STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LAURENS COUNTY
Honorable Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2020-001162

THE STATE,.....RESPONDENT

v.

LUTAVIOUS DENARD ELMORE,.....APPELLANT

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General
S.C. Bar No. 14244

TOMMY EVANS, JR.
Assistant Attorney General
S.C. Bar No. 65282

Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-6305

DAVID M. STUMBO
Solicitor Eighth Judicial Circuit
P.O. Box 516
Greenwood, SC 29646
(864) 942-8802
ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

STATUES

APPELLANT'S STATEMENT 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 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 the Appellant when he entered the bedroom?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Did the trial court err when emphasizing the importance for everyone staying healthy during the first trial during the Covid-19 pandemic? Did the court stating this case must become a "success," is referring to everyone staying healthy and not contracting Covid-19, and not that this case must come to a conclusion by jury verdict?

2. Did the trial judge err in not instructing the jury on the lesser included offense of voluntary manslaughter after looking at the evidence most favorable to the Appellant, and concluding that the Appellant is referring to this case as a self-defense and not a killing in the "heat of passion." Does evidence showing that the Appellant waited outside two hours before coming in the house, revealing a "cooling off" period making this a murder not manslaughter?

STATEMENT OF THE CASE

The Laurens county grand jury true billed four indictments at the July 2020 term. These indictments were for murder (indictment number 20-GS-3000441); burglary in the first degree (burglary 1st)(indictment number 20-GS-30-00442); possession of a weapon during the commission of a violent crime (indictment number 20-GS-30-00443); and, kidnapping (20-GS-30-00444)

On August 3, 2020, this case was called for trial. Appearing before the Honorable Donald B. Hocker representing the State of South Carolina was Deputy Solicitor C. Dale Scott, and Assistant Solicitor Margaret G. Boykin of the Eighth Circuit Solicitor's office. Representing the Appellant (Elmore) was attorneys Chelsea B. McNeill and Tristan M. Shaffer.

Due to the Covid-19 pandemic, on April 14, 2020, the South Carolina Supreme Court ordered all jury trials be continued until further notice. This trial was to be the first held since this order was imposed. This trial was intended to be experimental in order to determine if with masks and social distancing, jury trials could resume safely. If this trial could safely come to a conclusion without any positive Covid infections the Supreme Court would consider resuming jury trials statewide.

The trial came to a conclusion on August 11, 2020. A jury of his peers found Elmore guilty of murder, burglary 1st, and possession of a weapon during the commission of a violent crime.[1] That same day Judge Hocker imposed a sentence of a fifty year period of incarceration for the offense of murder, thirty years for burglary 1st, and five years for possession of a weapon during the commission of a violent crime. The weapons offense was to be served consecutively, the

[1] He was found not guilty of kidnapping.

sentence for burglary 1st was to be served concurrently. After the conclusion of this trial and sentencing, Elmore filed a timely notice of appeal.

Within this appeal Elmore argues that he was denied due process due to trial court's remarks emphasizing the importance of the trial being a success. Elmore's position is that these comments were coercive, strongly suggesting to the jury that they must reach a verdict. Elmore further argues that the trial judge erred by refusing to instruct the jury on the lesser included offense of voluntary manslaughter.

In response, the State will argue that the comments of the trial court wanting this case be a "success" had nothing to do with the jury coming in with a verdict. The trial court wanted no person involved with this trial to be infected with Covid-19. From his voir dire questions pertaining exclusively to Covid-19, to specifically focusing his attention on masks and social distancing, it was clear "the success" was pertained to the pandemic and not a jury verdict. The state would further argue that the trial court was correct in not instructing the jury on the lesser offense of voluntary manslaughter. None of the evidence presented reveals that Elmore's actions were made in the sudden heat of passion, aroused by legally adequate provocation. Even looking at the evidence most favorable to Elmore, it was either self-defense or murder. The brief of the State supporting these arguments follow.

STATEMENT OF FACTS

Ms. Crystal Bluford began a relationship with Elmore around February of 2018. (R. p. 166 line 24-25). This relationship ended with an altercation between Ms. Bluford and Elmore in August of 2018. (R. p. 170, line 16-20). During this time Ms. Bluford was working third shift at the cafeteria at ZF Transmissions. After this breakup she met Sergio Mandez Lindsey going through the line at the cafeteria, who was another third shift employee. After this meeting Ms. Bluford and Mr. Lindsey became friends. Mr. Lindsey would later become the victim of this crime.

On October 26, 2018, Ms. Bluford wished to go to a club called Champions. She did not own a vehicle so she needed a ride. She could not find anyone willing to take her so she decided to stay home. That same night Elmore did attend Champions with his cousin. He later went to his sister's house and was there until 3:00am, he then decided to walk to Ms. Bluford's house. According to Elmore he was going to Ms. Bluford's house to pay her owed restitution from their previous altercation.

