Geter could hear words

being exchanged and then someone shot the deceased victim killing him. She saw the deceased victim fall after he was shot. (R. pp. 80-87). This evidence does not support heat of passion or sufficient legal provocation. Starnes, supra.

Anitra Geter basically testified to the same thing except she did not witness the actual shooting of the victim as she had gone to call police after she told the gang of men to leave the end of her driveway. The record shows by the time she got 911 on the phone the victim had been shot and so had Kilgore and Brewton. (R. pp. 101-06, State's Ex. 52 [911 call]). This evidence does not support heat of passion or sufficient legal provocation. Starnes.

Kilgore testified he and his friends/relatives, including the victim, were unarmed. He testified he got into an altercation outside the liquor house with Clark and Pee Wee, but appellant was not there. Then later, at Geter's home, he was sitting in Brewton's car when he looked behind the car and saw the gang of men surrounding them. He got out and Clark was with four (4) other men, including appellant who was visibly armed with a pistol. Another man with Clark and appellant was also visibly armed with a pistol. Clark immediately began talking about the earlier altercation outside the liquor house. Kilgore thought Clark wanted to fight him until appellant stated, with a gun in his hand, it was not going to happen like that. Kilgore immediately began backing up trying to get to Brewton's car. Brewton approached the gang of armed men and attempted to calm them down. The victim then came out of Geter's home and saw his relatives surrounded by the armed gang of men and confronted them. He told Clark he was not afraid of their guns and he didn't care about their guns: "F ya'll's guns." Appellant then raised his gun and shot the victim in the face killing him. Appellant then turned his gun on Kilgore and Brewton and started shooting at them. They ran. At least one (1) other member of appellant's gang began shooting at Kilgore and Brewton too. Kilgore and Brewton were

wounded. The gang of armed men then fired another round of shots at Kilgore and Brewton or Geter's house. (R. pp. 107-152). This evidence does not support heat of passion or sufficient legal provocation. Starnes.

Finally, Brewton testified to leaving the liquor house and parking his car in Geter's driveway. He testified he was talking to Angela and Anitra Geter on their front porch when he heard a commotion behind him. He turned around and a group of armed men had Kilgore surrounded at the end of Geter's driveway. He approached the men and tried to calm the situation down and thought he had done so. The victim came out of the house as this was all occurring and saw the men with the guns surrounding his cousins at the end of his girlfriend's sister's driveway. The victim came to the defense of his cousins and confronted the men at the end of the driveway. The victim was unarmed and told the men he was not afraid of their guns, which the gang of men were visibly displaying. Appellant and the victim bumped into each other several times. The victim then said I am going to go get my gun too. At that point, appellant raised his firearm and shot the victim in the face killing him. Appellant then turned his gun on Brewton and Kilgore and started shooting at them. At least, one of appellant's gang members, maybe more, also began shooting at Brewton and Kilgore. The record shows one of appellant's gang fired at least sixteen (16) shots at the surviving victims and Ms. Geter's house. The gang of armed men then fired another round of shots at the surviving victims as they were leaving the area. (R. pp. 273-307). This testimony does not support a charge on voluntary manslaughter. Starnes.

"The requirement that this Court view the evidence in the light most favorable to the defendant does not allow this Court to throw out all reason from its analysis or to ignore overwhelming clear evidence" of a defendant's "mission of violence." Holland, 385 S.C. at 170,

682 at 904, *referencing as c.f. Collins v. Bisson Moving and Storage, Inc.*, 332 S.C. 290, 296, 504 S.E.2d 347, 350 (Ct App. 1998)(“In reviewing the grant of a directed verdict, the appellate court should not ignore facts unfavorable to the opposing party.”). As our Supreme Court held in Holland:

In sum, the trial court could have determined that based on the lack of evidence of any genuine threat posed by [victim], a charge on voluntary manslaughter would have confused the jury. Therefore, the trial court properly declined to give this charge. *See Blurton*, 352 S.C. at 208, 573 S.E.2d at 804 (“If a jury instruction is provided to the jury that does not fit the facts of the case, it may confuse the jury.”); *Ivey*, 325 S.C. at 142, 481 S.E.2d at 127 (holding that where no actions by the victim constitute legal provocation, a charge on voluntary manslaughter is not required). We find no abuse of discretion. Therefore, we are unable to reverse on this ground. *See Williams*, 367 S.C. at 195, 624 S.E.2d at 445 (holding that this Court will not reverse a ruling on a jury instruction unless the trial court abused its discretion).

