STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Laurens County

Donald B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LUTAVIOUS DENARD ELMORE,

APPELLANT.

APPELLATE CASE NO. 2020-001162

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

Whether, during the first trial held in South Carolina since the start of the Covid-19 pandemic, Appellant's due process rights were violated by the trial judge's repeated remarks to the jury panel, which emphasized the significance of the trial, the importance of the trial being a success, the role of the jury in making the trial a success, and the great interest in the trial, since such comments were coercive and strongly suggested to the jury that it must reach a verdict at the conclusion of the trial?

2.

Did the trial judge err by refusing to charge the jury on the lesser included offense of voluntary manslaughter when there was evidence to support the charge, specifically there was evidence Appellant stabbed the decedent in the sudden heat of passion upon sufficient legal provocation after Appellant found the decedent in bed with his "on again off again" girlfriend and the decedent struck Appellant when he entered the bedroom?

STATEMENT OF THE CASE

A Laurens County Grand Jury indicted Appellant on July 10, 2020 for murder, first degree burglary, kidnapping, and possession of a weapon during the commission of a violent crime. R. 885. Pretrial hearings were held on July 27, 2020 and July 30, 2020 before the Honorable Donald B. Hocker. R. 1. Appellant's case was called to trial on August 3, 2020 before Judge Hocker, and a jury. Deputy Solicitor Dale Scott and Assistant Solicitor Margaret Boykin represented the state. R. 3. Tristan Shaffer and Chelsea McNeill represented Appellant. R. 3.

On August 11, 2020, the jury found Appellant guilty of murder, first degree burglary, and possession of a weapon during the commission of a violent crime. However, it acquitted him of kidnapping. R. 874, l. 21 – 875, l. 20. Appellant was sentenced to fifty years for murder, thirty years concurrent for first degree burglary, and five years consecutive for the weapons offense. R. 876, ll. 1-9.

This appeal follows.

STATEMENT OF FACTS

The state alleged Appellant killed Sergio Mandez Lindsey during a jealous rage after Appellant discovered Lindsey in bed with his "on again off again" girlfriend, Crystal Bluford, during the early morning hours of October 27, 2018. Appellant maintained he acted in self-defense after Lindsey struck him and reached for an unknown object, which Appellant suspected was a gun or other weapon.

Appellant and Bluford met on Facebook and began dating in February 2018. According to Bluford, the pair broke up in August 2018 after "an altercation." R. 169, l. 23 – 170, l. 20. While they were dating, Appellant would stay at Bluford's house in Laurens, often for up to a week at a time. However, she claimed Appellant did not have a key and never lived at the house permanently. R. 167, l. 21 – 168, l. 10.

Despite supposedly breaking up in August, Appellant and Bluford still communicated regularly and Bluford admitted they continued to have a sexual relationship. R. 218, l. 20 – 219, l. 2. About a week before the killing, Bluford messaged Appellant that she loved him. R. 223, ll. 7-16. She also told Appellant during this same conversation that he could stay at her house for a few nights at a time, but he could not move in until she started paying rent. R. 223, l. 17 – 224, l. 20. The house Bluford lived in had belonged to her grandparents, who were deceased, and "was in probate." R. 167, ll. 4-17; R. 221, ll. 8-9. Bluford's family required Bluford to start paying rent before allowing Appellant to move into the residence. R. 223, l. 17 – 224, l. 20.

As a result of the "altercation" that occurred in August, Appellant was ordered to pay Bluford "restitution." R. 171, ll. 12-14; R. 229, ll. 4-6. He usually paid her on Fridays. R. 171, ll. 15-17; R. 229, ll. 7-8. The two would agree to meet either at Appellant's sister's house in "the projects" or at Bluford's house in order for Appellant to give Bluford the money. R. 171, l. 18 –

172, l. 1; R. 229, ll. 9-14. Bluford admitted that on a prior Friday shortly before the killing, she and Appellant had agreed to meet at Bluford's house at four o'clock in the morning for the handover. R. 224, l. 25 – 225, l. 3; R. 228, ll. 2-4; See R. 259, l. 24 – 260, l. 19.