Also that night the victim while on his way home phoned Ms. Bluford. He told her he was driving home from Clinton and was going to a rest stop. She told him that instead of stopping at a rest stop he could come to her house. (R. p. 177 lines 2-9). The victim arrived at her house around 1:00am. (R. p. 177 line 12). When he arrived he went into her bedroom, they laid on her bed and talked about his wife and kids. R. p. 177 lines 17-25). They watched TV until they both fell asleep. (R. p. 178 lines 2-6). Then Ms. Bluford woke up to find Elmore standing at the foot of her bed, he then began punching the victim. (R. p. 181 line 25 – p. 182 line 2). She tried to explain to him that they were just sleeping, Elmore then punched her in the face. (R. p. 183 lines 21-25). She then saw Elmore with a knife. (R. p. 184 lines 23-25). She ran outside through the front door to her neighbor's yard, and hid behind his truck. As she was hiding she could hear Elmore calling for her

saying, "she might as well come out because he was going to find her." (R. p. 186 lines 4 – 22). Ms. Bluford then hid under the truck, Elmore found her, grabbed her, and dragged her from under the truck; he then forced her inside the house. (R. p. 188 lines 1-4). When they got to the house he told her the victim was dead, and, "that he killed him so there nothing that she can do about it." (R. p. 188 lines 14-16). He told her that, "she was going to help him get rid of the body, and if she did not help he was going to kill her too." (R. p. 188 lines 24 – p. 189 line 3). They walked into the bedroom where she found the victim lying on the floor in a fetal position. Elmore told her that he was watching them through the window for two hours trying to figure out if he was going to kill him, or her first, or just kill them both. (R. p. 192 lines 8-10). Elmore told her they need to move the body, she told him "no way they can move him he's too big." (R. p. 196 lines 10-12).

Ms. Bluford then testified as she was putting on her shoes, Elmore dragged the victim's body through the hallway to the kitchen. (R. p. 196 lines 15-19) He then told her she had to take him out the back door and set him on fire, and that she had forty minutes before his body gets stiff. (R. p. 199 lines 15-25) He told her that she needed to hurry up and get him out and he gave her the keys to the victim's truck. When she got into the victims truck she drove away dialing 911. (R. p. 200 line 25 – p. 201 line 20) While on the phone with emergency services she asked to meet law enforcement at a local store. When she got to the store she met Officer Matthew Gault of the Laurens police department. Officer Gault testified that Ms. Bluford was visibly shaken with a laceration to her mouth. (R. p. 314 lines 17-24) She wanted officers to hurry to her house because she did not know if the victim was dead or alive. (R. p. 212 lines 2-6)

Officer Daniel Duckett testified that he, along with Lieutenant Byrd and Sergeant Hall, arrived at Ms. Bluford's house. (R. p. 275 lines 7-10). When he got to the house, outside he saw a hoodie with a star pattern sitting in the driveway. (R. p. 275 lines 17-21) As they walked inside he

saw a trail of blood going through the hallway. The blood trail was heavier toward the bedroom. It looked like somebody had been dragged or possibly crawled down the hallway. (R. p. 277 lines 10-13). In the bedroom he found a pool of blood from the top of the bed to the floor. The trail of blood began in the doorway of the bedroom, extending to the hallway into the living room area stopping in the kitchen. (R. p. 277 lines 21-25). As he walked into the kitchen he smelled gas fumes. All three officers shined their flashlights out to the back where they discovered the victim's body. (R. p. 281 lines 12-19). When they got outside they found the victim lying face down with his hands above his head. (R. p. 284 lines 16-18). Around the victim's body was the smell of gasoline. He then smelled smoke and saw light dancing in the treetops. About fifty meters away he saw a small fire. (R. p. 286 line 20 – p. 287 line 1). The fire looks as though it was hastily set with a gas can pitched off to the side. (R. p. 288 lines 20-24). In the fire he saw two boots, a pair of jeans, and a glitter belt in the pants belt loops. (R. p. 290 lines 18-21). Surveillance video from NF Transmissions later revealed Elmore was wearing the same clothing at work that night. (R. p. 357 line 18 – p. 358 line 3).

Law enforcement got a warrant for Elmore's arrest for the offense of murder. Detective Jared Hunnicutt of the Laurens County Sheriff's Department was notified about this warrant. Since he knew Elmore and his family he was asked if he could locate him. (R. p. 342 lines 3-14). Detective Hunnicutt believed that Elmore was located at his sister's house, and asked the assistance of Investigator Don Evans to apprehend Elmore. (R. p. 328 lines 6-17). They went to Elmore's sister's house. Once they were given consent to enter, they found Elmore hiding in a closet. He was removed from the closet and placed under arrest.

Once they got back to police headquarters Elmore was read his *Miranda* warnings and questioned. At first he told law enforcement that he was not at Ms. Bluford's residence the night

before. Elmore was questioned further, and shown evidence from the crime scene. He then told law enforcement that he was there but he was attacked by the victim and he had to stab him in order to defend himself. (R. p. 358 lines 6-11).