Holland, 385 S.C. at 170, 682 S.E.2d at 904. *Cf. State v. Wharton*, 381 S.C. 209, 214-15, 672 S.E.2d 786, 788-89 (2009)(holding that there was no evidence of sufficient legal provocation on the part of an individual who argued with the defendant because he did not pose a threat to the defendant either by possession a weapon or through hostile acts).

Here the evidence showed the deceased victim was minding his own business and collecting his clothing at his girlfriend’s sister’s home so he could go home. He was an invitee and was in a place he had a right to be. The same is true of his friends/relatives waiting on him outside. When he came out on the front porch of his girlfriend’s sister’s home, the victim saw at least five (5) men at the end of his girlfriend’s sister’s driveway, at least two (2) of which were visibly armed with guns, confronting two (2) of the victim’s relatives who were unarmed. According to the testimony, the deceased victim was unarmed. The deceased victim approached

the armed men, confronted them, and told them he was not afraid of their guns and he was going to go and get his own gun. Appellant, who had come to the crime scene armed with a loaded firearm, then shot and killed the victim. Appellant then turned and fired on the surviving victims. Appellant fired at least six (6) shots at the victim and his friends/relatives with his .45 caliber pistol. Co-perpetrators with appellant also fired on the surviving victims at least twenty (20) times, possibly twenty-one (21) times. Even viewing the evidence in the light most favorable to the appellant, this case is not one of voluntary manslaughter. State v. Niles, 412 S.C. 515, n. 11, 772 S.E.2d 877 (2015); State v. Shuler, 344 S.C. 605, 545 S.E.2d 805 (2001) (“A victim’s attempts to resist or defend himself from a crime cannot satisfy the sufficient legal provocation element of voluntary manslaughter.”); State v. Knoten, 347 S.C. 296, 314, 555 S.E.2d 391, 400 (2001)(Burnett, J., dissenting). There was no sufficient legal provocation.

Judge Cole did not abuse his discretion in finding there was no heat of passion. “Whether or not the facts constitute a sudden heat of passion is an appropriate question for the court.” Niles, supra; Hernandez, 386 S.C. at 662, 690 S.E.2d at 586 (citation omitted); Pittman, 373 S.C. at 575, 647 S.E.2d at 169 (“In determining whether an act which caused death was impelled by heat of passion or by malice, 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.” (citation omitted)).

The appellant’s decision to come to Howard Street and walk to the crime scene armed with a loaded deadly weapon along with a group of armed men discounts any claim that appellant in any way acted in a sudden heat of passion. Rather, appellant clearly planned for the possibility he might have to discharge his weapon to accomplish his purpose there on Howard Street; so did his co-perpetrators; and, appellant did in fact kill the victim. And, appellant and

his co-defendants shot at two (2) of the victim's friends/relatives, including Kilgore, the person Clark was angry with over the earlier altercation. Both Kilgore and Brewton were wounded. These salient facts cannot be ignored. Niles, 412 S.C. at 523-24, 772 S.E.2d at 881, *referencing Pittman*, 373 S.C. at 575, 647 S.E.2d at 169 ("In determining whether an act which caused death was impelled by heat of passion or by malice, 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." (citation omitted)). In other words, there was nothing sudden about appellant's or his co-defendants' decision to shoot at the victims. Id.