Appellant and Bluford both worked at ZF Transmissions. R. 165, l. 11 – 166, l. 4. However, they rarely "crossed paths" at work because Appellant worked second shift and Bluford worked third.[1] R. 166, ll. 5-18. Bluford met Sergio Mandez Lindsey, the decedent, at ZF Transmissions in September 2018. Lindsey also worked third shift at the facility. The two developed a "friendship." R. 174, l. 11 – 175, l. 6. Despite Bluford's claims that she and Lindsey were merely friends, Bluford admitted Lindsey, who was married, had previously texted her a photograph of his "private" and she had texted Lindsey a picture of her wearing lingerie. R. 232, l. 3 – 233, l. 15. The two had also previously discussed renting a hotel room together. R. 233, ll. 16-23.

On the night of Friday, October 26, 2018, Bluford sought to go to Champions, a nightclub in Laurens, but she did not own a car and was unable to find a ride. R. 175, l. 20 – 176, l. 22; R. 233, l. 24 – 234, l. 12. She later talked to Lindsey on the phone. According to Bluford, Lindsey told her he was driving on the interstate and was going to stop at a rest area to sleep because he was tired after working all day. R. 176, l. 25 – 177, l. 6. Bluford invited Lindsey to her house instead so he could "take a nap" rather than sleep at a rest area. R. 177, ll. 7-9.

Lindsey arrived at Bluford's house around one o'clock in the morning. R. 177, ll. 10-14. According to Bluford, they merely sat on her bed and watched television. They also talked about Lindsey's wife and children. R. 177, ll. 15-25. The pair eventually fell asleep. R. 178, ll. 2-6.

[1] Appellant's hours were approximately 3:00 pm to 11:00 pm. See R. 877.

Bluford testified that "something woke me up out of my sleep." R. 181, ll. 20-22. She claimed when she woke, she saw Appellant at the foot of the bed "punching" Lindsey. R. 181, l. 20 – 182, l. 2. Lindsey "sat straight up in the bed" and raised his forearms "to block the punches." R. 183, ll. 2-7. Bluford claimed Lindsey did not "fight back." R. 183, ll. 8-9. Bluford tried to stop Appellant from hitting Lindsey. She told Appellant that "it wasn't what he thought it was" and emphasized that she and Lindsey were "fully clothed." R. 183, ll. 18-24. However, Bluford alleged Appellant "wouldn't listen" and struck her causing her to fall to the floor. She then saw him "pull out a knife." R. 183, l. 24 – 184, l. 4. After seeing the knife, Bluford fled the home through the front door. She ran to a neighbor's carport and hid behind a large pickup truck. R. 186, ll. 4-17. Appellant eventually found her and "made [her] go back to the house." R. 187, ll. 9-11.

When they reached her front porch, Appellant told Bluford that Lindsey was dead. R. 188, ll. 5-9. The pair walked to Bluford's bedroom. Bluford claimed Lindsey was on the floor between her bed and her dresser. R. 189, l. 24 – 190, l. 4. According to Bluford, Appellant was "ranting and raving" asserting it was her fault and that she had cheated on him. R. 190, ll. 11-14. Bluford claimed Appellant eventually drug Lindsey's body from her bedroom, down the hallway, and into the kitchen. R. 196, ll. 14-19.

Once in the kitchen, Bluford said the pair discussed what to do with the body. R. 199, ll. 10-25. Bluford suggested they put Lindsey's body in his car, "take the car somewhere and call and say we found somebody on the side of the road." R. 200, ll. 15-24. Appellant supposedly told her he did not care what she did, but she needed "to hurry" and get the body "out of here." R. 200, ll. 23-24. Appellant handed Bluford Lindsey's keys. Bluford walked out the front door and sat in Lindsey's car. She "cranked it up" and "sat there for a few minutes trying to figure out

what [her] next move was going to be." R. 200, l. 25 – 201, l. 4.

Bluford ultimately decided to leave. She drove Lindsey's car through her neighbor's front yard. Once she reached the main road, she called the police and requested they meet her at a nearby convenience store. R. 201, ll. 5-23. She was later interviewed by the police and told officers her story of events. R. 214, l. 12 – 215, l. 3.

