

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM LEXINGTON COUNTY

Court of General Sessions

Eugene C. Griffith, Circuit Court Judge

Unpublished Opinion No. 2021-UP-275

(S.C. Ct. App. Filed July 14, 2021)

THE STATE,

Respondent,

v.

MARION C. WILKES,

Petitioner.

APPENDIX

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S.C. SUPREME COURT

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Marion C. Wilkes, Appellant.

Appellate Case No. 2018-001556

Appeal From Lexington County
Eugene C. Griffith, Jr., Circuit Court Judge

Unpublished Opinion No. 2021-UP-275
Heard June 9, 2021 – Filed July 14, 2021

AFFIRMED

H. Wayne Floyd and Colin Thomas Lee Spangler, both
of Wayne Floyd Law Office, of West Columbia, for
Appellant.

Attorney General Alan McCrory Wilson and Assistant
Attorney General Tommy Evans, Jr., both of Columbia;
and Solicitor Samuel R. Hubbard, III, of Lexington, all
for Respondent.

PER CURIAM: In this criminal appeal, Marion C. Wilkes appeals his conviction
for the murder of his wife, Susan Wilkes (Victim). Wilkes argues the trial court

erred in (1) excluding a DVD copy and portions of the film *Where the Lilies Bloom* (the Film) and (2) instructing the jury that malice may be inferred from the use of a deadly weapon. We affirm.

"In criminal cases, appellate courts sit to review errors of law only, and are therefore bound by the trial court's factual findings unless clearly erroneous." *State v. Robinson*, 410 S.C. 519, 526, 765 S.E.2d 564, 568 (2014). "An appellate court will not reverse a trial court's decision regarding a jury instruction unless there is an abuse of discretion." *State v. Brooks*, 428 S.C. 618, 625, 837 S.E.2d 236, 239 (Ct. App. 2019). Additionally, the exclusion or admission of evidence is within the trial court's discretion and will only be reversed if shown to be a "manifest abuse of discretion accompanied by probable prejudice." *State v. Westmoreland*, 421 S.C. 410, 418–19, 807 S.E.2d 701, 706 (Ct. App. 2017) (quoting *State v. Commander*, 396 S.C. 254, 262–63, 721 S.E.2d 413, 417 (2011)). "An abuse of discretion 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, 570, 647 S.E.2d 144, 166–67 (2007).

1. We find the trial court did not err in excluding the Film. First, we find Wilkes's argument that the trial court erred in failing to review the Film before ruling on its admissibility is unpreserved. *See State v. King*, 424 S.C. 188, 198, 818 S.E.2d, 204, 209 (2018) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal." (alteration in original) (quoting *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693–94 (2003) (per curiam))). The trial court considered and ruled on the Film's admissibility on two occasions, and at no point did Wilkes argue the court was required to view the Film before ruling on its admissibility. Accordingly, this issue is unpreserved, and we affirm.

Second, we find Wilkes's argument that the trial court erred in its Rule 403 analysis misconstrues the court's holding. *See generally* Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."). Based on our review of the record, the trial court excluded the Film under Rule 402 because it found it was not relevant. *See* Rule 402, SCRE (stating relevant evidence is admissible and irrelevant evidence is inadmissible). When the court first ruled on the matter, it noted that the Film was "not directly probative of the events." When Wilkes raised the issue again, the

court said, "I do[not] think that movie needs to come in, so I'm sticking – I[am] not going to allow the movie. *Nothing in the movie is relevant to what happened in 2014.*" (emphasis added). Because the trial court excluded the Film under Rule 402 rather than Rule 403, Wilkes's arguments in his appellant's brief are nonresponsive to the court's ruling. Therefore, we find the issue is unpreserved because Wilkes does not address relevancy under Rule 402 until his reply brief. *See State v. Fripp*, 396 S.C. 434, 441, 721 S.E.2d 465, 468 (Ct. App. 2012) ("[T]he appellant's failure to challenge the trial court's ruling in the appellate brief renders the unchallenged ruling the law of the case."); *State v. Daise*, 421 S.C. 442, 451, 807 S.E.2d 710, 714 (Ct. App. 2017) ("[A]n argument made in a reply brief cannot present an issue to the appellate court if it was not addressed in the initial brief." (quoting *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 692 (Ct. App. 2001))). Accordingly, we affirm the trial court's ruling on this issue.