Appellant's new arguments in favor of voluntary manslaughter have no merit either. Appellant argues there was evidence of more than two (2) guns being fired at the scene and therefore, one (1) of the victims must have had a gun. Appellant argues this entitles him to a voluntary manslaughter charge. As discussed, multiple 9mm and .45 auto shell casings were found at the scene and down Howard Street toward Spartanburg, one (1) fired bullet jacket that was consistent with a 9mm was found on Ms. Geter's front porch, and another bullet was found in front of the front porch. However, this does not establish or prove the victim or any of his friends/relatives were armed. It establishes at least a second armed man with appellant, as described by the eyewitnesses, fired on the fleeing victims and in the direction of Ms. Geter's home. The bullet jacket found on the front porch near where the house was struck by a bullet was consistent with a 9mm, which was fired by one (1) of appellant's co-perpetrators. Twenty (20) 9mm shell fired shell casings were found in Howard Street from in front of the end of the driveway of 1066 Howard Street and down Howard Street toward downtown Spartanburg. (See State's Ex. 57, Crime Scene Diagram). The physical evidence also establishes someone else in

the gang of men with appellant also fired in the direction of Ms. Geter's residence. The other bullet, consistent with a .10 mm or .40 caliber weapon, was found in front of the front porch of Ms. Geter's residence. (State's Ex. 57). This bullet could have come from one (1) of the other gang of men with appellant or was simply unrelated to the crime. Kilgore and Brewton testified two (2) of appellant's gang of men were visibly armed, one (1) of whom was appellant, but they could not tell if any of the other men, including Clark, were armed or not. Because of its location, this fired bullet is inconsistent with coming from the victim or any of his friends/relatives. It is consistent with coming from someone standing at the end of the driveway firing toward Ms. Geter's house. Additionally, the eyewitness who witnessed the armed men fleeing and firing back at Ms. Geter's home testified two (2) men were firing back at Geter's house. Only four (4) 9mm shell casings were found in this area. No .45 caliber shell casings were found in this area. Appellant was carrying a .45 caliber pistol. Another type of weapon could have been fired here toward the victims and Geter's residence. Furthermore, all of the .45 caliber shell casings found at the crime scene came from the same gun, and all of the .45 caliber bullets came from the same gun, including the bullet from the deceased victim's spine. This evidence does not support an instruction on voluntary manslaughter. State v. Starnes, *supra*.

Appellant also argues one (1) witness/victim [Kilgore] stated in his recorded statement to police that he fired the first shot; therefore, he had a gun, giving rise to sufficient legal provocation and heat of passion. This witness testified at trial and denied telling police that he fired or shot a gun. (R. pp. 135-39). The witness testified that if you will listen to the recorded statement you will hear him say he was "in shock" not that he shot a gun. (R. pp. 135-39). The detective who took the recorded statement also testified and also denied the witness [Kilgore] said that he shot first. (R. pp. 205-06). The detective testified Kilgore stated he was "in shock"

after witnessing his cousin, the victim, murdered by appellant. (R. pp. 205-06). The tape recorded interview of Kilgore was played to the jury. Respondent has reviewed the tape recorded interview of Kilgore several times and submits Kilgore does not say that he shot first but that he was "in shock" at first when his cousin was shot in the face by appellant. (Defendant's Ex. 1, Recorded Statement of James Kilgore). Respondent invites this Court to review the same. Contrary to appellant's argument, this evidence does not support a charge of voluntary manslaughter. Starnes, *supra*.

Appellant also argues that because the deceased victim tested positive for gun primer residue particles on his hands, that this is evidence the deceased may have fired a weapon, thereby entitling him to a voluntary manslaughter charge. However, the SLED expert testified the victim testing positive for gun primer residue particles was consistent with the victim having been shot at close range as testified to by the eyewitnesses. (R. pp. 337-47). In fact, the expert testified eighty percent (80%) of victims have gun primer residue on their hands from being shot. The expert also testified that Brewton and Kilgore were negative for gun primer residue. (R. pp. 337-47). All eyewitnesses testified the deceased victim did not have a gun and in fact stated he was going to go get his gun when he was shot. This evidence does not support a charge of voluntary manslaughter. Starnes, *supra*.