Appellant was arrested later that afternoon. R. 328, l. 4 – 331, l. 1; R. 343, l. 11 – 344, l. 20. He waived his rights and agreed to speak with law enforcement. R. 331, l. 2 – 334, l. 1; R. 345, l. 9 – 346, l. 17. Appellant explained that he got off work at 11:15 pm on October 26, 2018. After work, he went to Champions, the nightclub Bluford had sought to go to, with several friends. R. 878; State's Exhibit No. 27, CD of Defendant's Interview.[2] He left Champions around 2:30 am and went to his sister's house. R. 348, l. 18 – 349, l. 6; R. 878; State's Exhibit No. 27, CD of Defendant's Interview. While Appellant initially denied being at Bluford's house that morning, he later admitted he walked to her house around 3:00 am to give her restitution money as he normally did every Friday. R. 349, ll. 10-14; R. 358, l. 4 – 359, l. 10; State's Exhibit No. 27, CD of Defendant's Interview.

Upon arriving, Appellant entered Bluford's house through the front door and walked to her bedroom where he found her with another man. R. 359, ll. 11-15; R. 879. He was in the process of handing Bluford cash when Lindsey hit him. R. 470, ll. 15-17; R. 879; State's Exhibit No. 27, CD of Defendant's Interview. Appellant struck Lindsey in response. Lindsey fell and then began to reach for an unknown object, which Appellant suspected was a gun or other weapon. Appellant grabbed a knife that was on the dresser and stabbed Lindsey. The physical altercation continued from Bluford's bedroom down the hallway. R. 879; State's Exhibit No. 27,

2 State's Exhibit 27 is on file with this Court.

CD of Defendant's Interview. Lindsey knocked Appellant down and Appellant ended up on top of Lindsey. Appellant continued to stab Lindsey until Lindsey released him. R. 879. The altercation ended in the kitchen. State's Exhibit No. 27, CD of Defendant's Interview.

The state alleged Appellant entered Bluford's home through a kitchen window since Bluford claimed all the doors were locked and a screen from the kitchen window had been removed. R. 207, ll. 1-25. Bluford explained that there were several windows at her house that did not lock. She had previously told Appellant to enter the house through one of these unlocked windows. She had even entered the home through one of the windows on a previous occasion. R. 236, ll. 20. According to Bluford, "certain people" knew these windows did not lock. R. 239, ll. 7-11.

When law enforcement arrived at Bluford's house that morning, they found Lindsey's body in the backyard. It had been doused with gasoline. R. 281, l. 1 – 284, l. 6. They also found clothing and a pair of boots, later identified as belonging to Appellant, in a "burn pile" in the woods just beyond the backyard. R. 286, l. 20 – 288, l. 25; R. 290, l. 10 – 291, l. 24. Appellant denied moving the body outside or burning his clothing. R. 361, ll. 10-15; R. 375, l. 25 – 376, l. 7. However, he admitted to taking his clothes off and leaving them at Bluford's house before walking back to his sister's residence. R. 360, l. 15 – 361, l. 1; R. 377, ll. 9-13.

Bluford found out later that she had missed several calls from Appellant in the hours before the killing. R. 265, l. 10 – 266, l. 5. She testified Appellant was always "overprotective" and "jealous." R. 261, ll. 10-14. According to Bluford, Appellant's jealousy was one of the main reasons why their relationship ended. R. 262, ll. 19-22.

The trial judge refused to charge the jury on the lesser included offense of voluntary manslaughter. R. 846, l. 15 – 849, l. 4. The jury ultimately acquitted Appellant of kidnapping

Bluford. However, it found him guilty of the murder of Lindsey and first degree burglary. R. 874, l. 21 – 875, l. 20.

ARGUMENT

1.

During the first trial held in South Carolina since the start of the Covid-19 pandemic, Appellant's due process rights were violated by the trial judge's repeated remarks to the jury panel, which emphasized the significance of the trial, the importance of the trial being a success, the role of the jury in making the trial a success, and the great interest in the trial, since such comments were coercive and strongly suggested to the jury that it must reach a verdict at the conclusion of the trial.

