THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

Doyet A. Early, III. Circuit Court Judge

RECEIVED
May 26 2020
SC Court of Appeals

Appellate Case No. 2018-001848

Case No. 2016-GS-10-00241-242

The State of South Carolina,

Respondent,

vs.

William T. Gule, Jr.,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

On or about August 5, 2015, Appellant William Thomas Gule, Jr. murdered Pamela Michelle Burgess in Charleston County. He was arrested later the morning of August 5th in Dorchester County. On February 8, 2016, the Charleston County Grand Jury indicted him for murder and possession of a weapon during a violent crime. (2016-GS-10-00241-242). On October 8, 2018, he proceeded to a jury trial before Judge Doyet A. Early, III., represented by Christopher D. Lizzi, Esquire. Assistant Solicitors E. Culver Kidd, IV., and Edward R. Corvey, III., represented the State. On October 10, 2018, the jury returned verdicts of guilty. Judge Early imposed a sentence of 40 years for murder and 5 years on the gun charge. (R. 1-416). Appellant appeals his convictions and sentences raising 3 issues. This is the Brief of Respondent.

RESPONDENT'S STATEMENT OF FACTS

During the night of August 4th into the early morning hours of August 5th, 2015, Appellant William T. Gule ("Gule") murdered his estranged girlfriend Pamela M. Burgess ("the victim"). The victim was also the mother of Gule's small child. Gule murdered the victim by shooting her 4 times in the head with a 9mm pistol while the victim was lying in her bed under her covers. The victim lived in a duplex apartment in the City of Charleston. Gule lived in Summerville, S.C., in neighboring Dorchester County. (R. 1-416; State's Ex. 71 & 72).

The 911 Call

At **8:30 a.m.**, the morning of August 5, 2015, Gule called Charleston County 911 from the parking lot of a *Dollar Tree* store located in the City of Summerville, S.C. Gule lived with his father in Summerville. In the 911 call, Gule stated the following in relevant part:

911 Dispatcher: Ok. Tell me exactly what happened.

Gule: Me and my baby mother got into an ar—
disagreement about me hav—keeping my
son today, and we had a st—a little tussle and
I ended—accidentally ended up shooting her.
I don't know if she is dead .... (conversation continues)

911 Dispatcher: What time did this happen?

Gule: About **7 o'clock**..... (conversation continues)

911 Dispatcher: And, about what time did this happen?

Gule: About **6:30, 6:00** o'clock..... (conversation continues)

(State's Ex. 72)(emphasis added). According to Gule's statements in the 911 call, it was at least several hours after the shooting, that Gule called 911 from Dorchester County and reported the crime; though no one knows for sure exactly what time Gule murdered the victim. Later in the call, Gule states, after he shot the victim, he just panicked and grabbed his son and left the victim's home and did not know if the victim was dead or not. (R. 64-74, State's Ex. 72).

The Crime Scene

Shortly after the 911 call, around 9:00 a.m., when police arrived at the victim's duplex apartment in Charleston, they did not find a scene consistent with an argument, tussle, or accidental shooting. First, police had to break in the apartment to enter it. The front door was locked. Second, there was absolutely no evidence of a struggle or a disturbance in the home. Nothing was overturned or out of place. The victim's child was not there; his bedroom was empty. Third, the victim was found dead in her bedroom lying on the left side of her bed [if standing at the foot of the bed facing the headboard] on her right side under her covers, with her hands and arms under the covers, with only a small portion of one arm, perhaps a forearm or

elbow not under the covers.[1] Her head was resting on a pillow and another pillow was over her face. However, the pillow over her face had no bullet holes in it. The only blood in the apartment was on the victim's head, her pillow, mattress, sheets, the floor beside her body, and high velocity blood spatter, consistent with a gunshot wound, on a fan beside her bed sitting on a dresser. (R. 74-89; 115-83; 232; 244-51; State's Ex. 71).

If standing at the foot of the bed facing the headboard, lying to the right of the victim's body was 1/2 of the victim's eyeglasses and lying on the floor to the left of the bed was the other 1/2 of her glasses. Also lying on top of the covers on the bed near the victim was the remote control to the T.V. The right side of the victim's bed, including the covers, was completely undisturbed, indicating the victim was lying in the bed alone either watching TV or had fallen asleep when murdered. A bottle of water was found on a nightstand on the right side of the victim's bed. It contained Gule's DNA at its opening. A cigarette lighter was also found there next to this bottle. On a dresser to the left of the victim's body was the fan that contained at its bottom high velocity horizontal blood spatter consistent with the victim having been shot while lying in the bed as she was found. (R. 74-89; 115-83; 244-48; State's Ex. 71).

There were bullet holes in the pillow the victim's head was resting on and there were bullet holes in the mattress under the victim's body. Projectiles were found in the pillow under the victim's head, in the sheets under her, and in the mattress, a total of 4. Fired shell casings

[1] The first responding officer was wearing a body camera when he entered the victim's home and conducted a protective sweep. [State's Ex. 71]. In the body camera video, the victim can be seen lying on the left side of her bed with her body and arms under her covers. The testimony at trial was all of the victim's hands and arms were under her covers. Respondent reviewed the video several times and the victim is tucked in under her bed covers resting on her right side and there appears to be a small portion of one arm sticking out from under the covers, possibly a forearm, elbow, or upper arm exposed. The remainder of both arms and hands are under the covers. In order to see this, the body cam video had to be viewed slowly several times frame by frame. The covers were later moved by officers and EMS before her body was photographed.

were found under the bed and on top of the dresser next to the victim, 2 behind the headboard on the floor next to the wall, and 2 on the dresser. An old inactive I-phone was found on the dresser, but the victim's active cell phone she used every day was missing. (R. 74-89; 115-83; 244-48).

Gule's arrest

Gule was arrested after making the 911 call from Dorchester County, by a Dorchester County Deputy Sheriff, at the *Dollar Tree* in Summerville. A gun and holster for the gun were recovered lying on the curb next to where Gule was sitting when police arrived. The gun was loaded with 1 round in the chamber and 7 more rounds in the magazine. (R. 67-73; 89-102).

There were no significant injuries to Gule at the time of his arrest. The only injury noted by an officer was a small fresh cut at the base of his thumb at the webbing of his hand. (R. 92, ll. 18-20). This injury is consistent with the slide of an automatic weapon catching someone's hand. The lack of injuries to Gule was documented by photos taken at the police station and introduced at trial and testified to by the officer who photographed him. (R. 102-14). Gule's wallet was also seized at his arrest. It contained his identification and a concealed weapons permit indicating Gule was trained in the use of handguns and how they operate. (R. 67-73; 89-102). Gule's hands were bagged to preserve trace evidence and later tested positive for components of gunshot residue (GSR) on both hands. (R. 67-73; 102-08; 210-18).

After Gule's arrest, police obtained a search warrant for Gule's residence in Dorchester County, which he shared with his father. There police recovered a Glock 9mm pistol box and an ammunition drum for 30 rounds of 9mm ammo indicating the weapon seized from Gule at *the Dollar Tree* was in fact his gun. At his residence, police also found the victim's son, who Gule had taken with him after murdering the victim in her bed in Charleston. (R. 89-102).

Gule's cell phone was also seized. It showed there were multiple contacts between the victim and Gule between July 22 and August 5, 2015. The most recent before the victim's death was 2 days before the murder on August 3, 2015 at 5:37 p.m., consistent with the victim's sister Patricia Pye's testimony, discussed below. (R. 226-29).[2]

The prior relationship and events leading up to the victim's murder

The victim's sister, Patricia Pye, testified the relationship between the victim and Gule began 5 years prior to the victim's murder. The victim and Gule had a child together, a son, who was age 3 at the time of the murder. The relationship between Gule and the victim was toxic and it was on again/off again, usually precipitated by Gule finding another woman. Finally, about 1 month before the murder, the victim asked Gule to move out and he removed his belongings from her home and moved in with his father in Dorchester County. There were other problems in the relationship including Gule would say or text demeaning things about the victim, i.e. calling her fat, ugly, or a bad girlfriend. Even after Gule moved out, the victim and Gule were still trying to co-parent their child, who lived with the victim. (R. 262-91). Even though the victim and Gule had separated, Gule would still show up at the victim's duplex intoxicated, but the victim would only allow him to sleep on the couch, and this was so Gule did not get hurt driving drunk or arrested for DUI, since he was the child's father. Gule was supposed to be visiting the child when he came to the victim's apartment but he actually was there to see the victim. This had occurred 2 or 3 times in the month leading up to the murder. On the morning after the murder,

[2] Gule's phone records also showed on the night of the murder, there was an incoming call on Gule's phone at 1:33 a.m. The next call was listed at 5:49 a.m. There were 3 text messages and then an inbound call at 7:15 a.m. There were 17 activities on the phone going on in the 2 and a 1/2 hours between the 5:49 a.m. call and when the 911 call was made by Gule from Dorchester County at 8:30 a.m. (R. 226-29).

when police entered the victim's home, they found pillows and a blanket on the den couch consistent with Gule having spent the night at the victim's duplex. (R. 271-307; 115-209).

Approximately 3 days before her sister's death, Pye and the victim were walking on the greenway near her sister's duplex when Gule called the victim on her cell phone. The victim put the phone on speaker and Pye overheard Gule threaten her sister. Gule stated out loud: "if he could not have the victim, no one else would, and he would make sure of that." Pye had also seen *a text* from Gule to the victim in which Gule had also threatened about a year before the victim's murder to choke the victim out and put her up against the wall. Pye testified there were times during the relationship she saw bruises on her sister's neck and arms which the victim related were caused by Gule, including fingerprint impressions on her neck.[3] (R. 271-89).

A close friend of the victim, Lisa Villeponteaux ("Lisa"), also testified at trial. Lisa stated the relationship between Gule and the victim was on again/off again. There would be periods where Gule and the victim hated each other; they would get back together, and then they would hate each other again. The victim was the "bread winner," and Gule could not hold a job. There were periods where the victim paid all the bills when she and Gule lived together, and the victim also took care of their son. Gule was not living with the victim at the time the victim was murdered. Gule had moved out at least 2 to 3 weeks before the victim's death. Lisa shared with the jury a series of text messages between she and the victim 2 nights before the victim was murdered, which demonstrated the victim's state of mind at the time of her murder, including she was happy about ending the relationship with Gule, and she was getting on with her life. The victim was looking forward to not being demeaned anymore by Gule, not supporting him

[3] The victim's friend Lisa Villeponteaux also saw bruises on the victim during the relationship, but Judge Early would not allow her to testify to those since the victim did not relate to Villeponteaux how the bruises occurred. (R. 290-311).

financially, and being single and independent. The victim also discussed with Lisa the fact that the victim was not going to allow Gule to treat her in a disrespectful manner any more in front of her child. Two (2) mornings later, the victim was dead. (R. 290-311).

Two (2) nights after overhearing Gule threaten her sister on the greenway, Patricia Pye was coming back from her mother's home on August 4, 2015 and saw Gule's car in the driveway at the victim's apartment. Pye did not stop but continued on to her own home which was about a block away. She immediately called the victim but she did not answer her cell phone. The following morning, August 5, 2015, Pye was driving by her sister's residence at approximately 5:30 a.m. on her way to work and saw Gule standing in the doorway of her sister's home smoking a cigarette. No lights were on in her sister's home when she saw Gule but there was a street light outside which illuminated him. Gule's car was still parked in the victim's driveway. Pye was notified later in the morning that her sister had been murdered. (R. 271-78).