Dr. Michael Ward, forensic pathologist, performed the autopsy on October 29, 2018. (R. p. 448 line 2). He testified that the victim was placed in a body bag before being transported from the hospital. When the body bag was opened a strong odor of an accelerant came from the body into the room. He testified that this accelerant smelled like gasoline. (R. p. 448 lines 8-12). He noticed the victim had multiple sharp forced injuries, and abrasions to the forehead, right chest, right wrist, and right arm at the fold at the elbow. (R. p. 449 lines 20-23). He found eleven stab or cut wounds to the body. The fatal wound being at the left front chest to the midline that went through the chest wall into the heart and into the fibers surrounding the back of the heart. (R. p. 449 line 25 – p. 450 line 4). The victim also had defensive wounds on the back of both hands. These injuries resulted from trying to cover your head to ward off blows. (R. p. 455 line 12- p. 456 line 20).

Dr. Ward also testified that the body was covered in dirt and small rocks. His shirt was pulled up above the level of his chest in the fashion as if he was pulled by his feet allowing the friction of the ground to pull his shirt up. He also had abrasions on his skin consistent with being dragged across a rough surface. (R. p. 460 lines 12-18). The victim also had a blistering of the skin at the abdomen, left upper shoulder and mid-back. A type of blistering you see in motor vehicle collisions when there has been a disruption of a gas tank. As gas gets on the decedent's clothing it causes a chemical irritation where the skin blisters and breaks. (R. p. 458 lines 19-25). These injuries were likely postmortem. (R. p. 459 lines 1-2).

Ms. Anna Tankersley crime scene investigator for the South Carolina Law Enforcement Division (SLED) testified that she arrived at the crime scene the next morning. (R. p. 600 line 23). When she got to the scene she found a jacket lying on the ground near the house. (R. p. 603 lines 12-14). She sent everything in the burn pile to the trace department, and a sample of the liquid in the gas can for analysis. (R. p. 609 lines 12 – 18). She also lifted prints off the bedroom window located at the foot of the bed. (R. p. 643 lines 16-18). There was blood on the mattress that sat long enough to soak though the comforter, the sheets and down to the mattress. (R. p. 675 lines 17-21). However, she did not find broken glass, broken appliances, or any furniture overturned. (R. p. 645 lines 8-12). The scene did not look like a fight occurred as Elmore had told law enforcement.

ARGUMENT

1. **During the first trial being held during the Covid-19 pandemic the trial judge made references to the importance of this trial being a "success" this reference was not made in order to coerce the jury to come to a verdict. The trial court used the term "success" meaning that hopefully everyone involved remained healthy and were not infected with the virus.**

Due to the 2020 Coronavirus outbreak, by an April 3, 2020 order of the court, the South Carolina Supreme Court decided to continue all jury trials. (R. p. 894-895). The Supreme Court's intention was to make these continuances temporary until it can be determined that jury trials could be conducted in a safe and productive manner. The Supreme Court along with Court Administration wanted to conduct a trial complete with masks and social distancing to make sure that a jury trial could be safely conducted during the pandemic. They decided to make this Laurens County case the first test case. If the present case in Laurens County came to a conclusion without any positive tests or infections, the next experimental case would be in Horry County the following week.

Standard of Review:

In criminal cases the appellate court sits to review errors of law only. *State v. Wilson,* 345 S.C. 1, 5, 545 S.E.2d 827 (2001). The general rule in this state is that the conduct of a criminal trial is left largely to the sound discretion of the presiding judge and this court will not interfere unless it clearly appears that the rights of the complaining party were abused or prejudiced in the same way. *State v. Bridges,* 278 S.C. 447, 298 S.E.2d 212 (1982). A trial court is given enormous discretion in conducting a criminal trial. *State v. Bryant,* 372 S.C. 305, 313, 642 S.E.2d 582, 587 (2007). The scope of voir dire and the manner in which it is conducted are generally left to the sound discretion of the trial court. *State v. Bixby,* 388 S.C. 528, 542, S.E.2d 579 (2010). The trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of discretion. *Mitchell Supply Co. v. Gaffney,* 297 S.C. 160, 162-63, 375 S.E.2d 321, 322-23 (Ct. App. 1988). An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law. *State v. Garrett,* 350 S.C. 613, 619, 567 S.E.2d 523, 526 (Ct. App. 2002).

Discussion:

In all criminal jury trials the selection of a jury must occur through voir dire. In impaneling juries in criminal cases, the jurors must be called, sworn and impaneled anew for the trial of each case, according to the established practice. S.C. Code Ann. §14-7-1100 (2020).

This was a very important trial, not only that it was a murder trial, but this was going to be the test case for how the rest of the state could conduct jury trials safely. Even the defense bar realized the trial's importance. Prior to the *Jackson v. Denno* hearing Mr. Jim Brown with the South Carolina Defense Lawyers Association requested the trial court allow them to record

pretrial, jury selection, and the trial of the case pursuant to rule 605(f)(1)(i) of the South Carolina Appellant Court rules.[2] (R. p. 2 lines 7 -16).