2. We find the trial court erred in charging the jury that malice may be inferred from the use of a deadly weapon. *See State v. Burdette*, 427 S.C. 490, 504–05, 832 S.E.2d 575, 583 (2019) (holding charging the jury that malice may be inferred from the use of a deadly weapon is error regardless of the evidence presented at trial). However, we find this error was harmless. *See State v. Smith*, 430 S.C. 226, 233, 845 S.E.2d 495, 498 (2020) (per curiam) ("[E]rroneous jury instructions are subject to a harmless error analysis."); *State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014) ("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. 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.'" (citation omitted) (quoting *State v. Kerr*, 330 S.C. 132, 144–45, 498 S.E.2d 212, 218 (Ct. App. 1998))); *Kerr*, 330 at 144, 498 S.E.2d at 218 (providing that jury instructions must be considered as a whole and if reasonably free from error, isolated portions that may be misleading are not reversible error). Other than the inferred malice charge, the trial court's instructions were a correct statement of the law. We find beyond a reasonable doubt that the erroneous instruction did not contribute to the verdict because the State presented overwhelming evidence of malice. The State presented evidence that Wilkes confessed to killing Victim and attacking her in a manner consistent with the injuries and cause of death identified by the medical examiner. The State also presented evidence that Wilkes, with his son's help, secretly buried Victim and

sought to conceal her death before ultimately filing a false missing person's report.¹ Multiple witnesses testified that following Victim's death and alleged disappearance, Wilkes's demeanor was calm and unemotional. The State also showed the jury that, during the investigation of Victim's disappearance, Wilkes asked his son if he "change[d] up on" Wilkes and told him "[t]hey need physical evidence" and "I a[m not] changing up." Finally, the State introduced letters from Wilkes to his son discussing the need to "get their story straight" and that they would receive Victim's money if they were acquitted. In light of the evidence presented at trial, we hold the erroneous instruction did not contribute to the jury's verdict. *See Middleton*, 407 S.C. at 317, 755 S.E.2d at 435 (stating the relevant inquiry is whether the erroneous instruction contributed to the verdict). Accordingly, we affirm the trial court on this issue.

Based on the foregoing, Wilkes's conviction is

AFFIRMED.

WILLIAMS, THOMAS, and HILL, JJ., concur.

¹ Wilkes asserted Victim committed suicide by a self-inflicted stab wound and he kept her alleged suicide and burial a secret pursuant to her wishes.

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

THE STATE

Respondent,

v.

MARION C. WILKES,

Appellant.

APPELLATE CASE NO. 2018-001556

Appeal from Lexington County

Eugene C. Griffith, Circuit Court Judge

Unpublished Opinion No. 2021-UP-275

PETITION FOR REHEARING

On July 14, 2021, this Court issued an unpublished decision affirming Appellant Marion Wilkes's conviction and sentence. Pursuant to Rule 221(a), SCACR, Appellant respectfully requests the Court rehear the matter due to points overlooked and misapprehended in rendering its decision. Appellant submits the Court erred in determining counsel failed to preserve the two issues concerning the film *Where the Lillies Bloom*: that the trial court should have previewed portions of the film before ruling on it and that the trial court erred in excluding the video pursuant to Rule 403, SCRE, which was the only provision the State relied on in its objection before the trial court.

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SC Court of Appeals

Accordingly, even if the trial court's ruling may be characterized more as based on Rule 402 rather than Rule 403, the actual objection was firmly grounded in Rule 403, and therefore, the Court should have reached the merits of Appellant's argument. Additionally, Appellant contends the Court misapplied its harmless error analysis, as the evidence of malice in this case is not overwhelming; thus, Appellant suffered prejudice from the erroneous implied malice charge.

I. Screening of the Film

In its decision, the Court concluded defense counsel did not properly preserve this issue at trial because counsel failed to expressly inform the trial court that it should view the first thirty-five minutes of the film before ruling on its admissibility. The Court acknowledged that the trial court ruled on the admissibility twice, thus there was no dispute that both parties and the trial court were well aware of the question concerning the admissibility of the film. While counsel concedes it may have been more prudent in hindsight to expressly request the trial court view a portion of the film before issuing its ruling, the objection that was lodged, which in this case was done so by the State and not defense counsel, was sufficient to preserve the issue on appeal.

At trial, the admissibility of *Where the Lilies Bloom* was argued on three separate occasions: immediately prior to Appellant taking the stand; during Appellant's testimony on direct examination; and at the beginning of Appellant's testimony on re-direct examination.¹ Each of these arguments followed an objection by the State to the admissibility of the film.