Appellant also cites several cases arguing they support his argument that he was entitled to a voluntary manslaughter charge. However, as the appellant in Starnes, *supra*, appellant here takes our case law and turns primarily fact-driven holdings, which do not contain the same facts as those in the present case, into broad statements of law. See Starnes, 388 S.C. at 597, 698 S.E.2d 608-09 ("Given appellant's argument, which takes our case law and turns primarily fact-driven holdings into broad statements of law, we take this opportunity to clarify the law

regarding how a defendant's fear regarding an attack or a threatening act relates to voluntary manslaughter"). None of those cases cited by appellant involve a defendant being called to come to the scene with a loaded firearm to retaliate against an individual for a much earlier altercation. None of those cases involve a gang of armed men walking up a dark street surrounding the victims in a place where they had a right to be, the driveway of a relative and friend. None of those cases involve a gang of men firing multiple shots at multiple victims killing one (1) and wounding two (2) others. As a result, those cases are simply not controlling on these facts. Id.

As shown, Judge Cole did not abuse his discretion in declining to charge the jury on voluntary manslaughter. Gibson, 390 S.C. at 355-56, 701 S.E.2d at 770-71 (Declining to charge the lesser included offense is warranted when it very clearly appears that ... no evidence whatsoever [exists] tending to reduce the crime from murder to manslaughter). There was neither sufficient legal provocation nor sudden heat of passion as defined and recognized in the law. Starnes, 388 S.C. 590, 698 S.E.2d 604. What the evidence at trial showed was appellant came to the scene armed with a loaded handgun and joined a gang of armed men bent on retaliating for an earlier affront to Clark, appellant's "boss." Appellant and his gang of associates ultimately carried out that retaliation by murdering the victim in his girlfriend's sister's driveway and wounding two (2) of his friends, including the one (1) who committed the affront to appellant's cohort and "boss," Clark. Appellant's conviction and sentence for murder must be affirmed.

Harmless Error

Even assuming *arguendo* appellant was somehow entitled to a voluntary manslaughter instruction he now alleges he should have received, the failure to do so was harmless under the particular facts of this case. See State v. Middleton, 407 S.C. 312, 755 S.E.2d 432 (2014)(finding

harmless error analysis is appropriate for the failure to charge a lesser included offense); State v. Battle, 408 S.C. 109, 757 S.E.2d 737 (Ct. App. 2014)(same).¹⁹ The failure to give the specific charge, now argued, was harmless where the evidence and all reasonable inferences shows appellant was called to come to crime scene and came to the crime scene with a loaded firearm to commit an act of violence with a group of armed men in retaliation for what occurred outside another location, the liquor house. State v. Bryant, 369 S.C. 511, 633 S.E.2d 152 (2006). “When considering whether an error with respect to a jury instruction was harmless, we must ‘determine beyond a reasonable doubt that the error complained of did not contribute to the verdict.’” Middleton, *supra*, quoting State v. Kerr, 330 S.C. 132, 144-45, 498 S.E.2d 212, 218 (Ct. App. 1998). “In making a harmless error analysis, our inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered.” Id., *citation omitted*. “Thus, whether or not the error was harmless is a fact intensive inquiry.” Id. A fact intensive inquiry shows Judge Cole’s not charging voluntary manslaughter did not contribute to the verdict.

Appellant’s defense at trial was that he was not the perpetrator of the crimes.²⁰ Appellant’s defense was that he was at home at the time of the crimes and could not have committed the offenses. Appellant’s defense was that he did not even have possession of the cell

¹⁹ Our appellate courts have previously held the refusal to charge the jury with a requested instruction is subject to harmless error analysis. State v. Lee-Grigg, 374 S.C. 388, 649 S.E.2d 41 (Ct. App. 2007), *affirmed* 387 S.C. 310 (2010); State v. Jeffries, 316 S.C. 13, 21, 446 S.E.2d 427, 431 (1994)(harmless error analysis is appropriate where the error complained of is a “trial error” rather than a “structural defect” in the trial mechanism itself). *See also Lee-Grigg, Toal, C.J. concurring. Contra State v Light*, 278 S.C. 641, 664 S.E.2d 465 (2008).