Mr. Brown informed the trial court that they believed this trial would be unique regarding the modifications for the Covid-19 pandemic. (R. p. 2 lines 4-5). It was the intention of the Defense Lawyers Association to place this video on their website. (R. p. 2 lines 18-21). It was his opinion that the court could allow this recording pursuant to Rule 605(a)(1) of the South Carolina Appellant Court rules.[3] It was his opinion their website could be considered a trade paper, in house publication, or professional journal. (R. p. 2 lines 10-14).

The trial court was not the only body that relayed the importance of this trial. That importance was also revealed by the South Carolina Defense Lawyers Association. This proves how important it was that this trial be completed without anyone getting infected with Covid-19. If this trial could come to a conclusion, be it with a verdict of guilty, not guilty, or a hung jury, the South Carolina Supreme Court would be more inclined to allow more jury trials to commence.

Elmore raised objections to the trial court acknowledging individuals from court administration, newly elected Judge Debra McCaslin and South Carolina Supreme Court Chief Justice Donald W. Beatty. It is obvious by the reading of the transcript that the trial judge focus was to minimize the risk of any person involved contacting Covid-19. The trial judge introduced members of court administration simply as observers, to reiterate that this was a test case in how a trial could be conducted in this time of Covid-19.

---

[2] Subject to the requirements of this Rule, representation of the media may use video, still cameras or recorders to cover proceedings in courts of this state. Rule 605(f)(1)(i) SCACR.

[3] "Media" means any recognized news-gathering or news-reporting agency and individual persons involved and includes newspapers, radio, television, radio and television networks, news services, magazines, trade papers, in-house publications, professional journals, or other news-reporting or news-gathering agency whose function is to inform the public or some segment thereof. Rule 605(a)(1)SCACR.

The trial judge introduced Judge McCaslin to make the jury aware why she was present and in what capacity. Being that Judge McCaslin was newly elected to the Circuit Court only a few months earlier, she was still in her training period. As part of the training Judge's observe more experienced members of the Judiciary as they conduct trials. She was there to observe nothing more. During voir dire this is what was relayed to the jury panel by the trial court:

> "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 the trial." (Tr. p. 7 lines 1-5).

The trial court made it clear that Judge McCaslin was newly elected and just there in an observation capacity. The trial court had to make the jury panel aware why there were two judges sitting on the bench. A failure not to make the panel aware why Judge McCaslin was there would have raised unnecessary suspicions by the jury panel. Any suspicions the jury may have had was satisfied by the trial judge informing them of her minor capacity in this trial.

Chief Justice of the South Carolina Supreme Court Donald W. Beatty also came in to observe the proceedings. He was there not because of the parties involved, but due to the unique circumstances surrounding this trial. Due to the pandemic the Supreme Court ordered that all jury trials are to be continued. The denial of an opportunity to appear before a jury of your peers cannot go into perpetuity. A case had to proceed before a jury with Covid-19 protections in place, people wearing masks, the panel being brought in three groups, and the jury sitting apart so social distancing could remain in place. Chief Justice Beatty was present, to assure safety measures were in place. He was just briefly acknowledged by the trial court:

> THE COURT: Chief Justice, good to have you with us.
>
> CHIEF JUSTICE BEATTY: Thank you for having me. (R. p. 19 lines 12-13).

There was no significant amount of attention given to Chief Justice Beatty. However, the trial judge only did what any Circuit Court Judge would have done in similar circumstances. The trial court just made a short acknowledgement of the Chief Justice of the South Carolina Supreme Court. This was done out of respect to the Chief Justice of the highest Judiciary in the State of South Carolina.

Elmore argues that the court's repeated remarks were coercive, that strongly suggested to the jury they must reach a verdict. In reading the record it is easy determine that the major concern of the trial judge was for none of the participants to become infected with Covid-19. The presence of members of Court Administration and Chief Justice Beatty was because of the unique position of this trial. This was the first jury trial conducted after the Supreme Court ordered the close of trials because of the pandemic. This trial was an experiment on how a jury trial can be conducted in a way to avoid the spread of the coronavirus. Nothing was said by the trial court that reveals a wish for this case to come to a verdict. There were plenty of references regarding social distancing and masks so the jury or a party of the case would not be infected. The trial court began voir dire with the following statement:

> "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. For example, everyone's wearing masks. I'll put my mask on after I finish talking." (R. p. 4 line 25 – p. 5 line 5).

> "Social distancing. The trial jury – when we select the trial jury at the end of the day, as you can see, the chairs are – are spaced apart. We've taken temperatures at the front door. And we will disinfect periodically throughout the day, not only in the courtroom, but, also, in the jury room. So we – will do everything we possibly can to keep everyone, not only the jury, but, also, the lawyers, court staff and everyone else involved in – in this case safe." (R. p. 5 line 6-14).