The Autopsy

The autopsy determined the victim suffered multiple gunshot wounds to the head. The victim was shot once between the eyes. If facing the victim, this gunshot entered just to the right of the victim's nose near *her* left eye and exited the back of her head. Part of a projectile was found in her hair at this exit wound. Based on the stippling around this gunshot entry wound, it appeared the victim had had been shot with her eyeglasses on. The victim had 3 more entry gunshot wounds in close proximity to *her* left ear [i.e. to the right side of the victim's head if facing her]. Each wound was slightly in front of *the victim's* left ear. Each of these gunshot wounds traversed the base of the victim's brain and exited behind *the victim's* right ear. These were entirely through and through gunshot wounds and no portion of the fired projectiles from these gunshots were found in the victim's head or scalp. These 3 gunshots were fired from

relatively the same direction. All 4 entry wounds were made by a gun fired from 36 inches or closer because there was stippling around each wound. However, none of the gunshot wounds were contact wounds, and the victim had no fresh injuries to her hands whatsoever. The only injury the victim had to her hands was an old bruise on her right hand with scabbing. There were no powder burns or stippling on the victim's hands as there was around the gunshot wounds to her head. The victim's wounds were consistent with her having first been shot between the eyes from the right [her left] and then her head rotating slightly to her right and then she was shot 3 more times on the right side of her head [the victim's left]. Given the bullet holes to the pillow the victim's head was resting on, and to the mattress, and the fact fired projectiles were found under the victim's head, the evidence was consistent with the victim being shot while her head was resting on her pillow while the pillow was resting on her mattress. (R. 310-36; 175-83).

Also at the autopsy, found on the victim's body were 11 bruises on her right arm, 7 on her left arm, 3 on each leg, and 4 on the right side of her chest. Two (2) of these bruises were more than 24 hours old. However, the remainder of the bruising on her body was from 24 hours or less before she was killed. Several of the bruises on her arm were consistent with being grabbed by someone's fingertips. The end result, the victim had been physically abused at some point during the 24 hours before her murder. (R. 310-36).

The Ballistics

The gun recovered in Gule's possession was forensically matched to the 4 fired shell casings found at the crime scene behind and beside the victim's bed. The 4 fired projectiles recovered were also consistent with having come from the recovered gun. The murder weapon recovered from Gule was a 9mm semi-automatic pistol. It was test fired and it would not fire in an automatic mode. The gun would not accidentally fire. The trigger had to be pulled each time

to make the weapon fire. The trigger pull on the weapon was 6.5 lbs. This was consistent with lifting a ¾ gallon of water with 1 finger. (R. 184-209; 229-30; 254-61).

Summary of Facts

In summary, the evidence showed the victim was physically abused in the 24 hours before her death, with numerous bruises found on her body at autopsy. She died after she was shot 4 times in the head while sleeping in her bed or lying in her bed watching T.V. The shots were fired by Gule with his 9mm pistol from the relative direction of the right, if facing the head board, but close enough to leave stippling on the victim's head. Gule would have had to squeeze the trigger each time to fire the weapon 4 separate times. And, Gule did not call 911 until at least several hours after the murder and only after he had the opportunity to make numerous phone calls and text messages before reporting the crime. The victim's active cell phone was never recovered by police or the victim's family. It was missing after the murder. Finally, Gule made good on his threat that if he could not have the victim, he would make sure no one else did. (R. 67-108; 115-218; 226-30; 244-48; 254-336; State's Ex. 71 & 72).

ARGUMENT I.

Judge Early did not err in declining to instruct the jury on involuntary manslaughter.

Gule argues Judge Early committed reversible error in refusing to instruct the jury on the lesser included offense of involuntary manslaughter. (IBOA). Gule is wrong.

What occurred below

At the conclusion of the trial, at the charge conference, Gule requested Judge Early instruct the jury on the lesser included offense of involuntary manslaughter. Judge Early declined to instruct the jury on involuntary manslaughter finding the charge was not supported by the

evidence in the record. (R. 362). Gule now alleges Judge Early erred in declining to instruct on involuntary manslaughter for 2 reasons: (1) because Gule stated in the 911 call that he and his girlfriend had a tussle and he accidentally ended up shooting the victim, and (2) Judge Early charged the jury on the defense of accident so he was required to charge the jury on involuntary manslaughter. Gule is wrong.

Standard of Review

An appellate court will not reverse the trial court's decision regarding a jury charge absent an abuse of discretion. State v. Commander, 396 S.C. 254, 270, 721 S.E.2d 413, 421-22 (2011). "To warrant a reversal, a trial [court]'s refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." Id. at 270, 721 S.E.2d at 422. 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). "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). In determining whether the evidence requires a charge of manslaughter, the Court views the facts in the light most favorable to the defendant. State v. Byrd, 323 S.C. 319, 474 S.E.2d 430 (1996). For a court to refuse to charge a jury on manslaughter, there must be no evidence in the record tending to reduce the crime from murder to manslaughter. State v. Dickey, 380 S.C. 384, 669 S.E.2d 917 (Ct. App. 2008). However, "[a]n instruction should not be given unless it is justified by the evidence." State v. Moultrie, 273 S.C. 532, 534, 257 S.E.2d 730, 731 (1979). "Only the law applicable to the case should be charged to the jury." State v. Blurton, 352 S.C. 203, 208, 573 S.E.2d 802, 804 (2002). "If a jury instruction is provided that does not fit the facts of the case, it may confuse the jury." Id. When the record contains no evidence to support a lesser included offense, a charge on the lesser

included offense should not be given. *See* State v. Smith, 363 S.C. 111, 609 S.E.2d 528 (Ct. App. 2005), *referencing* State v. Cooley, 342 S.C. 63, 536 S.E.2d 666 (2000). A lesser included offense instruction is required only when the evidence warrants such an instruction, and it is not error for a judge to refuse to charge a lesser included offense unless there is evidence tending to show the defendant was guilty of the lesser offense. State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999). The presence of evidence to sustain a crime of a lesser degree determines whether it should be submitted to the jury and a defendant's mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice. State v. Funchess, 267 S.C. 427, 229 S.E.2d 331 (1976). The trial court should refuse to charge a lesser included offense where there is no evidence the defendant committed the lesser, rather than the greater offense. State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996). Due process requires that a lesser offense be charged when the evidence warrants it, but only if the evidence would permit a jury to rationally find the defendant guilty of the lesser offense. Patterson, 337 S.C. 215, 522 S.E.2d 845. In order to justify a charge of a lesser included offense, the evidence must be capable of sustaining either the greater or the lesser offense, depending on the jury's view of the evidence. State v. Pressley, 292 S.C. 9, 354 S.E.2d 777 (1987). In determining the issues to be submitted to the jury, all of the testimony, both for the State and the defense must be considered. State v. Knoten, 347 S.C. 296, 309, 555 S.E.2d 391, 398 (2001).

Analysis

The evidence in this case did not entitle Gule to an instruction on involuntary manslaughter under South Carolina law. State v. Wharton, 381 S.C. 209, 672 S.E.2d 786 (2009); State v. Reese, 370 S.C. 31, 36, 633 S.E.2d 898, 900-01 (2006), *overruled on other grounds by* State v. Belcher, 385 S.C. 597, 685 S.E2d 802 (2009); State v. Cabrera-Pena, 361 S.C. 372, 381,

605 S.E.2d 522, 526-27 (2004)(finding defendant is not entitled to a charge on involuntary manslaughter where no evidence exists to support the charge). Under South Carolina law, involuntary manslaughter is the unintentional killing of another without malice and while engaged in either: (1) *an unlawful act* not amounting to a felony and not naturally tending to cause death or great bodily harm; or (2) a lawful act with *reckless disregard* for the safety of others. State v. Smith, 391 S.C. 408, 414, 706 S.E.2d 12, 15 (2011); State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996). There is nothing in the record which would have entitled Gule to an instruction on involuntary manslaughter because he does not fit in either of these 2 categories.

First, Gule intentionally shot the victim 4 times in the head with a 9mm pistol. The gun was test-fired prior to trial, by both the State's and the defendant's expert, and it would not fire accidentally or automatically. The gun would only fire if the trigger was pulled each time to make it fire. State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007)(defendant not entitled to involuntary manslaughter instruction where after altercation with his grandfather he obtained shotgun, returned to his grandparents room and shot them, even though he claimed involuntary intoxication from Zoloft); Cabrera-Pena, 361 S.C. at 381, 605 S.E.2d at 526 (involuntary manslaughter instruction not warranted where accused was "engaged in unlawful, felonious and harmful conduct" at the time of the incident);[4] State v. Smith, 315 S.C. 547, 446 S.E.2d 411

[4]*See also* State v. Cooney, 320 S.C. 107, 112, 463 S.E.2d 597, 600 (1995)("no error in refusal to charge involuntary manslaughter when the defendant admitted intentionally firing the gun, but claimed only he meant to shoot over the victim's head"); Harris v. State, 354 S.C. 382, 581 S.E.2d 154 (2003)(PCR Court erred in granting relief because defendant was not entitled to involuntary manslaughter instruction where he admitted he intentionally fired gun, but meant to only fire warning shots); State v. Craig, 267 S.C. 262, 269, 227 S.E.2d 306, 310 (1976) (involuntary manslaughter charge not warranted where defendant intentionally fired his shotgun but claimed he meant to shoot over the victim's head); Douglas v. State, 322 S.C. 67, 74, 504 S.E.2d 307, 310 (1998)(involuntary manslaughter charge not warranted where defendant admitted he intentionally fired gun into a crowd in self-defense despite testimony that defendant had been rushed by a group of people during a fight).

(1994)(trial court did not err in refusing to instruct on involuntary manslaughter **where defendant wielded knife in an intentional manner, because the intentional use of a dangerous instrumentality does not support the allegation of mere criminal negligence**); Bozeman v. State, 307 S.C. 172, 177, 414 S.E.2d 144, 147 (1992)(no evidence of mere criminal negligence in use of a dangerous instrumentality because the defendant intentionally fired his weapon);[5] Gibson v. State, 390 S.C. 347, 701 S.E.2d 766 (Ct. App. 2010)("the essence of involuntary manslaughter is the involuntary nature of the killing" and because co-defendant admitted he voluntarily and intentionally fired his weapon, the trial court properly denied the instruction on involuntary manslaughter to accomplice defendant); State v. Pickens, 320 S.C. 528, 466 S.E.2d 364 (1996)(holding where defendant admitted he intentionally shot his gun, contending he was acting recklessly but lawfully in self-defense, involuntary manslaughter charge was not warranted); State v. Morris, 307 S.C. 480, 483-84, 415 S.E.2d 819, 821-22 (Ct. App. 1991)(noting that under involuntary manslaughter, the act must be unintentional and defendant intentionally shot his gun though he claimed self-defense); State v. Light, 378 S.C. 641, 664 S.E.2d 465 (2008)(finding defendant had lawfully armed himself in self defense and was entitled to instruction on involuntary manslaughter where there was evidence the gun *unintentionally* discharged); State v. Brayboy, 387 S.C. 174, 691 S.E.2d 482 (Ct. App. 2010)(although unlawful to point and present a firearm, when defendant lawfully armed himself in self defense his failure to immediately disarm himself when the threat subsided did not amount to unlawful pointing and presenting a firearm and evidence suggesting gun *accidentally* discharged was sufficient to warrant instruction on involuntary manslaughter). *See also* State v.

[5]A deadly weapon is generally defined as any article, instrument, or substance which is likely to produce death or great bodily harm. State v. Davis, 374 S.C. 581, 649 S.E.2d 132 (Ct. App. 2007); State v. Bennett, 328 S.C. 251, 493 S.E.2d 845 (1997). A pistol is definitely a deadly weapon or dangerous instrumentality. *See* State v. Smith, 315 S.C. 647, 446 S.E.2d 411 (1994).