²⁰ As previously noted, the fact that appellant asserted an alibi defense at trial is irrelevant in the legal analysis of whether he was entitled to a jury instruction on voluntary manslaughter, Knoten, *supra*; however, it is certainly relevant in determining whether the failure to instruct on the lesser included offense was harmless beyond a reasonable doubt. *See Middleton*, 407 S.C. 312, 755 S.E.2d 432; Battle, 408 S.C. 109, 757 S.E.2d 737; Kerr, 330 S.C. at 144-45, 498 S.E.2d at 218.

phone at the time of the calls from Clark; therefore, he could not have been called to come to the scene with a loaded firearm. Appellant's defense was that he was a scapegoat for the murder of the victim. Appellant's defense was that he was incorrectly identified by Kilgore and Brewton, the only two (2) eyewitnesses.

However, the evidence at trial showed appellant came to the scene armed with a deadly weapon, a .45 caliber pistol. The evidence [cell phone records] showed appellant came to the scene at the behest and request of Clark after Clark was shoved or pushed outside the liquor house by Kilgore. The evidence at trial showed not only that appellant came to the scene armed but also at least four (4) other men, at least one (1) of whom was also armed with a deadly weapon, a 9 mm pistol. The evidence showed appellant, Clark, and at least three (3) men then walked up Howard Street and surrounded the victim's friends/relatives including Kilgore and Brewton in Ms. Geter's driveway. The evidence showed appellant fired one (1) shot which struck the victim in the head [face] killing him immediately, and appellant then turned his gun on Kilgore and Brewton. Appellant fired at least six (6) shots, including at Kilgore, the person who had the earlier altercation with Clark. At least one (1) of appellant's co-defendants, possibly more, also fired a 9mm pistol at Kilgore and Brewton or at Geter's home, at least sixteen (16) times at the end of Ms. Geter's driveway. The gang of armed men then fled together with two (2) armed men, then shooting back another round of shots at the victim's friends/relatives or Ms. Geter's house. The gang of men then fled the area. Appellant fled in a vehicle that was parked down Howard Street by prearrangement. Here, there was overwhelming evidence of malice. *See* S.C. Code Ann. Section 16-3-50 (defining manslaughter as "the unlawful killing of another without malice, express or implied."); State v. Blassingame, 271 S.C. 44, 46, 244 S.E.2d 528, 529 (1978)(Voluntary manslaughter is an intentional killing which lacks the element of malice);

see also State v. Cottrell, 421 S.C. 622, 643-44, 809 S.E.2d 423, 435 (2017)(*citing* State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009)(Belcher does not “restrict the State from arguing to the jury for a finding of malice from the use of a deadly weapon. . .”).

Appellant does not challenge his convictions for attempted murder, the accompanying weapon charges, or their sentences. (IBOA, pp. 4-22). The jury was charged on the lesser included offense of ABHAN on the two (2) attempted murder indictments. The jury instead found appellant guilty of two (2) counts of attempted murder. The jury **rejected** that the shootings of Kilgore and Brewton were without malice and without a specific intent to kill. Based on the trial judge’s charge to the jury, the jury found appellant shot Kilgore and Brewton with malice aforethought and with the specific intent to kill. This was only moments after appellant shot the victim in the head with the same pistol.

As a result, appellant cannot show prejudice from the failure to instruct the jury on voluntary manslaughter therefore the failure to instruct, if error, was harmless beyond a reasonable doubt. Middleton, supra; Battle, supra. The evidence of malice was overwhelming, and voluntary manslaughter was never appellant’s defense.

CONCLUSION

For the above stated reasons, appellant’s conviction and sentence for murder along with his accompanying conviction for possession of a weapon during a violent crime on the same indictment must be affirmed.

Respectfully submitted,

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January 30, 2019.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
The Honorable J. Derham Cole, Circuit Court Judge
Appellate Case No. 2017-001974

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SC Court of Appeals

THE STATE,

Respondent,

vs.

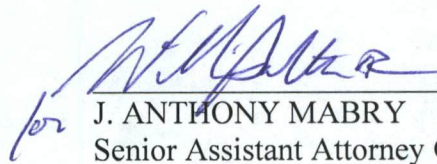
HOLMES ANDREW SIMPSON-DAVIS,

Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, Order of the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

This 30th day of January, 2019.


for J. ANTHONY MABRY
Senior Assistant Attorney General

ATTORNEY FOR RESPONDENT