Elmore argues that the trial court stating that the case needs to be a "success" is referring to a need of the jury to return with a verdict. It is clear the meaning of "success" had nothing to do with a verdict, the trial court was referring to the pandemic. During voir dire the trial court also stated:

> "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." (R. p. 7 line 22 – p. 8 line 3).

Why would the trial court mention another "test case" in Horry County if he was referring only to a verdict? It is obvious with that statement his definition of "success" had everything to do with no one contracting Covid-19 and nothing to do with a verdict.

Within his brief Elmore cited many South Carolina Supreme Court decisions relating to *Allen* charges. These cases are relating to trial courts pushing the minority number of members to side with the majority in order to quickly resolve the case and return with a verdict, or other unconstitutional actions committed by law enforcement. *Workman v. State,* 412 S.C. 128, 771 S.E.2d 636 (2015)(*Allen* charge was directed to minority voters on the jury panel, therefore, unconstitutionally coercive.); *Tucker v. Catoe,* 346 S.C. 483, 552 S.E.2d 712 (2001)(*Allen* charge violated defendant's due process rights when the charge viewed as a whole was impermissibly directed to minority jurors.) *State v. Bryant,* 354 S.C. 390, 581 S.E.2d 157 (2003)(Court finds the questioning of jurors family members, friends and employers by members of law enforcement not fair and impartial, and in violation of the Appellant's sixth and fourteenth amendment rights.) In the present case Elmore argues that the trial court violated his right to due process during voir dire, however, no members of the jury panel had been selected. Nothing was presented by Elmore that mentioning of the being a "success" was the trial court's attempt to influence the jury to return

with a verdict. It is clear by the voir dire questions and other references during trial, "success" was meant for this case to come to a conclusion without any participant becoming infected with Covid-19.

Just as an *Allen* charge is judged "in its context and under all circumstances," *Dawson v. State,* 352 S.C. 15, 20, 572 S.E.2d 445, 447 (2002) so too should a trial judge's other charges or comments to a jury during voir dire. In reading the trial court's voir dire questions and comments during trial it should be obvious that the court's only concern was that all parties involved avoid being infected with the Covid-19. The jury's verdict was not a major concern of the trial court. The trial court also wished not to spread the coronavirus to other members of the jury panel. During voir dire the trial court asked the following questions:

> "Has any member of the jury panel tested positive for COVID-19 since you filled out the last questionnaire from the Court? If so please stand." (R. p. 23 lines 20-22).
>
> "Any member of the jury panel fear that you are likely to contact COVID-19 by appearing in court for jury duty and, of course, if selected this week on the trial jury?" (R. p. 24 lines 11-14).
>
> "Is any member of the jury panel unwilling to abide by any rules the Court instructs you regarding social distancing and the wearing of masks today and if selected on the trial jury during the week?" (R. p. 24 line 23 – p. 25 line 1).
>
> "Understanding that the lawyer – at least, the lawyers have indicated that this case may take all week, understanding that, any member of the jury panel have any opposition to wearing a face mask for the duration of the trial, also, while in the jury room? Is there any opposition to that?" (R. p. 25 lines 5-10).
>
> "Is any member of the jury panel unwilling to notify the court immediately if during the trial, if you're selected on the trial jury, if you begin feeling ill, if you're exposed to anybody that's been ill, or if you believe that maybe you are developing some COVID-19 symptoms? Is there anybody on the jury – the jury panel unwilling to do that if you're selected on the trial jury?" (R. p. 25 line 22 – p. 26 line 3).

Elmore argues that the trial court's emphasis on the importance of this trial forced the jury to come to a verdict. That was not the concern of the trial court. It is obvious that the trial court expected the jury to come with a fair verdict only after properly deliberating and taking into consideration evidence presented by the State as well as the Defense. The court was concerned that due to the pandemic the jury might punish one side of the other, or come with a verdict prematurely, without proper deliberation. These concerns were revealed in these voir dire questions:

> "Would any member of the jury panel blame the Defendant or the State for having to attend a public hearing during this pandemic? Would you blame either side or both sides for having to attend today potentially the week, if you're selected." (R. p. 24 line 17-21).
>
> "Now if you are selected on the – on the trial jury, would any member of the jury have a fear of COVID-19 to the extent that you would feel pressured to render a decision in the case quicker than maybe you otherwise would?" (R. p. 26 lines 15-19).
>
> "Would there be anything to prevent you, whether it's COVID-19 or anything else, from making a thorough and deliberate deliberation and decision in the case in order to reach a verdict?" (R. p. 26 lines 20-23).

Throughout the trial the court displayed its concern regarding any possible Covid-19 outbreaks that could occur due to the jury trial. The Judge constantly warned about the importance of wearing masks, and jurors remaining safe, avoiding any possible infections. Some examples of the concerns and warnings displayed by the trial court during the trial include:

1. As witness Andrew Turner of the Laurens Police Department concluded his testimony the trial court reminded him to wear his mask and he also instructed everyone to remember to wear their masks properly. (R. p. 553 lines 16-25).