Relevant Facts

The jury panel was divided into three groups of approximately forty potential jurors to allow for social distancing. During his introductory remarks, the trial judge told Group A:

> **As you are sitting here in this courtroom this morning, you are making history. And let me explain to you why you are making history.** When this pandemic came about back in March, the Chief Justice of our Supreme Court decided that all trials would be stopped. We've had limited court functions going on since that time. But we have had no - - no trials since about mid-March.
>
> Well, the Chief Justice decided about a month ago, maybe - - no, probably about six weeks ago, rather, that he wanted trials to start back and needed a - - a test jury trial. And he selected Laurens County to be that test jury county.
>
> . . .
>
> **So I want you to know how important this is.** And we have taken a lot of - - well, we've put in a lot of thought and consideration to taking precautions to keep everyone as safe as we possibly can.
>
> . . .
>
> I failed to - - to introduce myself, I don't think I did. My name is Don Hocker. I am the Judge who signed the letter that went out to you, initially, when you received your jury summons.
>
> I'm chambered here in Laurens. I'm the chief administrative Judge for General Session in the Eighth Circuit. **I'm just really, really excited and**

> **delighted to have sitting next to me to my right is Judge Debbie McCaslin. She is the newest circuit court judge in the State. And she will be with us this week observing this trial.**
>
> I'm not going to introduce anybody else. **We have a lot of people that have an interest in - - in this trial. We have some ladies from court administration, and from other parts of the State.** And they're seated primarily over here.
>
> . . .
>
> Ladies and Gentlemen, as I told you in letter, **jury service is very important.** It's the civic responsibility that we all have, some say the second highest civic responsibility that we have second only to serving in the military. So, **once again, your presence here today is very, very important**.
>
> **And *if you are selected on the trial jury, then I want you to do everything you can to make this trial a success. We have a lot of eyes on this trial.* And if it is successful and if the second test jury trial in Horry County next week if that is successful, then I believe the Chief Justice will open things back up for more trials throughout the State.**
>
> ***So we're going to work very hard to make it a success. And if you're selected on the trial jury, then I hope you will work equally hard to make it a success.***

R. 4, l. 8 – 8, l. 7 (emphasis added).

While the first panel, Group A, was being qualified, Chief Justice Beatty entered the courtroom. The trial judge acknowledged the chief justice's presence and stated, "[G]ood to have you with us." R. 19, ll. 9-13.

After Group A was qualified, defense counsel put his objection to the judge's opening remarks on the record. He argued the judge's comments were coercive and pressured the jurors to reach a verdict at the conclusion of the trial. He emphasized the judge's statements that the jurors were "making history" and that the success of the trial was important and would impact the possibility of additional trials being held during the ongoing pandemic. Counsel cited to the

line of cases concerning coercive Allen[3] charges, including Dawson v. State, 352 S.C. 15, 572 S.E.2d 445 (2002), and our Supreme Court's unpublished opinion in Garner v. State, 2016-MO-005 (S.C. Sup. Ct. filed March 23, 2016). R. 40, l. 8 – 41, l. 20. Counsel also cited to State v. Liberte, 336 S.C. 648, 521 S.E.2d 744 (Ct. App. 1999), where this Court reversed Liberte's convictions holding the prosecutor's improper comments during his closing argument, which were calculated to appeal to the jurors' passions and prejudices, invited the jurors to convict the defendant even if the evidence did not prove his guilt beyond a reasonable doubt.

Defense counsel also emphasized that, in addition to the judge's statements, the jurors were introduced to three judges, including the trial judge and the chief justice of the Supreme Court, which he argued added to the "coercive effect" of the judge's opening remarks. Specifically, counsel asserted, "I do appreciate the Chief Justice being here. But . . . pointing him out sort of adds to that . . . air of . . . this is a very important thing. And our whole system depends on this. I mean . . . right now, they're [the jurors are] going to see that there's three judges in the room. . . . I understand the reasons for that. I'm just saying that . . . by pointing them out, it adds to the coercive effect. I think that it's probably going to put in the minds of each one of those jurors that . . . it's important that they go forward, more so than in other cases . . . even if they don't feel comfortable doing it." R. 41, l. 21 – 42, l. 8.

The trial judge overruled Appellant's objection. He found his "general statement that . . . we all strive for this to be a success" was not analogous to "Allen charges that are coercive." The judge noted that after defense counsel originally objected to his remarks, presumably off the record, the judge told the jury "our hopes of this being a success had nothing to do with whatever

[3] Allen v. United States, 164 U.S. 492 (1896)

verdict that they - - if they're selected on the trial jury, whatever verdict that they may . . . reach."[4] R. 42, ll. 10-20.