Tyler, 348 S.C. 526, 560 S.E.2d 888 (2002)("An unintentional killing resulting from an unlawful assault and battery, **not of a character of itself to cause death**, is involuntary manslaughter...") *quoting* State v. Chatman, 336 S.C. 149, 152-53, 519 S.E.2d 100, 101 (1999), *citing* 40 C.J.S. *Homicide* Section 40 (1991), *other citations omitted* (emphasis added).[6] State v. Davis, 374 S.C. 581, 649 S.E.2d 132 (Ct. App. 2007)(defendant not entitled to involuntary manslaughter charge where striking someone in the head with a 5-pound sledgehammer would naturally tend to cause death or great bodily injury *and* there was no evidence defendant handled sledgehammer with reckless disregard for the safety of others but *intentionally struck the victim on the head* with it). Under the evidence, Gule was not entitled to an instruction on involuntary manslaughter.

Gule argues the jury could have determined he acted recklessly while in self-defense; and, as a result, he alleges he was entitled to an involuntary manslaughter instruction. Gule is wrong. Our Supreme Court faced a nearly identical argument, and found it was tantamount to imperfect self-defense, which South Carolina has not recognized, and has no application to involuntary manslaughter. State v. Sams, 410 S.C. 303, 764 S.E.2d 511(2014), *referencing* State v. Finley, 277 S.C. 548, 551, 290 S.E.2d 808, 809 (1982)(imperfect self-defense is not the law in South Carolina), *and citing* Douglas v. State, 332 S.C. 67, 75 n. 4, 504 S.E.2d 307, 311 n. 4 (1998). In addition, under this precedent the most Gule would be entitled to receive, even if South Carolina were to recognize imperfect self-defense, was an instruction on voluntary manslaughter, not involuntary manslaughter. Id., *citing* Roy Moreland, The Law of Homicide 93 (1952); 40 C.J.S. *Homicide* Section 110 (2006), *also referencing* State v. Falkner, 301 Md. 482,

[6]*See also* Smith v. Padula, 444 F.Supp. 531 (D.S.C. 2006)(habeas corpus petitioner failed to show S.C. Supreme Court unreasonably applied U.S. Supreme Court precedent in reversing PCR Court's grant of relief on ineffective assistance of counsel for failing to preserve trial judge's refusal to charge involuntary manslaughter where S.C. Supreme Court determined Petitioner was not entitled to involuntary manslaughter instruction under S.C. law).

483 A.2d 759 (1984).[7] In fact, in Sams, the Court cited approvingly the Court of Appeals opinion, State v. Scott, 408 S.C. 21, 757 S.E.2d 533 (Ct. App. 2014):

> Similarly the Court of Appeals recently considered a defendant's assertion that "the trial court erred by not charging involuntary manslaughter because under his version of the facts, he unintentionally caused [the victim's]death when he lawfully but recklessly performed a martial arts move in self defense." State v. Scott, 408 S.C. 21, 22, 757 S.E.2d 533, 534 (Ct. App. 2014). The Court of Appeals found "no basis to conclude Scott acted recklessly in defending himself because the circumstances Scott alleges to be reckless are the same circumstances that justified his use of force." Id.

Sams, *supra*. As a result, this issue has no merit and must be denied.

Gule was simply not entitled to an instruction on involuntary manslaughter in this case. It is undisputed the victim was shot 4 times in the head by Gule with a semi-automatic 9mm pistol.[8] The victim was shot 1 time between the eyes. The remaining shots were grouped all together just in front of the victim's left ear and exited behind the victim's right ear. None of the shots were contact wounds. They were fired from within 36 inches of the victim's head while her head was resting on her pillow on her bed mattress. There were bullet holes in the pillow on which she was lying and there were bullet holes in her mattress under that pillow. Projectiles were recovered under her head, under her pillow, and under her mattress or bed.

The murder weapon was test fired by both the State's and Gule's own experts. The gun would not fire except if the trigger to the gun was intentionally squeezed each time the gun was fired. Which means, Gule fired the gun intentionally each of the 4 times it was fired. The trigger pull on the gun was 6 ½ pounds. The State's firearms expert explained this was equivalent to Gule lifting ¾ of a gallon of water with 1 finger each time he pulled the trigger.

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[7] Gule does not contend in this appeal that he was entitled to an instruction on voluntary manslaughter but only involuntary manslaughter. (See IBOA).

[8] Gule fails to mention anywhere in his brief or argument in support of an instruction on involuntary manslaughter, the fact that the victim was shot 4 times.

While the pathologist could not tell which bullet wound was caused first, or the sequence, there is no question the victim was shot 4 separate times in the head. Gule would had to have squeezed the trigger and fired each shot into the victim's head.

While Gule claimed in his 911 call that he accidentally ended up shooting the victim, this did not entitle him to an involuntary manslaughter instruction. The undisputed evidence established the victim was shot intentionally 4 different times in the head with a 9mm pistol. The evidence also established the gun would not discharge accidentally nor would it fire automatically. The trigger had to be pulled to make the gun fire. As a result, Gule pulled the trigger 4 times intentionally, shooting the victim 1 time between the eyes and 3 times in front of her left ear. *See* State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999)(court properly refused charge of simple assault and battery on ABHAN indictment, where there was a difference in size and sex of the defendant and victim, a gun was held to the victim's head, and victim was pregnant and was dragged up a flight of steps on her stomach in the victim's home); State v. Tyndall, 336 S.C. 8, 518 S.E.2d 278 (Ct. App. 1999)(court properly refused charge of simple assault and battery on ABHAN indictment, where there the aggravating circumstance was resisting a lawful authority, i.e., a police officer. Thus, even if the defendant had committed a simple assault in the usual sense, he would be guilty of ABHAN under these circumstances).

Furthermore, the crime scene evidence was inconsistent with a tussle or struggle over a gun and would not entitle Gule to an involuntary manslaughter instruction. There was nothing disturbed in the residence itself. There was no indication of a struggle. The victim was found on her bed under her covers with her arms and hands under her covers, except for a portion of 1 arm, and her head resting on a pillow. There were **no fresh injuries or powder burns or stippling to her hands, as there was to her face and the side of her head.** She had through

and through gunshot wounds to the head [4] and gunshot holes in the pillow her head was resting on and some holes in the mattress. She also had bruising all over her body, including numerous bruises to her arms, legs, and chest, including most of which was fresh bruising from the last 24 hours. This evidence demonstrated that the victim had been physically abused in the 24 hours before her death when Gule had access to her and was in her apartment. Some of the bruising found at autopsy was consistent with that seen on the victim prior to her death by the victim's sister, which the victim attributed to Gule. In his brief, Gule has yet to explain how he could have negligently or recklessly physically abused the victim leaving bruises all over her body, and also negligently or recklessly discharged a firearm 4 separate times into the victim's head.[9] This is from a firearm that would not fire unless the trigger was intentionally pulled and a firearm that would not fire accidentally or fire in automatic mode. Gule was simply not entitled to an instruction on involuntary manslaughter. State v. Wharton, 381 S.C. 209, 672 S.E.2d 786; Reese, 370 S.C. at 36, 633 S.E.2d at 900-01; Cabrera-Pena, 361 S.C. at 381, 605 S.E.2d at 526-27. Judge Early did not abuse his discretion in declining to charge involuntary manslaughter.

Gule also argues that because Judge Early charged the defense of accident he erred in not charging involuntary manslaughter. This argument was not raised below as a basis to charge involuntary manslaughter, therefore it is not preserved for appellate review. State v. Wiggington, 375 S.C. 25, 649 S.E.2d 185 (Ct. App. 2007)(appellant's argument on appeal in support of involuntary manslaughter charge was not raised below; therefore he would be entitled to reversal

[9] Gule cites to numerous cases in his brief which eventually held the appellant in that case was entitled to an instruction on involuntary manslaughter where the defendant alleged he and the victim had struggled over a weapon. However, Gule has not cited any case in which the victim was shot 4 times, much less 4 times in the head with a weapon that would not accidentally discharge or fire automatically. Nor has he cited any case where the victim was shot in the head multiple times while lying under her covers and her body was also covered in bruises unrelated to the gunshot wounds. Gule is simply not entitled to an involuntary manslaughter instruction under the facts and evidence of this case.

only on the basis he raised below), *referencing* State v. Freiberger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005)(argument advanced on appeal was not raised and ruled on below thus the issue was not preserved for review); State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003)(arguments not raised to and ruled upon by the trial court are not preserved for appellate review, and defendant may not argue 1 ground below and another on appeal), *other citation omitted*; Knight v. Waggoner, 359 S.C. 492, 597 S.E.2d 894 (Ct. App. 2004)(arguments made for the 1st time on appeal are not preserved for review).

Regardless, it would not matter. The cases cited or referenced by Gule in his brief as the basis for this argument, do not hold that if a trial judge charges the defense of accident, he must also charge involuntary manslaughter. *See* Knoten, 347 S.C. at 309, 535 S.E.2d at 398 (defendant not entitled to involuntary manslaughter); State v. Burriss, 344 S.C. 256, 259, 513 S.E.2d 194, 106 (1999)(defendant entitled to both accident and involuntary manslaughter); Wiggington v. State, 413 S.C. 578, 776 S.E.2d 407 (Ct. App. 2015)(only discussing the fact that the trial judge charged the defense of accident at trial indicated he found some evidence defendant was acting lawfully when he armed himself and ultimately finding based on the facts defendant was entitled to involuntary manslaughter charge); State v. Chatman, 336 S.C. 149, 153, 519 S.E.2d 100, 102 (1999)(defendant not entitled to accident charge but was entitled to involuntary manslaughter charge); State v. Smith, 391 S.C. 408, 414, 706 S.E.2d 14, 15 (2011)(defendant was not entitled to either accident or involuntary manslaughter charge). Additionally, the facts of Knoten, Burriss, Wiggington, Chatman and Smith are completely different from the facts of this case where the victim was covered in bruises all over her body, most of which occurred 24 hours before her murder, and she was shot while lying in her bed with her head on her pillow and her arms under her blanket, and she was shot between the eyes and then shot 3 more times in the

head with a gun that would not fire accidentally or automatically but only if the trigger was pulled. Further, there is no case law holding that if the trial judge erroneously gives a defendant a jury charge to which he was not entitled, such as accident, he must also give an instruction on involuntary manslaughter. A jury instruction must be supported by evidence in the record. Here the evidence does not support a charge on the lesser offense of involuntary manslaughter.

Harmless error

Further, even assuming *arguendo* Gule was somehow entitled to an involuntary manslaughter instruction on this record, the failure to do so was harmless under the particular facts of this case. 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). To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous **and** prejudicial to the defendant. State v. Hughey, 339 S.C. 439, 529 S.E.2d 721 (2000). "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). An erroneous instruction will be deemed a harmless error if, based on all of the evidence presented to the jury, it did not contribute to the verdict. Tate v. State, 351 S.C. 418, 570 S.E.2d 522(2002); Plyler v. State, 309 S.C. 408, 424 S.E.2d 477 (1992). "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." Middleton. "Thus, whether or not the error was harmless is a fact intensive inquiry." Id. A fact intensive inquiry shows Judge Early's not charging involuntary manslaughter did not contribute to the verdict in this case.