2. The trial court offered an appreciation to the jury for abiding to social distancing in the courtroom and jury room. (R. p. 587 lines 21-25).

3. The trial court stating that this is a "test jury trial" and that so far it's working, "and a lot has to do with you guys I appreciate it very much." (R. p. 588 lines 1-4).

4. While releasing the jury for the weekend, he expressed to them to "try and lay low for the weekend and keep your health." (Supp. ROA. p. 1 lines 13-15).

5. There were numerous times during trial especially with expert witnesses dealing with forensics that the trial court reminded the witness to wear gloves when they were going to handle evidence.

Elmore argues that a jury returning with a verdict in only two hours reveals the coercion used by the trial court. He argues that the trial court made sure that the jury returned a verdict or this case would not be a "success." The jury returning with a verdict in two hours had nothing to do with any statements made by the trial court during voir dire. The two hour deliberation had everything to do with the overwhelming evidence presented by the State proving Elmore's guilt beyond a reasonable doubt. The brevity of a jury's deliberation is not a ground for the reversal of a criminal conviction. *State v. Lemire,* 406 S.C. 558, 753 S.E.2d 247 (Ct. App. 2013).

Ms. Crystal Bluford, Elmore's ex-girlfriend, who was an eyewitness, testified that she had broken up with Elmore in August just two months before the incident. (R. p. 169 line 25 – p. 170 line 2). She had a previous altercation with Elmore and due to this altercation she changed the deadbolt and doorknob locks (R. p. 170 lines 23-25), and Elmore did not have a key. (R. p. 169 lines 12-14). She testified that after Elmore had broken into her home and assaulted the victim, she saw a knife and she ran. (R. p. 184 lines 2-4). She testified that after the murder Elmore dragged the victim's body from the bedroom out to the kitchen. (R. p. 196 lines 17-19) Office Daniel Ducket testified that he did see a trail of blood going through the hallway, looking like someone had been dragged or crawled. (R. p. 277 lines 10-13). Officer Andrew Turner testified that he observed the screen removed from the kitchen window and a ladder propped against a table leaning onto the window. (R. p. 501 line 25 – p. 502 line 14). When he got to the scene the window was

still open. He also saw blood smeared in the carpet which was a constant smear all the way from the kitchen leading into the back bedroom. (R. p. 511 lines 25 – p. 512 line 2).

The testimony of these officers corroborated the testimony of Ms. Bluford. The officers not only testified about the blood smear from the bedroom to the kitchen, they also testified about finding the body of the victim outside with his shirt rolled up to his head. (R. p. 305 lines 7-9). Dr. Michael Ward testified that the victim's body smelled like gasoline. (R. p. 448 lines 17-18). He also testified as to the condition of the body when he received it. He stated that his shirt was pulled up above the level of his chest as if he was pulled by his feet. (R. p. 460 lines 12-16). The items that were found by law enforcement that were being burned were also identified as being the identical clothing Elmore wore to work that same night. With the testimony, physical and forensic evidence presented by the State it was obvious that Elmore was the person who committed this murder. Jury deliberations were only two hours not because of what the trial judge told the jury during voir dire, but because of all the evidence presented proving his guilt.

By a reading of the transcript it should be obvious that when speaking of the trial being a "success" the trial court was referring to everyone involved remaining healthy and not being infected with Covid-19. The trial court never put any pressure on the jury to return with a verdict of guilty or not guilty. The trial court never revealed it was concerned with the trial's outcome. The court was not concerned if the jury reached a verdict of guilty, not guilty or they were hung. The transcript obviously revealed that a major concern of the trial court was that this case come to a conclusion with everyone involved remaining healthy, not being infected with Covid-19. That was the "success" being sought by the trial court, Court Administration, and the South Carolina Supreme Court. This was the only way that trial courts were to resume during the height of the

pandemic. Due to a failure to present any evidence as to the trial court coercing the jury into a verdict, the State would ask this court to affirm the decision of the trial court.

2. **The trial judge did not err in refusing to instruct the jury on the lesser included offense of voluntary manslaughter when there was no evidence presented that Elmore killed the victim in the sudden heat of passion, and upon sufficient legal provocation.**

Ms. Crystal Bluford and Elmore started a relationship in February of 2018, they met each other on Facebook. (R. p. 166 lines 24-25). At the time Elmore was living with his sister. (R. p. 168 lines 18-21). Ms. Bluford testified that during their relationship he was overprotective and jealous, it became a big issue between them. (R. p. 261 lines 12-14). The two of them got into an altercation which caused their breakup in August of 2018. (R. p. 170 lines 16-20). Ms. Bluford then met the victim while working third shift at ZF Transmissions. They developed a friendship and on the night the incident occurred Ms. Bluford invited the victim over to her residence. Once he arrived they both laid on the bed fully clothed talking and watching TV until they both fell asleep. (R. p. 178 lines 2-6). Elmore went in and attacked the victim. He later told Ms. Bluford that he was watching them from her bedroom window for two hours wondering which one he will kill first. (R. p. 192 lines 8-10).