Defense counsel later clarified that he believed the judge's remarks implied that it was important the jurors reach a verdict at the end of the trial in order for the trial to a success. R. 43, l. 19 – 44, l. 3. He asserted, "I'm saying that [the] implication of saying . . . we need to have a successful trial in order to reopen the courts, essentially, it's putting pressure on them [the jurors] to come up with a [verdict]." R. 44, ll. 6-11.

Despite Appellant's objection, during his introductory remarks to Group B, the trial judge told the potential jurors:

> Let me welcome you to a term of circuit court for the County of Laurens. My name is Don Hocker. I am a circuit court judge. I - - my chambers is in Laurens. And I have been assigned to this term of court.
>
> **Also, with me is Debbie McCaslin. She is our newest circuit court judge**. She's from - - lives in Chapin, but she is chambered in Lexington County. And *she's here to observe this week.*
>
> And, also, **I'm extremely delighted to have our Chief Justice of the South Carolina Supreme Court, Don Beatty, present. And he's going to hang out with us for . . . a while.**
>
> Back in about mid-March, the Chief Justice decided to shut down courts insofar as jury trials, placed limitations on the other operations of the - - the court system. So we have not - - and throughout the whole State of South Carolina, we have not had any jury trials conducted either criminal or civil. Now, you're here for criminal court, the Court of General Sessions.
>
> So about six weeks ago or so, **the Chief Justice decided to - - for Laurens County to - - to host the test jury trial**. And next week, Horry County will . . . be having the second test jury trial. **So it's very important that . . . you are here.** And **we are to test the process and to - - hopefully, the process will work very smoothly** in light of the environment in which we live and find ourselves in.

[4] After reading and rereading the qualification of potential jurors from Group A, undersigned counsel was unable to find any mention on the record that the judge's hope that the trial was a success "had nothing to do with whatever verdict . . . they may reach."

> **So it's very important that you're here. And we're going to do our best. And *I ask that you do your very best, to make sure that this process is very successful.* So we can, hopefully, in the near future go back to normal court operations**, certainly, keeping in place guidelines and procedures to keep everyone safe.
>
> **We've gone to great lengths putting this together** . . . to try to keep everybody, the jury, lawyers, staff members safe throughout the whole process.

R. 44, l. 22 – 46, l. 8 (emphasis added).

After the Group B jury panel was sworn and roll call was completed, the trial judge continued:

> Ladies and gentlemen of the - - jury panel, again, I welcome you to this term of court. **Jury service is a very, very important responsibility** that we all have. Many people say it's the second highest civic responsibility that we have, second only to serving in the military. But **your presence here today is extremely important. Again, this is the first jury trial conducted in the state since mid-March when the coronavirus hit.**

R. 48, ll. 13-20 (emphasis added).

Appellant renewed his objection to the trial judge's statements at the conclusion of qualifications for Group B. R. 89, ll. 17-23.

Despite Appellant's objection, during his introductory remarks to Group C, the trial judge told the potential jurors:

> My name is Don Hocker. I am a circuit court Judge. My chambers are in Laurens.
>
> **And, also, I have with me Debbie McCaslin, who is our newest circuit court judge. And she's - - she's here to observe this trial.**
>
> Back in about mid-March, when the - - the pandemic hit, South Carolina, the beginning of it, **our Chief Justice, who by the way was here earlier today, decided to shut down all jury trials, criminal and civil.** And so we've not had any jury trials since mid-March.
>
> About six weeks ago or thereabouts, **he decided that he wanted to have some test jury trials to see if the process will work in light of the environment**

> **that - - that we are in. And he selected as the first jury trial Laurens County.** The second jury trial will be held in Horry County. And I think **after that is done, then he will make the decision whether or not to open up courts to where all the counties will - - will have jury trials.**
>
> So **you're here today to test the process and to make sure that we can make things work.**

R. 94, ll. 3-22 (emphasis added).

The judge later continued:

> . . . **Again, I want you to understand how important your presence here is today.** It is a very high civic responsibility serving on a jury. Some people say it's the second highest civic responsibility that we have, second only to serving in the military. So your - - **your presence here today is very important**.
>
> We - - and I told this to the other jury panels. We are so fortunate in this country that we have the greatest justice system ever created. And juries play a very important and vital role in our judicial system. So it's - - **it's very important that - - that you're here.** And we're glad you're here. And I think you should take some pride in the fact that Laurens County was selected as the first county to conduct this test jury trial.