In the present case, there was overwhelming evidence of malice. Gule had threatened the victim over the phone in the past and approximately 3 days before her murder. Gule told the victim that if he could not have her then no one else would and he would make sure of that. Gule also repeatedly demeaned the victim in text messages. This was testified to by the victim's sister and separately by her friend Lisa. The victim's body was also covered with bruises at the autopsy that were not caused by the gunshot wounds to her head. She had bruises on her legs, her arms and her chest. While some of these bruises were more than 24 hours old, most of the bruises were less than 24 hours old, proving the victim was physically abused before her death. Some of the bruising was consistent with that earlier witnessed on the victim by the victim's sister, which the victim attributed directly to Gule. Finally, the victim was shot 4 times in the head with a 9mm semi-automatic pistol, including 1 time between the eyes and 3 times in front of her left ear, with a gun that would not fire automatically or accidentally but only if the trigger was pulled. There was overwhelming evidence of malice and the failure to instruct the jury on *involuntary manslaughter* had no impact on the jury's verdict. The jury only deliberated for approximately 30 minutes and based on the overwhelming evidence of guilt completely rejected the defense of accident, which was charged, and found Gule guilty of murder.

Given the evidence *in this particular case*, it is clear the failure to charge involuntary manslaughter, if error, was harmless beyond a reasonable doubt. Middleton, 407 S.C. 312, 755 S.E.2d 432 (finding failure to charge lesser included offense was harmless after a fact specific inquiry). As a result, this appellate ground has no merit and must be denied. *See* Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992)(judge's incorrect instruction was harmless, where instruction did not contribute to verdict, where there was overwhelming evidence of malice).

ARGUMENT II.

Judge Early did not err in allowing the decedent's sister to testify about threats and bruises made by Gule where the threats and bruises were admissible independent of Rule 404(b) and in any event these were proven by clear and convincing evidence, they were not too remote, and their probative value was not substantially outweighed by the danger of unfair prejudice; regardless, the evidence was harmless where it was cumulative to other evidence and there was overwhelming evidence of malice and Gule's guilt of murder.

What occurred below

Prior to the beginning of the trial, *in camera*, the parties agreed that prior to the State introducing any evidence about the prior relationship between Gule and the victim, including any previous threats, abuse, or prior bad acts, the State would proffer that evidence outside the jury so Judge Early could properly determine its admissibility. The State also agreed not to go into any such evidence in its opening statement, and would not mention the same until Judge Early had the opportunity to properly rule on its admissibility. (R. 43-45).

Thereafter, during the trial, prior to the victim's sister Patricia Pye testifying, the State proffered her testimony on prior difficulties between Gule and the victim leading up to the victim's murder, including prior threats, abuse, or bad acts. Pye testified she lived about 4 doors down from the victim and they saw and spoke to each other every day. Pye met Gule around the time the victim and Gule started dating. Gule and the victim were involved in a volatile on again off again toxic relationship for 4 to 5 years. They argued constantly. Gule would leave the victim, sometimes for another woman, or sometimes because he got mad over something, and then return to the victim, and the victim would allow Gule back into her home. Gule and the victim had a child together, but about 1 month before her sister's death, Gule moved out of the victim's home for the last time taking his belongings. The victim had decided to move on with her life. Pye overheard Gule threaten her sister, the victim, on the phone 3 to four 4 days before her murder in a phone call that the victim placed on speaker phone; Gule stated if he could not

have the victim no one else would and he would see to it. Pye saw a text message on the victim's phone from Gule in which Gule threatened to choke the victim out and put her up against the wall. This text was about a year before the murder but when the relationship was ongoing. Pye also saw bruises on the victim's body during her relationship with Gule which the victim related to her sister [Pye] were caused by Gule grabbing her. The bruises were fingerprint marks on the victim's neck and some on her arm. Pye also saw demeaning texts from Gule to the victim criticizing the victim's body and skills as a homemaker, and the texts were a constant thing during the relationship including up to a few days or the day before the victim's murder. In them, Gule would call the victim fat, ugly, and would state she would never make a good wife. Gule would also state whoever his new girlfriend was, was a better woman than the victim.[10] Pye also testified to another incident in which Gule broke into the victim's residence and there was an argument that ensued; however, Pye testified this occurred at the victim's previous residence. The State did not offer this last incident in evidence before the jury. (R. 263-68).

Gule objected to the admission of any of Pye's testimony regarding threats, bruises, or bad acts. He argued the testimony was prejudicial to him and its prejudice outweighed any probative value. He also argued some of the acts were too remote. (R. 268-70).

Judge Early admitted the testimony over Gule's objection finding the evidence was relevant and admissible to show not only malice but also the difficulties in the relationship between the parties *and* the absence of mistake or accident, **and** its probative value was enhanced and outweighed any prejudice to Gule because Gule was asserting as his defense that the shooting of the victim was a mistake or an accident. Judge Early also found given the nature

[10]Pye's testimony of Gule's demeaning comments toward her sister were corroborated by actual text messages between the victim and her friend, Lisa, about 48 hours before her death that were admitted without objection. Lisa also testified to the same without objection. (R. 290-311).

and length of the relationship between Gule and the victim the fact that 1 threat was a year old was not too remote to be admissible under the totality of the circumstances. (R. 268-71).

Thereafter, Pye testified before the jury consistent with her proffered testimony, except she did not testify to Gule's break-in at a previous residence of the victim. She also testified to the general nature of the relationship between her sister and Gule, its beginning, and end, and what was occurring in the days leading up to her sister's death. She also testified to the events she witnessed on the night before, i.e. Gule's car at her sister's home and her trying to reach her sister by phone, and to what occurred the morning after her sister's murder, seeing Gule standing in the doorway of her sister's home smoking a cigarette at 5:30 a.m. (R. 271-289).[11]

Gule now argues Judge Early erred in admitting Pye's testimony of threats and bruises. (IBOA). Gule argues the evidence was not clear and convincing, too remote, and its prejudicial value was not substantially outweighed by its probative value. (IBOA, 22-24). Gule is wrong.

Standard of Review

The admission of exclusion of evidence is within the sound discretion of a trial judge, and an appellate court may disturb a ruling admitting or excluding evidence only upon a showing of a manifest abuse of discretion accompanied by probable prejudice. State v. Douglas, 369 S.C. 424, 632 S.E.2d 845 (2006); State v. Dennis, 402 S.C. 627, 742 S.E2d 21 (Ct. App. 2013).

Analysis

Judge Early did not err in admitting the challenged evidence. Contrary to Gule's argument, the evidence was admissible not only under Rule 404(b), SCRE, to show the absence

[11] The pathologist also testified at trial that in addition to having 4 gunshot wounds to the head, the victim also had numerous bruises all over body including 11 on her right arm, 7 on her left arm, 3 on each leg, and 4 on the right side of her chest, 2 of which were more than 24 hours old. The remainder were from 24 hours or less before she was killed. Several of the bruises on her arm were consistent with being grabbed by someone's fingertips. (R. 310-36).

of mistake or accident, since Gule was raising accident as a defense, but also under other case authority as evidence of malice, including prior difficulties between the parties, and of Gule's state of mind. Blakely v. State, 360 S.C. 636, 602 S.E.2d 758 (2004); State v. Cooley, 342 S.C. 63, 536, S.E.2d 666 (2000); State v. Beck, 343 S.C. 129, 536 S.E.2d 679 (2000).

The evidence was admissible independent of Rule 404(b), SCRE

First, testimony that a defendant continued to contact a victim after the relationship had ended and threatened the victim is admissible to show malice toward the victim. Blakely, 360 S.C. 636, 602 S.E.2d 758. A defendant's threats to injure or harm the victim are not necessarily prior bad acts that fall under Rule 404(b) but are independent evidence that is admissible to show malice, the defendant's criminal intent, and the defendant's state of mind. Beck, 342 S.C. 129, 536 S.E.2d 679. Such threats are admissible because they are relevant under Rule 401 & 402, SCRE. Evidence is relevant and admissible if it tends to establish or make more or less probable a fact in issue or a matter in controversy. State v. Wiles, 383 S.C. 151, 158-59, 679 S.E.2d 172, 176 (2009); Beck, *supra* (testimony that defendant had made a statement of his intent to perpetrate certain crimes – albeit 4 months prior to the crime – was highly probative as to a manifestation of an intent to commit a fatal attack upon the victim; the evidence bore directly on the defendant's identity as the killer as well as the establishment of motive, and was therefore admissible under Rule 401; the temporal attenuation between the defendant making the statement and the crime being committed, was of no moment in assessing its admissibility, and at most, the 4 month lapse was a matter bearing on the weight of the evidence, which was for the jury to determine); State v. Glenn, 328 S.C. 300, 492 S.E.2d 393 (Ct. App. 1997)(statements made by defendant 1 year before the incident, were relevant where the defendant was accused of injuring his victim in the same manner). As a result, Gule's threats to harm the victim 3 days before the

murder and even the one made 1 year before the murder were admissible not under Rule 404(b) but under Rule 401 & 402 SCRE, because they established Gule's malice, his criminal intent, and his state of mind. Blakely, *supra*; Beck; Glenn, 328 S.C. 300, 492 S.E.2d 393. Further, the probative value of this evidence was enhanced where Gule asserted the defense that the shooting of the victim was an accident. As a result, the probative value of this evidence substantially outweighed any unfair prejudice to Gule. Rule 403, SCRE.

All of the evidence proffered by the victim's sister was also admissible to show prior difficulties between the parties. In a homicide case, prior difficulties between the parties are admissible to prove motive. State v. Sweat, 362 S.C. 117, 606 S.E.2d 508 (Ct. App. 2004). The victim's sister testified to the entire course of the relationship between Gule and the victim, including Gule's threats to harm the victim, his demeaning statements and texts about her, and the bruises on the victim's person he inflicted during the course of the relationship that ended in her murder. At the victim's autopsy, in addition to the 4 gunshots to her head, the victim had numerous bruises to her body consistent with those seen by the victim's sister during the course of the relationship between Gule and the victim. Cooley, 342 S.C. 63, 536 S.E.2d 666 (evidence that accused and decedent had previous difficulties are admissible). The evidence is admissible to show the animus between the parties, including whether there was an abusive marital relationship between the defendant and the victim, and to aid the jury in deciding who was the probable aggressor. State v. Taylor, 333 S.C. 159, 168, 508 S.E.2d 870, 874 (1998); State v. Clinkscales, 231 S.C. 650, 99 S.E.2d 663 (1957); Cooley, *supra*.

Here, the threat to kill the victim was 3 days before her murder. The bruises observed on the victim attributed to Gule were during the toxic relationship, and the threat to choke her into unconsciousness and slam her against a wall was approximately 1 year before her death. These

acts were not so remote as to be unfairly prejudicial and require exclusion under Rule 403, SCRE. Sweat, 362 S.C. 117, 606 S.E.2d 508 (prior CDV 2 months before murder was not too remote and was admissible); Beck, *supra* (4 months between statement or threat and the crime went only to the weight of the evidence not its admissibility); Glenn, *supra* (statements made by defendant 1 year before the incident, were relevant where the defendant was accused of injuring his victim in the same manner); Cooley (where son's testimony about father's domestic abuse of mother was over 2 years prior to the date of the killing and son had not lived with his parents since then, son's testimony should have been excluded under Rule 403); State v. King, 334 S.C. 504, 514 S.E.2d 578 (1999)(excluding evidence of Defendant's bad acts that occurred more than 1 year before the crime on trial). This is true especially, where Gule claimed the shooting was accidental **and** the victim's body was covered with fresh bruises at autopsy similar to those seen by Pye during the relationship, and Pye had seen fingerprint marks on the victim's neck and Gule had threatened in a text to choke the victim out and put her against a wall. (R. 310-34; 262-89).