Elmore was later arrested and was charged with the offenses of murder, burglary 1st, and kidnapping. Upon his arrest he was questioned by Captain Jared Hunnicutt of the Laurens Police Department. After being given his *Miranda* warnings Elmore gave a statement. Within this statement Elmore told Captain Hunnicutt that he went to Ms. Bluford's to pay her the restitution he owed her. Once he got there he was attacked by the victim. (R. p. 358 lines 6-11).

At the conclusion of this trial Elmore's counsel made a request for the trial court to charge the jury on the offense of voluntary manslaughter. Elmore argued the "any evidence" standard to support his request. The trial court ruled that he was not going to instruct manslaughter because

by Elmore's own admission during his interview there was no heat of passion or provocation to justify a manslaughter charge. (R. p. 847 lines 17-21).

Standard of Review

In criminal case the appellate court sits to review errors of law only. *State v. Wilson,* 345 S.C. 1, 5, 545 S.E.2d 827 (2001). Voluntary manslaughter is the unlawful killing of a human being in the sudden heat of passion upon sufficient legal provocation. *State v. Kornahrens,* 290 S.C. 281, 286, 330 S.E.2d 180, 184 (1986). An appellant court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion. *State v. Marin,* 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016). An abuse of discretion by the trial court on a jury charge occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. *State v. Pittman,* 373 S.C. 527, 569, 647 S.E.2d 144, 166 (2007). To warrant reversal, a trial judge refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant. *State v. Hernandez,* 386 S.C. 655, 659, 690 S.E.2d 582, 584 (2010). It is not error to refuse to charge the lesser included offense unless there is evidence tending to show the Defendant was guilty *only* of the lesser offense. *State v. Coleman,* 342 S.C. 172, 175, 536 S.E.2d 387, 389 (Ct. App. 2000)(emphasis in original).

Discussion

Elmore argues that the trial judge erred in not relaying a jury instruction for the offense of voluntary manslaughter. He argues that there exists a "sudden heat of passion" when he found his "on again off again" girlfriend in bed with another man.

The State argues that there was not a sudden heat of passion, nor sufficient legal provocation. In *State v. Pittman,* the South Carolina Supreme defined voluntary manslaughter as an "unlawful killing of a human being in the sudden heat of passion upon sufficient legal

provocation." *Pittman,* 373 S.C. at 571, 647 S.E.2d at 167. A sudden heat of passion 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 an uncontrollable impulse to do violence. *State v. Cole,* 338 S.C. 97, 101-102, 525 S.E.2d 511, 513 (2000). Elmore argues that he had the sufficient passion. It is his position that according to the State arguments regarding his relationship with Ms. Bluford, his actions, when he saw them in bed together, justifies a jury charge for manslaughter. However, heat of passion alone will not suffice to reduce murder to manslaughter. *Pittman,* 373 S.C. at 571, 647 S.E.2d at 167. In order for there to be manslaughter there must also be sufficient legal provocation.

Elmore argues that the evidence raised by the State of his "on again off again" relationship with Ms. Bluford and him finding her and the victim in bed together reveals a sufficient legal provocation. Two people sleeping together fully clothed is not a sufficient legal provocation to kill someone. Their prior relationship is not enough to justify this killing and allow this to be considered manslaughter. History of a domestic strain between Defendant and one victim without evidence of legal provocation failed to rise to the jury question of voluntary manslaughter. *Kornahrens,* 290 S.C. at 281, 350 S.E.2d at 180 (1986). The State raised the relationship between Elmore and Ms. Bluford in order to reveal his jealousy, thereby, revealing a motive to commit murder. There was evidence presented revealing that Elmore watched them through Ms. Bluford's bedroom window before he attacked the victim. This reveals that a sudden heat of passion did not exist.

Ms. Bluford testified that she was told by Elmore that he looked through her bedroom window for two hours trying to figure out if he was going to kill her first, him first, or both of them. (R. p. 192 lines 8-10). Ms. Anna Tankersley South Carolina Law Enforcement Division (SLED) crime scene investigator testified that she reported to the crime scene the day after the

incident. While there she lifted latent fingerprints off the exterior side of the window located at the foot of the bed. (R. p. 643 lines 16-18). Mr. Thomas Darnell SLED fingerprint examiner testified that upon examination of the lifted prints he positively identified four latent prints; left little, left ring, left middle and right middle fingers belonging to Elmore. (R. p. 704 lines 22-25)(R. p. 708 lines 1-3). This forensic evidence corroborates Ms. Bluford's testimony that Elmore told her he was watching them from the bedroom window. So this does not show a "sudden heat of passion" which is needed for voluntary manslaughter.