R. 97, ll. 5-20 (emphasis added).

Appellant renewed his objection to the trial judge's statements at the conclusion of qualifications for Group C. R. 127, ll. 15-17.

Of the twelve jurors who sat on the jury which ultimately convicted Appellant of murder, first degree burglary, and possession of a weapon during the commission of a violent crime, three were from Group A, four were from Group B, and five were from Group C. Notably, after hearing six days of testimony and argument, the jury reached a verdict in less than two hours.

Discussion

"The Sixth and Fourteenth Amendments to the United States Constitution guarantee a defendant a fair trial by a panel of impartial and indifferent jurors." State v. Bryant, 354 S.C. 390, 395, 581 S.E.2d 157, 160 (2003) (citing Estelle v. Williams, 425 U.S. 501 (1976) and Irvin

v. Dowd, 366 U.S. 717 (1961)). "Any criminal defendant . . . being tried by a jury is entitled to the uncoerced verdict of that body." Tucker v. Catoe, 346 S.C. 483, 492, 552 S.E.2d 712, 717 (2001) (quoting Lowenfield v. Phelps, 484 U.S. 231 (1988)). "A verdict of a jury should be the concurrence of 12 minds, derived from a consideration of the evidence, absolutely free of other influence." Voyles v. State, 596 So. 2d 31, 38 (Ala. Crim. App. 1991) (citing Gidley v. State, 95 So. 330 (Ala. Crim. App. 1923)). "There should be nothing in the intercourse of the trial judge with the jury *having the least appearance of duress or coercion*." Id. (quoting Meadows v. State, 62 So. 737, 738 (Ala. Crim. App. 1913) (internal quotation marks omitted) (emphasis in original).

Our Supreme Court has long held that a "trial judge has the duty to urge, but not coerce a jury to reach a verdict." Dawson v. State, 352 S.C. 15, 20, 572 S.E.2d 445, 447 (2002) (citing Green v. State, 351 S.C. 184, 194, 569 S.E.2d 318, 323 (2002)); See Workman v. State, 412 S.C. 128, 130, 771 S.E.2d 636, 638 (2015). "Whether an Allen charge is unconstitutionally coercive must be judged 'in its context and under all the circumstances.'" Id. (quoting Tucker v. Catoe, 346 S.C. 483, 491, 552 S.E.2d 712, 716 (2001)); Workman, 412 S.C. at 130, 771 S.E.2d at 638; See Lowenfield v. Phelps, 484 U.S. 231, 237 (1988). Just as an Allen charge is judged "in its context and under all the circumstances" so too should a trial judge's other charges or comments to a jury.

During his opening remarks to the jury panel, the trial judge repeatedly emphasized the significance of the trial in the wake of the pandemic, the importance of the trial being a success, and the role of the jury in making the trial a success. For example, the judge told Group A, "So, once again, your presence here today is very, very important. And *if you are selected on the trial jury, then I want you to do everything you can to make this trial a success*." R. 7, ll. 20-24 (emphasis added). He later told Group B, "So it's very important that you're here. And we're

going to do our best. And *I ask that you do your very best, to make sure that this process is very successful*." R. 45, l. 25 – 46, l. 2 (emphasis added).

The trial judge also highlighted the outside interest in the trial. For example, he told Group A, "We have a lot of people that have an interest in - - in this trial. We have some ladies from court administration, and from other parts of the State [present in the courtroom]." R. 7, ll. 6-10. He later asserted, "We have a lot of eyes on this trial." R. 7, l. 24. Moreover, in addition to identifying himself, the judge drew the jurors' attention to the presence of Chief Justice Beatty and fellow circuit court judge, Debra McCaslin.