Additionally, Gule's threats and abuse of the victim was admissible as *res gestae* of the crime. Sweat, *supra* (prior CDV was admissible evidence of *res gestae* of the crime). "Under the res gestae theory, evidence other bad acts may be an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred." State v. Gillian, 360 S.C. 433, 601 S.E.2d 61 (Ct. App. 2004)(*citing* State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001); State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003)). Here, Gule was on trial for the murder of his estranged girlfriend. It was necessary for a full presentation of the case and for context, for the jury to understand the full nature of the relationship between Gule and the victim, including the prior abuse leading up to their break up just 1 month before the killing, which eventually led to Gule's threat 3 days before

the crime that if he could not have the victim, then no one else would, and he would make sure of that. As a result, the evidence of Gule's prior threats and abuse was admissible as *res gestae* of the crime, especially where at autopsy the victim was found to be covered in bruises in addition to 4 gunshot wounds to the head and the victim had informed her best friend, Lisa, by text that she was not going to allow Gule to treat her in such a manner in front of their child anymore. (R. 310-34; 262-309). State v. Adams, 322 S.C. 114, 122, 470 S.E.2d 366, 370-71 (1996)(evidence of other crimes is admissible when it furnishes the context of the crime or is necessary for a full presentation of the case and is necessary to complete the story of the crime on trial by proving its context); Sweat (prior act of domestic abuse gave victim opportunity to escape her relationship with defendant; as a result she moved out, and he spent time in jail; he was upset, and 11 days after his release the crimes for which he was on trial occurred; the October abuse and events that followed provided the fact finder with an appropriate context in which to place the later attack).[12]

The evidence was also admissible under 404(b), SCRE

Rule 404(b), of the SCRE, provides for the admission of such evidence, not to prove action in conformity therewith, but to prove motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. Rule 404(b), SCRE. The substance of

[12] *See also* King, 334 S.C. at 512, 514 S.E.2d at 582 (*res gestae* recognizes evidence of other bad acts may be an integral part of the crime or may be needed to aid the fact finder in understanding the context in which the crime occurred.); Wiles, 383 S.C. at 158-59, 679 S.E.2d at 176 (evidence of other crimes which supplies the context of the crime, or is intimately connected with and explanatory of the crime, is admissible as *res gestae*); State v. Martucci, 380 S.C 232, 669 S.E.2d 598 (Ct. App. 2008)(admission of prior incidents of abuse or neglect was needed to present overall view of the facts and to provide context in which the crime occurred, and demonstrated the culminating impact upon the child; evidence regarding the prior bad acts was relevant to show the complete, whole story relating to the charge of homicide by child abuse; *See* State v. Bolden 303 S.C. 41, 43, n. 1, 398 S.E.2d 494 (1990) (noting *res gestae* does not fit squarely within any of the 5 categories in Lyle); State v. Smith, 309 S.C. 442, 451, 424 S.E.2d 496, 501 (1996) (Toal, J. dissenting)(although there is some overlap between *Lyle* and *res gestae*, *res gestae* is a separate method where other evidence of criminal acts can be admitted).

Rule 404(b) is the same as the rule of evidence stated in State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923), followed prior to the adoption of the SCRE. Lyle, 125 S.C. at 416-17, 118 S.E. at 807. As noted, evidence of other bad acts or crimes is inadmissible, unless it can be shown by the prosecution the evidence is necessary to establish a material element of the crime charged. State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987). In State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990), the Court defined the term "necessary" as being synonymous with the term relevant:

> Bell requests that this Court limit the Lyle rule by finding that other acts evidence is admissible only if necessary. Relying mainly on State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987), Bell argues that the trial judge erred in admitting the other acts evidence because it was not needed. Bell notes that the testimony of an eyewitness who identified Bell as the abductor as well as other evidence linking him to the crime. In Johnson, we stated that evidence of other crimes is never admissible unless necessary to establish a material fact or element of the crime charged. 293 S.C. at 324, 360 S.E.2d at 319. Consistent with our rulings since Lyle, we define necessary as synonymous with relevant. Thus, evidence of other crimes is never admissible unless relevant to establish a material fact or element of the crime charged.

Bell, 302 S.C. at 27-28, 393 S.E.2d at 369.

Proof of Bad Act by Clear and Convincing Evidence

Evidence of bad acts need only be proven by clear and convincing evidence. State v. Pierce, 326 S.C. 176, 485 S.E.2d 913 (1997); Bell, 302 S.C. 18, 393 S.E.2d 364. Where a witness's testimony is the sole evidence of a bad act, the determination of the witness's credibility must be left to the trial judge who saw and heard the witness and is therefore in a better position to evaluate the witness's veracity. State v. Kirton, 381 S.C. 7, 671 S.E.2d 107 (Ct. App. 2008); State v. Tutton, 354 S.C. 319, 580 S.E.2d 186 (Ct. App. 2003). Should the trial judge determine the witness's testimony clearly and convincingly establishes the bad act occurred, an appellate court is bound by the trial judge's factual findings unless clearly erroneous. State v. Scott, 405 S.C. 489, 748 S.E.2d 236 (Ct. App. 2013); Kirton, 381 S.C. 7, 671

S.E.2d 107; Tutton, 354 S.C. 319, 580 S.E.2d 186. An appellate court will not conduct a *de novo* review of a trial judge's ruling on the admissibility of bad act evidence on the issue of whether the evidence rises to the level of clear and convincing evidence. State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001); State v. Perry, 420 S.C. 643, 803 S.E.2d 899 (Ct. App. 2017). A trial judge's ruling admitting bad act evidence will be upheld on appeal if it is supported by any evidence. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300; State v. Smith, 391 S.C. 353, 705 S.E.2d 491 (Ct. App. 2011), *reversed on other grounds*, 406 S.C. 215, 750 S.E.2d 612 (2013); Sweat.

Here, contrary to Gule's argument, the State proved the prior bad acts of Gule, whether threats, bruises, or derogatory comments by clear and convincing evidence through the testimony of the victim's sister, which was sufficient. The victim's sister actually overheard the threat 3 days before the victim's death.[13] The victim's sister saw bruising on the victim which the victim related to her sister was caused by Gule and the sister noted the bruising looked like finger marks on her sister's neck.[14] The victim's sister actually saw the text message from Gule to the victim threatening to choke the victim out. State v. Gilchrist, 329 S.C. 621, 496 S.E.2d 424 Ct. App. 1998)(testimony of co-defendant with defendant when prior bad acts were committed was sufficient to meet the clear and convincing standard); State v. Aiken, 322 S.C. 177, 470 S.E.2d 404 (Ct. App. 1996)(testimony of co-defendant that defendant had been involved in prior

[13] The victim's sister's testimony on this threat is corroborated by Gule's phone records which show a phone call to the victim 3 days before the murder at 5:36 p.m. (R. 226-29).

[14] Respondent would note the victim's sister's testimony on this issue is corroborated by the findings at the victim's autopsy, which in addition to the 4 gunshot wounds, the victim had numerous bruises all over her body including marks consistent with fingertip marks. (R. 310-36). The victim's sister's testimony on this issue is also corroborated by the *in camera* testimony of Lisa Villeponteaux that she saw bruises on the victim during the relationship with Gule and also with the texts between her and the victim, admitted before the jury, shortly before the victim's death, in which the victim and Lisa discuss not allowing Gule to treat the victim in a disrespectful manner anymore in front of the victim's 3 year old child. (R. 290-309).

robberies constituted clear and convincing evidence); Kirton, *supra* (testimony of 1 witness was clear and convincing evidence of prior bad act).[15] This portion of Gule's argument has no merit.

The evidence was admissible to show absence of accident or mistake

Furthermore, as Judge Early found on the record, even when the prior statements, threats, or acts are bad acts or crimes, they are admissible to show the absence of mistake or accident. Rule 404(b), SCRE. Here, Gule's defense at trial **was accident**. As a result, his prior threats to harm the victim, his physical abuse of her, and his demeaning comments to her by text were admissible and their probative value increased to show the absence of mistake or accident. State v. Key, 277 S.C. 214, 284 S.E.2d 781 (1981)(fact that defendant had threatened victim with a pistol on 2 or 3 different occasions was admissible in prosecution for ABHAN to show absence of mistake or accident in shooting the victim); State v. Smith, 337 S.C. 27, 522 S.E.2d 598 (Ct. App. 1999)(in murder and ABWIK prosecution, fact that defendant had previously been convicted for CDV against victim and made prior threats to kill the victim with a pistol, was admissible to refute defendant's claim the shooting was an accident); Martucci, 380 S.C. 232, 669 S.E.2d 59 (admission of prior incidents of abuse or neglect were not error where evidence

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[15]*See* Sweat (in prosecution for burglary, ABWIK and AHAN, evidence of prior CDV for which defendant was arrested, but never convicted, after victim signed a statement the event did not actually happen, was nevertheless admissible at trial, where victim testified incident in fact occurred, and she only copied the statement at the request of defendant's sister and acquiesced in signing it because all she wanted was out of the situation; and, there was also testimony by a witness he saw bruises on victim's arms after the incident); State v. Ford, 334 S.C. 59, 512 S.E.2d 500 (1999)(testimony by victim he was previously robbed by the defendant, which was partially corroborated by a detective, was clear and convincing evidence of prior bad act); Scott, 405 S.C. 489, 748 S.E.2d 236 (in prosecution for CSC on a minor and lewd act, court did not err in allowing prior bad act testimony under 404(b) from 2 witnesses, where prior bad acts occurred 20 years before the defendant's arrest----the proffered 404(b) testimony was very specific and appeared credible; deference afforded to a trial judge's findings in this regard, and the court did not err in finding the bad act evidence was clear and convincing); State v. Atkins, 309 S.C. 542, 424 S.E.2d 554 (Ct. App. 1992)(prosecution failed to prove a subsequent bad act by clear and convincing evidence, where there was no identification of the defendant as the perpetrator).

was admissible as proof of intent and absence of accident, this was especially true because defendant disputed motive and intent to commit homicide by child abuse).[16]

The prior bad acts were not too remote

Gule argues Pye's testimony regarding prior bad acts was too remote to be admissible. Gule is wrong. In State v. Good, 308 S.C. 308, 417 S.E.2d 640 (Ct.App.1992), *affirmed*, 315 S.C. 135, 432 S.E.2d 463 (1993), this Court upheld the admission of evidence relating to the defendant's burglary conviction of his grandmother's home, occurring within 4 months of his grandmother's murder, for which the defendant was on trial. *See also* State v. Lynch, 327 N.C. 210, 393 S.E.2d 811 (1990)(evidence of the defendant's surreptitious entry into the victim's home 1 month prior to her murder was admissible to show the defendant's intent toward the victim, and hence, his identity as the assailant); Masters v. State, 186 Ga. App. 795, 368 S.E.2d 557 (1988)(evidence of a prior burglary over 5 years earlier was admissible to prove intent and bent of mind in an accused's subsequent trial for burglary and criminal damage to property). In view of case law and 404(b), courts have considered temporal remoteness in determining whether

[16] *See also* Smith, 391 S.C. 353, 705 S.E.2d 491 (court did not err in admitting evidence defendant had broken child's leg about 3 months before child's death, the femur injury was highly relevant to show defendant's motive for attempting to "chemically restrain" the child with medicine, and was critical to show the overdose leading to death was not a mistake or accident); State v. Gaines, 380 S.C. 23, 667 S.E.2d 728 (2008)(where defendant was convicted of criminal solicitation of a minor, involving solicitation over the internet of a person defendant thought was a minor, but in fact a police officer, evidence of the defendant's previous chats with a Pennsylvania police officer were properly admitted under Rule 404(b), to prove among other things the absence of mistake, where defendant subsequently engaged in similar chats with a S.C. officer); State v. Talley, 77 S.C. 99, 57 S.E. 618 (1907)(where defendant was on trial for obtaining goods by false pretenses, having allegedly submitted a false claim for payment to a county, it was proper for the State to cross-examine him as to other duplicate claims which he had made against the county in the past; the State's case depended on whether the defendant had obtained double pay for services rendered by fraud or by honest mistake; the burden being on the State to prove fraudulent intent, it was competent to prove past similar offenses); State v. Turbeville, 275 S.C. 534, 273 S.E.2d 764 (1981)(evidence of night-hunting was introduced in homicide trial to prove the absence of mistake or accident by the defendant).