The trial court decided not to charge the jury on voluntary manslaughter due to the statement Elmore gave to law enforcement. It was the position of the trial court that upon Elmore's own admission there was no heat of passion, or provocation to justify a manslaughter charge to the jury. (R. p. 847 lines 17-21). In determining whether the evidence requires a charge of voluntary manslaughter, the Court views the facts in the light most favorable to the defendant. *Pittman,* 373 S.C. at 572, 647 S.E.2d at 168. The most favorable evidence for Elmore was his statement to law enforcement proclaiming that this was self-defense. Nothing in his statement revealed sudden heat of passion nor sufficient legal provocation.

Elmore argues that the trial court relied solely on his statement and ignored the remainder of the evidence presented by the State. If the trial court was to consider the State's evidence then all evidence must be considered. In determining whether an act which caused death was impelled by heat of passion or by malice, all the surrounding circumstances and conditions are to be taken into consideration, including previous relations and conditions connected with the tragedy, as well as those existing at the time of the killing. *Pittman,* 373 S.C. at 575, 647 S.E.2d at 171. Even viewing the evidence presented in the light most favorable to Elmore the evidence presented still does not support a jury charge for voluntary manslaughter.

The evidence presented by the state revealed Elmore as a jealous and controlling boyfriend. (R. p. 261 lines 12-14). Ms. Bluford testified that if she did not answer her phone or there would be a big argument, which would cause him to just show up at her residence unannounced. (R. p. 261 lines 18-21). It got to the point that she could no longer be in a relationship with him. (R. p. 264 lines 14-16). The evidence revealed that the victim and Ms. Bluford were just lying on her bed fully clothed, sleeping. That fact was never disputed by Elmore. Watching two individuals lying on a bed fully clothed sleeping is not enough to find there was sufficient legal provocation for Elmore to attack the victim.

Ms. Bluford testified that Elmore told her that he was watching them through her bedroom window for two hours. There was forensic evidence supporting his presence at that window. This removes any sudden heat of passion. Elmore argues that the State did argue that he was in a "jealous rage" when he attacked the victim. This rage occurred after seeing Ms. Bluford and the victim in bed together not in any sexual act, but fully clothed and sleeping. An average person would not be aroused to the point of murder by just seeing two individuals in a bed sleeping. Elmore watched them for two hours, this does not show any sudden heat of passion but premeditation and malice, the difference between murder and manslaughter. A jury instruction on a lesser included offense is required *only* when the evidence warrants such an instruction. *Coleman,* 342 S.C. at 175, 536 S.E.2d at 389 (2000)(emphasis in original).

The court decided to use Elmore's own statement to determine if there should be a jury charge for manslaughter. The law is clear that the evidence must be viewed in the light most favorable to the Defendant. Nothing could be more favorable to a defendant than his own statement claiming self-defense. In looking at his statement, if all the facts are true then there is no sudden heat of passion nor sufficient legal provocation. Elmore told law enforcement that he went through

the front door of Ms. Bluford home to pay her restitution money. Elmore then stated that once he entered the bedroom the victim jumped on him and a fight began. This fight went from the bedroom through the hallway into the kitchen. He stated he had to grab the knife and stab the victim to defend himself. Elmore's claim is self-defense, and this was his claim through the entire trial. So this case was going to come down to who the jury believed, either they believed Ms. Bluford and it is murder, or they believed Elmore and he is not guilty.

Within his brief Elmore argues that during trial the State argued that he was a scorned lover that showed up in a "jealous rage" so that proves a sudden heat of passion. For manslaughter to exist there must be a sudden heat of passion upon a sufficient legal provocation. The fact the victim and Ms. Bluford were sleeping fully clothed is not sufficient legal provocation to attack someone with a knife eventually killing them. Especially since there is evidence that Elmore stalked them for two hours. This allowed for any "cooling off" period to occur before he committed these heinous acts.

It is clear from the evidence presented that either Elmore was defending himself, or that he attacked the victim while sleeping after watching them for hours. So either Elmore is innocent because of the law of self-defense or he committed murder. The facts of this case do not reveal the possibility of manslaughter. The court made the proper decision not to charge the jury on voluntary manslaughter.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General
ID No. 14244

TOMMY EVANS JR.
Assistant Attorney General
ID No. 65282

Office of the Attorney General
Post Office Box 11549
Columbia, SC 11549
(803) 734-6305

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit
(864) 942-8802

BY: *s/ Tommy Evans, Jr.*

ATTORNEYS FOR RESPONDENT

September 28, 2021
Columbia, South Carolina

RECEIVED
Sep 28 2021
SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LAURENS COUNTY
Honorable Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2020-001162

THE STATE,.....RESPONDENT

v.

LUTAVIOUS DENARD ELMORE,.....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 28th day of September, 2021.

s/ *Tommy Evans, Jr.*
TOMMY EVANS, JR.
Assistant Attorney General

ATTORNEY FOR RESPONDENT