Based on the totality of the circumstances, the judge's repeated remarks were unconstitutionally coercive and strongly suggested to the jury that it must reach a verdict at the conclusion of the trial in order for the trial to be a success. Further proof that the comments were coercive is the short duration of the jury's deliberations. After hearing six days of testimony and argument, the jury reached a verdict in less than two hours. See Workman, 412 S.C. at 131, 771 S.E.2d at 638 (time between when the charge was given and when the jury returned with a verdict can demonstrate coercion).

Because Appellant's due process right to a fair trial by a panel of impartial and indifferent jurors was violated by the trial judge's coercive remarks, respectfully, this Court should reverse Appellant's convictions and sentence and remand for a new trial.

2.

The trial judge erred by refusing to charge the jury on the lesser included offense of voluntary manslaughter when there was evidence to support the charge, specifically there was evidence Appellant stabbed the decedent in the sudden heat of passion upon sufficient legal provocation after Appellant found the decedent in bed with his "on again off again" girlfriend and the decedent struck Appellant when he entered the bedroom.

Relevant Facts

During the charge conference, defense counsel requested the trial judge charge the jury on the lesser included offense of voluntary manslaughter. Emphasizing the "any evidence standard," counsel argued there was evidence presented to support the charge. Specifically, he asserted there was evidence Appellant believed he was in a relationship with Bluford, that he found Bluford in bed with another man, and that upon entering Bluford's bedroom, Appellant was provoked. R. 846, l. 15 – 848, l. 4.

The judge denied the request. He found based on Appellant's "own admission during the interview" there was "no heat of passion [or] provocation to justify a manslaughter charge." R. 847, ll. 17-21.

Appellant's written request to charge voluntary manslaughter was marked as Court's Exhibit No. 15. R. 883.

Standard of Review

"A trial judge must charge a lesser included offense if there is *any evidence* from which the jury could infer the defendant committed the lesser rather than the greater offense." State v. Sims, 426 S.C. 115, 130, 825 S.E.2d 731, 738 (Ct. App. 2019) (quoting State v. White, 361 S.C. 407, 412, 605 S.E.2d 540, 542 (2004)) (internal quotation marks omitted) (emphasis added). "To

warrant a court's eliminating the offense of manslaughter, it should *very clearly appear* that there is *no evidence whatsoever* tending to reduce the crime from murder to manslaughter." State v. Lowry, 315 S.C. 396, 399, 434 S.E.2d 272, 274 (1993) (citing State v. Norris, 253 S.C. 31, 168 S.E.2d 564 (1969)) (emphasis added).

"If there is any evidence from which it could be inferred the lesser, rather than the greater, offense was committed, the defendant is entitled to such charge." State v. Childers, 373 S.C. 367, 373, 645 S.E.2d 233, 236 (2007) (citing Dempsey v. State, 363 S.C. 365, 371, 610 S.E.2d 812, 815 (2005)). "Whether a voluntary manslaughter charge is warranted turns on the facts. If the facts disclose *any* basis for the charge, the charge must be given." State v. Starnes, 388 S.C. 590, 597, 698 S.E.2d 604, 608 (2010) (emphasis added).

"In determining whether the evidence requires a charge of voluntary manslaughter, the Court views the facts in a light most favorable to the defendant." State v. Pittman, 373 S.C. 527, 572-573, 647 S.E.2d 144, 168 (2007) (citing State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001)).

Discussion

The trial judge erred by refusing to charge the jury on the lesser included offense of voluntary manslaughter when there was evidence to support the charge. The state alleged Appellant killed Lindsey during a jealous rage after Appellant discovered Lindsey in bed with his on again off again girlfriend, Crystal Bluford, with whom Appellant continued to have a sexual relationship. Appellant admitted to stabbing Lindsey after Lindsey first struck him and then reached for an unknown object Appellant suspected was a gun or some other weapon. Consequently, there was evidence Appellant killed the decedent in the sudden heat of passion

upon sufficient legal provocation. Given the standard of review, this Court should reverse Appellant's convictions and remand for a new trial.

"Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation." Starnes, 388 S.C. at 596, 698 S.E.2d at 608 (citing State v. Wharton, 381 S.C. 209, 214, 672 S.E.2d. 786, 788 (2009)). "The sudden heat of passion, upon sufficient legal provocation, which mitigates a felonious killing to manslaughter, while it need not dethrone reason entirely, or shut out knowledge and volition, must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence." State v. Childers, 373 S.C. 367, 373, 645 S.E.2d 233, 236 (2007) (quoting State v. Byrd, 323 S.C. 319, 322, 474 S.E.2d 430, 432 (1996)) (internal quotation marks omitted). "Both heat of passion and sufficient legal provocation must be present at the time of the killing to constitute voluntary manslaughter." Childers, 373 S.C. at 373, 645 S.E.2d at 236 (citing State v. Hughey, 339 S.C. 439, 451, 529 S.E.2d 721, 727 (2000)).

"Where death is caused by use of a deadly weapon, words alone, however opprobrious, are not sufficient to constitute a legal provocation." State v. Lowry, 315 S.C. 396, 399, 434 S.E.2d 272, 274 (1993) (citing State v. Gardner, 219 S.C. 97, 104, 64 S.E.2d 130, 134 (1951)). "Words accompanied by hostile acts may, according to the circumstances, reduce a charge from murder to voluntary manslaughter." State v. Byrd, 323 S.C. 319, 322, 474 S.E.2d 430, 432 (1996) (citing State v. Mason, 115 S.C. 214, 105 S.E. 286 (1920)). "Provocation necessary to support a voluntary manslaughter charge must come from some act of or related to the victim in order to constitute sufficient legal provocation." State v. Locklair, 341 S.C. 352, 362, 535 S.E.2d 420, 425 (2000) (citing State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996)).

"The provocation of the deceased must be such as naturally and instantly produces in the mind of a person ordinarily constituted the highest degree of exasperation, rage, anger, sudden resentment, or terror, rendering the mind incapable of cool reflection." Id. (internal citation omitted) (emphasis removed).

"In determining whether the act [that] caused death was impelled by heat of passion or by malice, all the surrounding circumstances and conditions are to be taken into consideration, including previous relations and conditions connected with the tragedy, as well as those existing at the time of the killing." State v. Smith, 391 S.C. 408, 413, 706 S.E.2d 12, 15 (2011).

Viewing the evidence in the light most favorable to Appellant, as this Court must, there was evidence presented to support a charge on the lesser included offense of voluntary manslaughter. There was evidence Appellant was acting under the sudden heat of passion after he discovered Bluford, his "on again off again" girlfriend, in bed with another man in the middle of the night. Bluford admitted, despite claiming she and Appellant had broken up months earlier, that the two continued to have a sexual relationship, that she told Appellant she loved him as little as a week before the killing, and that Appellant often stayed at her house during this period. Appellant told law enforcement that when he arrived at Bluford's house in the middle of the night to give her money, he walked straight into the house through the door and found Bluford in bed with Lindsey. Almost immediately, Lindsey struck Appellant and reached for an unknown object. Such circumstances would "naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what . . . may be called an uncontrollable impulse to do violence." See State v. Knoten, 347 S.C. 296, 302-303, 555 S.E.2d 391, 394-395 (2001) (quoting State v. Cole, 338 S.C. 97, 525 S.E.2d 511 (2000)).

The trial judge erroneously relied solely on Appellant's statement to police and ignored the remainder of the evidence presented by the state, which supported a voluntary manslaughter charge. The judge found by Appellant's "own admission during the interview" there was "no heat of passion [or] provocation to justify a manslaughter charge." R. 847, ll. 17-21. However, again, the state presented evidence that Appellant was in a jealous rage after he discovered Bluford, his on again off again girlfriend, in bed with Lindsey in the middle of the night, and evidence, through Appellant's statement, that upon entering the room Lindsey struck Appellant and then reached for an unknown object. From these circumstances, the jury could have found Appellant acted in the sudden heat of passion upon sufficient legal provocation when he killed Lindsey during the ensuing altercation.

Respectfully, given the any evidence standard of review, this Court should hold the trial judge erred by refusing to charge voluntary manslaughter, reverse Appellant's convictions and sentence, and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his convictions and sentence and remand for a new trial.

Respectfully submitted,

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This 20th day of September, 2021.

CERTIFICATE OF COUNSEL

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

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This 20th day of September, 2021.