admission is proper, but there is no set time limit beyond which a prior bad act is simply, per se, too remote. Scott, 405 S.C. at 504, 748 S.E.2d at 244-45. Here, Gule's relationship with the victim was a toxic one, which lasted 4-5 years, in which he had threatened to injure her in the past and had injured her. This had occurred just 1 year before her death and the victim's sister had seen bruises on her similar to choke marks. He had written demeaning texts to her consistently during the relationship, even up until her death. And, Gule had threatened the victim just 3 days before her murder, and there were more fingerprints and bruises found on her at autopsy. Given these facts, none of the evidence admitted was too remote. Id.[17]

The evidence was admissible under Rule 403, SCRE

In determining whether relevant evidence should be admitted in evidence, the trial judge must also consider whether the probative value of the evidence is substantially outweighed by the danger of undue or unfair prejudice to the defendant. Rule 403, SCRE; Smith, 337 S.C. 27, 522 S.E.2d 598; State v. Moultrie, 316 S.C. 547, 451 S.E.2d 34 (Ct. App. 1994). Accordingly, after a trial judge conducts a Rule 404(b) analysis and finds the evidence both relevant and admissible as a bad act, the trial court must still conduct a Rule 403, SCRE analysis to determine whether or not the evidence is unduly prejudicial. Beck; State v. King, 349 S.C. 142, 561 S.E.2d 640 (Ct. App. 2002). This weighing test has been referred to by our Supreme Court as the enhancement of probative value test. State v. Parker, 315 S.C. 230, 433 S.E.2d 831 (1993); State v. McClellan, 283 S.C. 389, 323 S.E.2d 772 (1984). Any Rule 403 analysis should include on-the-record findings by the trial judge. State v. Spears, 430 S.C. 242, 742 S.E.2d 878 (2013).[18]

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[17] *See also* Tutton, 354 S.C. at 332, n. 5, 580 S.E.2d at 193; State v. Blanton, 316 S.C. 31, 33, 446 S.E.2d 438, 440 (Ct. App. 1994); State v. Perry, 420 S.C. 643, 803 S.E.2d 899 (Ct. App. 2017).

[18] Where the evidence is shown to be relevant, if its probative value is substantially outweighed by the danger of unfair prejudice, the evidence must be excluded. *See* Rule 403, SCRE; State v. Cope, 405 S.C. 317, 337-38, 748 S.E.2 194, 204-05 (2013). Unfair prejudice means an undue tendency to suggest decision on an improper basis. Stokes, *supra*; Beck; Gilchrist, 329 S.C. at

This Court reviews a trial court's decision on the admission of evidence under Rule 403 under an abuse of discretion standard. State v. Holland, 385 S.C. 159, 682 S.E.2d 898 (Ct. App. 2009). "A trial [court's] balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise due to a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence." Id., *quoting* State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 593-94 (Ct. App. 2001), *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). The trial court's determination should be reversed only in exceptional circumstances. Hamilton, 344 S.C. at 357, 543 S.E.2d at 593.

The probative value of bad act evidence may be shown by the similarity of the crime charged, or whether a real connection can be drawn between the 2 incidents, and whether the evidence is relevant to a material issue. Lyle, 125 S.C. 406, 118 S.E. 803; State v. Kennedy, 339 S.C. 243, 528 S.E.2d 700 (Ct. App. 2000).

Here, after hearing the proffered testimony of Pye, Judge Early conducted an *on the record* Rule 403 balancing test. (R. 268-71). Judge Early noted the victim's sister testified that the relationship between Gule and the victim was a toxic one; it culminated in Gule taking his belongs and moving out shortly before the murder, and then ultimately the victim was shot and killed a few weeks later, and there was no question the State contended it was murder and Gule contended the shooting was an accident. Therefore, Judge Early found the testimony of Patricia Pye was more probative than prejudicial to Gule because it showed the whole nature of the relationship and its probative value was enhanced where Gule claimed the shooting was an

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627, 496 S.E.2d at 427 ("Unfair prejudice means an undue tendency to suggest [a] decision on an improper basis."); State v. Lyles, 379 S.C. 328, 665 S.E.2d 201 (Ct. App. 2008)(the determination of whether the danger of unfair prejudice outweighs the probative value of evidence must be based on the entire record and will turn on the facts of each case).

accident or a mistake. (R. 268-271). Judge Early appropriately determined the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice to Gule. Holland, 385 S.C. 159, 682 S.E.2d 898. Gule has failed to show Judge Early abused his discretion in admitting this evidence. Id. Judge Early's findings are supported by the record.

Gule and the victim had been involved in a toxic on again off again relationship for 5 years. There was domestic abuse in the relationship including threats by Gule to choke or slam the victim against the wall, or to kill her [3 days before her death], and the victim's sister had seen bruise marks on the victim's neck consistent with fingertip marks and the victim identified Gule as the person who caused the marks, and the victim's autopsy corroborated this fact because at autopsy the victim had old bruises and numerous new bruises to her arms, legs, and chest, including some bruises consistent with fingertip marks. The couple's relationship had ended romantically only 1 month before the victim's death when Gule had moved out taking his belongings, but Gule continued to return to the victim's home intoxicated, but the victim forced him to sleep on the couch. Gule had also demeaned the victim in text messages. The victim's sister had seen the text messages and the victim's best friend's texts with the victim 48 hours before the victim's death confirmed the prior abuse and demeaning comments of Gule.

As a result, Pye was appropriately allowed to testify that she overheard Gule threaten her sister over the phone **just a few days before her eventual murder**, that if Gule could not have the victim, no one else would, and he would see to that. Pye saw bruises on the victim consistent with fingertips during the course of the relationship, including to her neck, and the victim related they were caused by Gule. There was no hearsay objection to this testimony either before the witness testified or during her testimony. Additionally, this was a statement of identification, which is not hearsay. The bruises on the victim occurred during the course of the relationship of

the victim with Gule, and were consistent and corroborated by what the pathologist found at the autopsy. The victim had similar bruising on her body after her death, including fresh bruising and fingertip marks. There was no objection to this testimony by the pathologist of the bruising found on the victim at autopsy. (R. 310-36). And, Pye saw a threatening text message to the victim approximately 1 year before her death in which Gule threatened to *choke* the victim unconscious, which would imply grabbing the victim by the neck using Gule's hands, and *slam* her against a wall. Judge Early did not abuse his discretion in admitting any of this testimony.

Harmless error

Even assuming *arguendo* error in admitting any of Pye's testimony, it was harmless and could not have affected the verdict. "Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained." State v. Pagan, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006); *See* State v. Liverman, 398 S.C. 130, 727 S.E.2d 422 (2012)(admission of evidence can be harmless where testimony was similar to testimony of another witness admitted at trial); State v. Page, 378 S.C. 476, 483-84, 663 S.E.2d 357, 360 (Ct. App. 2008)(error is harmless where it could not reasonably have affected the trial's outcome, and considering as 1 factor whether the evidence was cumulative to other testimony). This Court will not set aside a conviction for an insubstantial error not affecting the result when guilt is conclusively proven by competent evidence and no other rational conclusion could be reached. State v. Kelley, 319 S.C. 173, 460 S.E.2d 368 (1995).

The admission of Pye's testimony of bruises on the victim during the relationship was harmless. There was other un-objected to testimony of bruising to the victim. At autopsy, the pathologist found 11 bruises on her right arm, 7 on her left arm, 3 on each leg, and 4 on the right side of her chest, 2 of which were more than 24 hours old. The remainder of the bruising on her

body was from 24 hours or less before she was killed. Several of the bruises on her arm were consistent with being grabbed by someone's fingertips. The bruises occurred during the time period Gule would visit the victim while intoxicated and stay at her residence **or** on the night of her murder when Gule had exclusive access to the victim. (R. 310-36). Further, when testifying before the jury, Pye only related to the jury that her sister told her Gule caused the bruises when she and Gule "had gotten into it." Pye did not accuse Gule of being the instigator or the sole aggressor in the incident. (R. 274, ll. 14-21). As a result, the testimony of Pye she saw bruises on the victim during the relationship and her sister related Gule caused them, was harmless. *See* Liverman, *supra* (evidence can be harmless where testimony was similar to testimony of another witness); Page, 378 S.C. at 483-84, 663 S.E.2d 357 (error is harmless where it could not reasonably have affected the outcome, and considering as 1 factor the evidence was cumulative).

Furthermore, Pye's testimony in this regard is harmless given the other admissible testimony of threats made by Gule during the relationship, including 3 to 4 days before the murder, the demeaning of the victim by Gule testified to by Pye and Lisa, admission of the texts between the victim and Lisa 2 nights before her death, **and** the testimony of the pathologist the victim was shot 4 times in the head, including 1 time between the eyes, proving malice and the absence of accident or mistake beyond any doubt. And, the victim was covered with bruises on her arms, legs, and chest, and was shot to death while lying in her bed with her head resting on a pillow and her hands and arms under her covers. (R. 310-36). State v. Gillian, 360 S.C. 433, 602 S.E.2d 62 (Ct. App. 2004), *affirmed*, 373 S.C. 601, 646 S.E.2d 872 (2007)(Although trial judge erred in not limiting the amount of the evidence presented as to bad acts, such error was harmless, where other evidence established defendant's guilt beyond a reasonable doubt).

ARGUMENT III.

This issue in not preserved for appellate review because Gule did not object to the admission of this evidence on the same basis he raised the motion for a mistrial at the end of the State's case; and, Gule waived and abandoned this issue when he did not raise Judge Early's original ruling admitting this evidence in his brief; regardless, Judge Early did not err in declining to grant a mistrial when the State only asked the witness questions as a fact witness which were not protected by attorney client privilege or attorney client work product; the State did make a showing of substantial need, and other witnesses had testified to the same or similar matter; finally, any error was harmless, as the testimony was cumulative and the evidence of Gule's guilt was overwhelming, and could not have affected the verdict.

What occurred below prior to trial relevant to this issue

Prior to the trial of this case, Charleston police forwarded the fired shell casings and projectiles found at the crime scene and at autopsy to the State Law Enforcement Division (S.L.E.D.) Forensic Laboratory, along with the 9mm semi-automatic Glock pistol seized from Gule at his arrest, for the purpose of forensic comparison to determine if the weapon was actually the murder weapon. S.L.E.D. firearm and tool-mark identification expert Jamie Green test fired the gun into a water tank 3 times, mainly for the purpose of recovering test bullets and fired shell casings for comparison to the fired shell casings and projectiles from the crime scene and autopsy. Green determined, through comparison under an electronic comparison microscope, the gun fired the shell casings recovered at the crime scene. Green also determined the fired projectiles found at the crime scene and at autopsy were consistent with having been fired by the gun. (R. 184-208). Several weeks prior to trial, Green suffered 2 collapsed lungs and was hospitalized. Due to this fact, the Assistant Solicitor prosecuting the case, was unable to consult with Green about the case or have him perform any additional tests on the weapon. (R. 346-47).

Also prior to trial, Gule retained a firearms expert Dale Hanna. Hanna scheduled a test firing of the weapon at the Charleston Police Department's gun range. Detective Thomas Bailey,

with the Police Dept., took the gun out of evidence and to the gun range, where Hanna test-fired the weapon in front of the police firearms instructor, Det. Bailey, another instructor, Assistant Solicitor Kidd, his investigator, and Gule's defense counsel. Gule did not obtain a court-order to test fire the weapon in private or object to the presence of the State's officers and representatives being present at the test firing. Hanna test fired the weapon 34 times and the gun did not misfire, jam, fire accidentally, or fire automatically. (R. 254-56). Hanna then subsequently **issued a report**, which was provided to the Solicitor's Office. (R. 256, ll. 1-25). At that time, as far as the Solicitor could tell, there was no issue as to the functionality of the firearm. (R. 346-47)

As previously set forth in the Statement of Facts, Gule called 911 at approximately 8:30 a.m. on August, 5, 2015 stating "I" accidentally ended up shooting the victim. Gule stated that **he** accidentally ended up shooting the victim, not that the gun accidentally misfired or went off. Gule blamed himself, not the 9mm pistol for the shooting. (State's Ex. 72, 911 call).

What occurred below at trial relevant to this issue

At trial, Gule listed Dale Hanna as a potential witness. Prior to jury selection, Judge Early read a list of potential witnesses to the jury pool. Included in this list of witnesses, was Dale Hanna, the defense firearms or ballistics expert.

COURT: .....

And the witnesses are - - potential witnesses are as follows:

Dale Hanna, Antonio Drayton, Leslie Snyder, Trish Pye, P-Y-E-E, Pablo Perez ....

(R. 14, ll. 11 & 21-24)(emphasis added). Judge Early read the list of potential defense witnesses first, then the list of potential state witnesses. Regardless, Hanna was on the State's witness list *or* Gule's witness list; otherwise, Judge Early would not have read out his name. Gule asserts in his brief Hanna was not on the State's witness list. (IBOA). As a result, given the record, this is a

concession that Hanna was on Gule's witness' list. And, as previously stated, Hanna had issued a report prior to trial which was provided to the State through discovery. (R. 256). No one in the jury pool knew Hanna or was related to Hanna. (R. 14-15). The jury was then selected.

During the trial, the State called its firearms and tool-mark identification expert from S.L.E.D. Mr. Greene testified his primary work and most of his work in this case was determining whether the murder weapon in fact fired the shell casings and fired projectiles found at the scene or at autopsy. Greene also testified that he had test fired the murder weapon in this case 3 times and there were no misfires or accidental firings. On cross-examination, Gule, through defense counsel, delved into the fact that Greene only test fired the gun 3 times, and it was possible that the gun could misfire or accidentally fire at other times. Gule's counsel stressed that most of Greene's work was identifying the shell casings and projectiles to the murder weapon, not the weapon's functionality itself. Gule's counsel stressed the gun contained an after-market connecter rod that could cause the weapon to misfire. (R. 184-208).

The State then called Detective Thomas Bailey who testified without objection that, "In preparation for the trial I had to check this firearm out of evidence in order for an expert witness for the defense to test fire this gun and examine the gun." (R. 229, 1. 20 - 230, 1. 4). Bailey also testified he took the gun to the firing range and the following people were present: "defense counsel, the Solicitor's Office, myself, the expert witness for the defense [Dale Hanna], ... the CPD firearms range instructor, [and] the lead instructor[.]" (R. 230, ll. 5-9). Bailey testified the gun was test fired about 30 times, and it did not misfire or malfunction. (R. 230). There was no objection, motion to strike, or for a mistrial based on Bailey's testimony. (R. 230-31).

The State then decided to call defense expert Dale Hanna as a fact witness. Prior to calling Hanna as a fact witness, the Solicitor informed the Court and defense counsel that he

intended to call Mr. Hanna as a fact witness as to the functionality tests he conducted on the murder weapon *in the presence of several State police officers, the Solicitor, the Solicitor's investigator, and defense counsel.* These tests occurred at the State's shooting range. The record shows the defense expert, had also **issued a report** prior to trial on the results of the functionality tests he performed in front of the State's witnesses. (R. 251-52; 256).

Gule informed Judge Early *he may* have an objection to Hanna's testimony depending on what testimony the State sought to elicit from the witness. (R. 251, ll. 8-25). The State informed the court and defense counsel that it was only calling Hanna as a fact witness, was not going to qualify him as an expert or ask any expert opinion, and would only elicit from him the results of the functionality tests he performed on the gun in the presence of witnesses for the State and defense counsel. (R. 252-53). In response, defense counsel argued the witness was not listed as a State's witness; the State was now trying to bolster or repair their own expert's testimony, and the witness' certification had lapsed. (R. 253, ll. 4-13). When Judge Early asked what kind of certification, counsel explained the witness was a former Glock armor, but that certification had lapsed and that was why Gule elected not to call him in this case. (R. 253, ll. 10-13).[19] Judge Early noted the State was not calling the witness as an expert or seeking to elicit expert opinion testimony. (R. 253, ll. 14-19). The Solicitor agreed. (R. 253, ll. 20-22). Gule raised no other argument against the admission of Hanna's testimony. (R. 253, ll. 23-24). Judge Early ruled the State could call Mr. Hanna as a fact witness and elicit the testimony it proposed from him, i.e. the results of his functionality tests performed in front of the State's witnesses and defense counsel at the police firing range, i.e. whether the gun fired normally, (R. 253, ln. 25). This was

[19] While Gule contended at this point they had decided not to call the witness in this case because his certification had lapsed, the witness was listed on the defense' witness list at the beginning of trial. (R. 14-15). In fact, he was the very first witness listed on the defense witness list. (R. 14).

only reasonable since Gule contended in the 911 call that he accidentally ended up shooting the victim, Gule was raising the defense of accident, and defense counsel cross-examined the SLED expert on his limited functionality testing of the weapon [3 shots] and that the gun could misfire or accidentally discharge at a later time or test. There was no objection to Judge Early's ruling allowing Hanna to testify as to these limited facts. (R. 254, ll. 1-25).

Thereafter, Hanna testified before the jury that he had test fired the murder weapon in this case at a firing range in the presence of several police officers, the Solicitor, the Solicitor's investigator, the case detective, and defense counsel. He fired the gun approximately 34 times and the gun functioned as intended. It did not misfire, jam, or accidentally fire. It would only fire if the trigger was pulled and it would only fire semi-automatically, i.e. if you repeatedly pulled the trigger. It would not fire automatically. The trigger-pull was 6 ½ pounds. (R. 254-57). On cross-examination he testified he had never heard of a Glock accidentally firing, but he had heard of negligent firings. (R. 260). He also testified on re-direct that he had never heard of a 9mm Glock misfiring or accidentally firing 4 times. (R. 261, ll. 8-11). His entire testimony on direct and redirect was approximately 3 pages of trial transcript. (R. 254-57, 261, ll. 8-11). He was cross-examined by defense counsel. (R. 257-61).

At the conclusion of Hanna's testimony, there was no objection, motion to strike, or motion for a mistrial. The trial continued with other witnesses and evidence being presented and then the State rested and court was adjourned for the evening. (R. 263-334).

The following morning, before the defense began its case, the Solicitor then made Judge Early aware that he had been informed by his superiors that he had failed to inform the Court of State v. Jones, 383 S.C. 535, 681 S.E.2d 580 (2009), prior to calling Hanna as a witness. It was

only at this point that Gule for the first time moved for a mistrial. Gule did not move to strike the testimony Hanna had given several witnesses before the motion was made. (R. 342-49).

At the time of the mistrial motion, the Solicitor explained on the record his need to call the expert. The SLED firearms expert had been critically ill for several months [3] before the trial with collapsed lungs. Because the Solicitor was: unable to consult with the SLED firearms expert due to his medical condition; Gule was asserting he accidentally shot the victim; Gule's own expert had found prior to trial that the gun functioned properly; and, Gule asserted at trial through his cross-examination of the State's firearms expert that the gun misfired, the State had a substantial need to call the witness. The record shows the expert had produced a report, because the Solicitor used that report to refresh the expert's memory regarding how many times he test-fired the gun at the shooting range in front of the State's witnesses. The Solicitor was aware when Hanna fired the gun at the range it functioned properly and did not misfire. As a result, the Solicitor only called Hanna to testify to the results of the functionally tests witnessed by several State representatives, including he, his investigator, and the case detective. (R. 343-49).

After reviewing Jones, 383 S.C. 535, 681 S.E.2d 580, Judge Early denied the motion for a mistrial, finding the expert did not testify to any attorney-client privileged information or attorney-client work product privileged information and only testified as a fact witness to the functionality tests he performed in the presence of other witnesses including the State' detective and the Solicitor's Office. Judge Early found this case was not akin to Jones, or the concerns expressed by the Court in Jones, because Hanna was not called to testify to any confidential communications or private tests he had performed on the gun but only to the functionality tests performed before numerous witnesses including police and the Solicitor's Office. (R. 348-49).

The issue is not preserved for appellate review.

Gule does not raise on appeal Judge Early's ruling during the trial admitting the testimony of Dale Hanna. (IBOA, pp. 25-28). Instead, Gule argues on appeal only that Judge Early erred in denying the motion for mistrial at the end of the State's case, after the Court had denied a motion for a directed verdict and when Gule was about to begin his defense, because the State violated his right to effective assistance of counsel under the Sixth Amendment when it called Hanna as a witness. (IBOA, pp. 25-28). The reason Gule raises only this issue is because Gule did not object to the testimony of Hanna when he was called by the State as a fact witness on the grounds it violated his right to effective assistance of counsel under the Sixth Amendment. (R. 251-62). If there was an objection at all, it was that Gule was not listed on the State's witness list, the State was trying to bolster its' expert's testimony, and Hanna's certification had lapsed. (R. 251-62). At no time did Gule raise a Sixth Amendment violation or Jones as a basis for excluding Hanna's testimony. Gule did not move for a mistrial contemporaneously with the admission of Hanna's testimony, on the basis his right to counsel under the Sixth Amendment had been violated. (R. 251-62).[20] It was incumbent upon Gule to preserve this Sixth Amendment issue for appeal to raise the objection at the earliest possible time. He did not. Gule did not move for a mistrial on the basis he raises on appeal until several witnesses later and only after the State rested its case and the Court had denied a motion for directed verdict. In fact, Gule did not move for a mistrial until the State brought to the Court's attention the holding in Jones. As a result, this appellate issue is not preserved for appellate review. State v. Aldret, 333 S.C. 307, 509 S.E.2d 811 (1999)(in order to preserve a trial error for appellate review, the appellant's

[20] Nor did Gule object when Det. Bailey testified he took the gun to the shooting range and along with others watched Hanna test fire the weapon 30 times without it misfiring, firing automatically, or accidentally. (R. 229-30).

objection at trial must be contemporaneous to the introduction of the objectionable evidence.); State v. Lynn, 277 S.C. 222, 284 S.E.2d 786 (1981)(No objection was made to the introduction of the testimony, but appellant's counsel moved for a mistrial after the State completed its case. Failure to contemporaneously object to the question now advanced as prejudicial cannot be later bootstrapped by a motion for a mistrial; any objection to the testimony was waived).[21] This ground is not preserved for appellate review. It must be denied and dismissed.

Additionally, this issue is not preserved for appellate review because Gule does not appeal Judge Early's ruling admitting the testimony of Dale Hanna (R. 251-62), but the denial of the mistrial at the end of the case, after the State rested. (IBOA, pp. 25-28). An un-appealed ruling is the law of the case. Biales v. Young, 315 S.C. 166, 432 S.E.2d 482 (1993)(a ruling of the trial court will be affirmed by an appellate court if the offended party does not challenge that ruling).[22] Gule appeals only the denial of the motion for mistrial by Judge Early after the State rested and the State brought to the Court's attention the holding in Jones. As a result, the

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[21]*See also* State v. Simpson, 325 S.C. 37, 42, 479 S.E.2d 57, 60 (1996)("Unless an objection is made at the time the evidence is offered and a final ruling made, the issue is not preserved for review."); State v. Moultrie, 316 S.C. 547, 555-56, 451 S.E.2d 34, 39 (Ct. App. 1994)("[A] 'failure to contemporaneously object' to the introduction of evidence claimed to be prejudicial 'cannot be later bootstrapped by a motion for a mistrial.'")(quoting State v. Lynn, 277 S.C. at 226, 284 S.E.2d at 789); State v. Groome, 274 S.C. 189, 262 S.E.2d 31 (1980); State v. Atchison, 268 S.C. 588, 235 S.E.2d 294 (1977); State v. Smith, 307 S.C. 376, 425 S.E.2d 409 (Ct. App. 1992)(motion for mistrial at the end of the case was insufficient to preserve issue for appeal, timely and sufficient objection had to be made at the time of the admission of the testimony)(citing Lynn, *supra*). *See* State v. Barron, 268 S.C. 318, 233 S.E.2d 110 (1977). An objection must also be timely to be preserved, and in order to be timely it must be made at the earliest available opportunity. State v. Manning, 400 S.C. 257, 734 S.E.2d 314 (Ct. App. 2012); State v. Black, 391 S.C. 515, 521-22, 462 S.E.2d 311, 315 (Ct. App. 1995)(failure to object when testimony is offered results in waiver of right to object).

[22]*See also* Resolution Trust Corp. v. Eagle Lake & Golf Condominiums, 310 S.C. 473, 427 S.E.2d 646 (1993)(trial judge's procedural ruling is the law of the case since it has not been appealed): Anderson v. Short, 323 S.C. 522, 476 S.E.2d 475 (1996)(where a decision is based on more than 1 ground, the appellate court will affirm unless the appellant appeals all grounds because the un-appealed ground becomes the law of the case).

admissibility of Hanna's testimony was waived and abandoned by Gule in his brief because it was admitted much earlier in the trial and that ruling is not raised on appeal. (IBOA, pp. 25-28). It cannot be the basis for the granting of a mistrial. Therefore, this appellate ground was waived and abandoned and must be denied and dismissed. Id.

Judge Early did not err in denying the motion for a mistrial

Standard of Review

The decision of whether to grant or deny a motion for a mistrial is in the sound discretion of the trial judge. State v. Manning, 400 S.C. 257, 734 S.E.2d 314 (Ct. App. 2012). The circuit court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law. Id. Granting a mistrial is a serious and extreme measure. State v. Moore, 377 S.C. 299, 311-13, 659 S.E.2d 256, 263 (Ct. App. 2008). A mistrial should only be granted when "absolutely necessary," and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial. State v. Stanley, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct. App. 2005).

Analysis

First, Gule argues that the State did not include the witness Hanna on their witness list. As a result, he was surprised by the State calling Hanna. This argument has no merit as Judge Early read to the jury a list of potential witnesses to determine if jurors knew or were related to any witnesses in the case, and Mr. Hanna's name **was the very first name on the witness list.**

COURT: .....

And the witnesses are - - potential witnesses are as follows:

Dale Hanna, Antonio Drayton, Leslie Snyder, Trish Pye, P-Y-E-E, Pablo Perez .... (witness' names continue). (R. 14, ll. 11 & 21-24)(emphasis added). Therefore, Hanna was either on the State's witness list *or* on Gule's witness list; otherwise, Judge Early would not have

read out his name to the jury pool. No juror knew Hanna or was related to him. (R. 15). Therefore, there was no prejudice to Gule if Hanna was not on the State's witness list **but on Gule's witness list**. And, if Hanna was not on the State's witness list, he was certainly listed on Gule's witness list, so Gule cannot claim unfair surprise. Gule knew Hanna had knowledge of facts in the case. (R. 14-15). Additionally, Gule knew the State had subpoenaed Hanna a week before the trial. (R. 348, ll. 9-13). He cannot claim surprise in the State calling a witness Gule listed on his witness list and he knew the State had subpoenaed. Further, the record shows Hanna had **issued a report** which had been provided to the Solicitor prior to trial. **(R. 256-57).** This distinguishes the present case from Jones, *supra*, where the Court expressed concern that the State could circumvent the discovery rules by subpoenaing a merely consulting expert to trial. Id. *See also* State v. Barnes, 407 S.C. 27, 753 S.E.2d 545 (2014), Toal, C.J. and Kittredge, J. *dissenting* (discussing holding in Jones). Hanna was not a merely consulting expert, otherwise he would not have been listed on Gule's witness list and a report provided to the Solicitor.

Gule also argues Judge Early should have declared a mistrial based on the holding of Jones. However, Judge Early carefully reviewed Jones at the time of the mistrial motion and found the holding of that case was not applicable here. Judge Early was correct.

This witness was listed by Gule as a potential witness in the case and the witness had issued a report provided to the State through discovery. Despite trial counsel's protestations at the time the State called Hanna, Hanna was not simply a consulting expert who Gule never intended to call. Otherwise, he would not have listed him as a witness at the beginning of the trial. Additionally, this witness had conducted functionality tests on the murder weapon at a firing range that were not conducted privately but were witnessed by a State's detective, a police firearm's instructor, another instructor, the prosecutor, his investigator, and defense counsel.

Hanna only testified to his test firing of the firearm in the presence of the detective, the instructors, and the Solicitor's Office staff, not to any confidential communications between Hanna and defense counsel or any confidential work product. There was no violation of attorney-client privilege or attorney client work product.

The State had already called its firearms expert who conducted *limited* functionality tests on the murder weapon and found it only fired in the semi-automatic mode and the gun did not jam, fire accidentally, or fire in the automatic mode. The State had also already called the case detective who testified without objection that he witnessed the functionality tests conducted by Hanna and testified to what he observed, i.e. the weapon functioned as it was supposed to function, i.e. it fired only in the semiautomatic mode and did not jam, fire accidentally, or fire automatically. Essentially, the same testimony as Hanna.

And, Hanna did not give an expert opinion. Hanna merely testified **to facts**, i.e. the gun fired as it was supposed to when he fired it in front of representatives of the State, including the case detective and the Solicitor prosecuting the case. It did not jam, fire accidentally, or fire automatically. It fired only semi-automatically. And, the trigger pull on the weapon was 6 ½ pounds. The same weight found by the State's firearms expert.

Additionally, the present case is distinguishable from Jones, because Gule did not move to quash the subpoena or object to Hanna's testimony when it was presented on Sixth Amendment grounds, due to its limited nature, or move to strike the testimony after Hanna testified. Gule waited until after the State rested and after the trial court denied the motion for a directed verdict to raise the issue he raises on appeal.

Regardless, even Jones recognized there would be situations where the State had made a showing of substantial need to call the witness. Here, the State's firearms expert had performed

only limited test firing of the weapon in order to obtain test specimens to compare to those recovered at the crime scene. The State's firearms expert was seriously ill prior to trial to such an extent that the Solicitor prosecuting the case could not consult with him or have him perform further testing on the weapon. The expert had collapsed lungs and was unavailable for 3 months. Additionally, Gule did not blame the firearm for shooting the victim in his initial 911 call. He did not claim the gun malfunctioned. Gule stated the **he** accidentally ended up shooting the victim after an argument and then a tussle. (State's Ex. 72, 911 call). The State was present when Hanna test fired the weapon and there was no indication the gun did not function as intended. It was on cross-examination of the State's firearms expert that the defense first initially asserted *the gun* may have accidentally discharged, i.e. a mechanical failure. Therefore, the State had a substantial need to rebut this assertion by the defense by calling Hanna for the limited purpose of a fact witness. It would be unreasonable to expect the State to retain another expert during the middle of trial. Gule was able to thoroughly cross-examine Hanna on the points he wanted to bring out as well. (R. 257-61). This did not interfere in any way with Gule's 6th Amendment right to counsel. And, Gule has not pointed out in his brief anywhere how the State actually interfered with his 6th Amendment right to counsel. (See IBOA).

Finally, Gule asserts the State elicited opinion testimony from Hanna by asking him if he had ever heard of a Glock 9mm accidentally firing 4 times. This was simply not opinion testimony. It may have required a hearsay response, but there was no objection on the grounds of hearsay. (R. 261). Plus, it was proper re-direct in light of Gule's cross-examination of Hanna and asking Hanna if he had heard of the Glock accidentally or negligently firing. (R. 257-61).

Harmless error

Furthermore, even assuming *arguendo* error, the error was harmless beyond a reasonable doubt. Hanna's testimony was cumulative and therefore harmless. The State's expert witness, Greene, testified he examined the pistol in this case. (R. 188-190). "When I tested [the pistol in this case] I had to pull the trigger for each shot." (R. 194, 11. 21-24). He "shot [the pistol] three times" and it did not double fire or misfire. (R. 195, 11. 4-8). The gun worked as intended. (R. 195). He also testified the trigger pull on the weapon was 6 ½ pounds, like lifting a milk jug containing 3/4 of a gallon of water. Detective Bailey testified he check the firearm out of evidence in order for Hanna to test fire and examine the gun. (R. 229, 1. 20 - 230, 1. 4). He took the gun to the firing range and "defense counsel, the Solicitor's Office, myself, the expert witness for the defense, ... the CPD firearms range instructor, [and] the lead instructor[.] were present" (R. 230, ll. 5-9). The gun was test fired about 30 times, and it did not misfire or malfunction. (R. 230). This is the same test-firing Hanna testified to. There was no objection.

The evidence of guilt was also overwhelming. The victim was shot 4 separate times in the head, once between the eyes. None were contact wounds. The other 3 shots entered just in front of the victim's left ear and traversed her brain. These wounds were closely grouped together and had relatively the same path. With the recoil of this gun, Gule would have had to re-aim the gun each time to achieve this close grouping of shots. Gule held a permit to carry a concealed weapon; he was trained in the use of firearms and how they work. The trigger pull on the gun was 6 ½ pounds and it would only fire if the trigger was separately pulled each time. The victim was physically abused in the 24 hours before her death. She had numerous bruises on her legs, arms, and chest; 11 bruises on her right arm, 7 on her left arm, 3 on each leg, and 4 on the right side of her chest. Two (2) of the bruises were more than 24 hours old; but, the remainder were

from 24 hours or less before she was killed. Several of the bruises were consistent with being grabbed by someone's fingertips. The bruises occurred during the time period Gule would visit the victim while intoxicated and stay at her residence **or** on the night of her murder when Gule had exclusive access to the victim. The victim and Gule had recently broken up 1 month before her death. Gule had threatened the victim's life just 3 days before she was killed, telling her if he could not have her, no one else would; he would make sure of that. The victim was murdered in her bed with her head resting on her pillow and the covers over her body. Gule was arrested in possession of the murder weapon and his hands were covered in gunshot residue. The victim's active cell phone was missing from her home and never recovered by police. Given the overwhelming evidence of Gule's guilt of murder, including the evidence of malice toward the victim, the admission of Hanna's testimony that he test fired the weapon and it did not malfunction, which was the same as other witnesses, could not have affected the verdict.

CONCLUSION

For the above stated reasons, Gule's convictions and sentences for the murder of Pamela M. Burgess and possession of a weapon during a violent crime must be affirmed.

Respectfully submitted,

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By:s/J. Anthony Mabry
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ATTORNEYS FOR RESPONDENT

May 26, 2020.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

Doyet A. Early, III. Circuit Court Judge

RECEIVED
May 26 2020
SC Court of Appeals

Appellate Case No. 2018-001848

Case No. 2016-GS-10-00241-242

The State of South Carolina,

Respondent,

vs.

William T. Gule, Jr.,

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 26th day of May, 2020.

s/J. Anthony Mabry
J. ANTHONY MABRY
Senior Assistant Attorney General

ATTORNEY FOR RESPONDENT