After the State raised its objection to the film under Rule 403—citing specifically unfair prejudice based on waste of time and that it was cumulative—the trial court was tasked with

¹ Although argument on the film's admissibility was heard three (3) separate times, the film was only offered by Appellant twice: during his direct examination and at the conclusion of his cross examination. The other argument occurred when the State objected to the film prior to Appellant's testimony, before the film was offered by Appellant.

determining both the probative value of the film and the danger of unfair prejudice it presented. Instead of screening the film to reach a conclusion on these issues, the court summarily ruled the film was not probative of the events in this case. The question in this case is this: Could the court meaningfully evaluate the film's probative value without first discerning the film's contents, either by screening the film in whole or in part? Respectfully, Appellant asserts the answer to this question is no.

Appellant submits this Court erred in applying a hyper technical application of our preservation rules, thereby preventing it from reaching the merits. It is clear that an issue must be both presented to and ruled upon by the trial court in order to preserve an issue on appeal. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (noting the “long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments”). However, in employing this fundamental rule, the court is tasked not with examining whether a party used the exact language of a rule or case but instead must review the record to determine whether the trial court understood the basis of the objection. State v. Russell, 345 S.C. 128, 132, 546 S.E.2d 202, 204 (Ct. App. 2001) (noting that the precise legal doctrine need not be named when “it is clear from the argument presented in the record that the motion was made on this ground”). Specifically, issue preservation rules are not a game of “gotcha,” see Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012); instead, they are intended “to prevent[] a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case.” I'On, 338 S.C. at 406, 526 S.E.2d at 724.

Because this Court respectfully invoked too narrow an application of issue preservation rules, it did not address the merits. Concerning the merits, the trial court did not and could not properly analyze the admissibility of the film without first screening it. Without actually looking at the piece of evidence, a court is in no position to determine its probative value or assess the danger of unfair prejudice it presents. While there is no bright-line rule in this State as to how much analysis a trial court must undertake before ruling on an objection brought under Rule 403, it is clear the court must, at the very least, undertake *some* analysis of the contested evidence before excluding it at trial. See State v. King, 424 S.C. 188, 199-200, 818 S.E.2d 204, 210 (2018) (finding an issue preserved where the argument was not that the trial court failed to employ a proper Rule 403 or 404(b) analysis, but instead that “the trial court erred by not conducting any analysis *at all* before deciding to admit evidence of the unrelated murder charge and the [other] charges”) (emphasis in original).

Moreover, our Supreme Court's holding in Goss v. State is instructive. Goss v. State, 425 S.C. 101, 820 S.E.2d 373 (2018). In Goss, a judge ruling on a PCR application chose not to hear testimony from alibi witnesses; rather the judge, along with consent of both parties, took judicial notice of the witness's testimony. Goss at 106, 375. The judge went on to rule these witnesses were not credible despite never actually hearing their testimony or performing any type of analysis into their credibility. Id. The Goss court found this analysis to be erroneous, noting: “When a factfinder evaluates the credibility of witnesses, the mental process employed often requires the credibility evaluations to be based upon a consideration of all the evidence, not simply the parts the factfinder choose to hear firsthand.” Goss at 108, 376.

In this case, the trial court's decision to rule on the probative value of the film without even making a cursory attempt to evaluate its contents is error. Appellant contends that in light of Goss, when a court rules on the admissibility of evidence, the court must make decisions based on *all* the evidence and cannot fail to examine the piece of evidence or its contents prior to ruling. Accordingly, it was error for the Court to determine Appellant did not preserve this issue on appeal, and thus, it should have reached the merits.

II. Rules 402 and 403, SCRE

This Court also determined Appellant misconstrued the trial court's ruling as one under Rule 403 rather than Rule 402, and thus, the failure to address Rule 402 until on reply rendered the issue unpreserved. Appellant respectfully disagrees and contends the Court overlooked the fact that it was the State who objected and sought to exclude the film. In anticipation of Appellant offering the film, the State objected to the film's entry prior to Appellant taking the stand. (R. p. 126, lines 7-25, p. 127, p. 128, p. 129, lines 1-15.) The crux of the State's argument was that the film should be excluded under South Carolina Rule of Evidence 403. (R. p. 126, lines 21-22.)² After hearing only from the State, the trial court took the matter under advisement. (R. p. 129, lines 16-17.)

Appellant took the stand and testified about the plot of the film and its characters. (R. p. 146, lines 8-25, p. 421, lines 1-4.) Appellant then identified and offered a DVD copy of the film, informing the court he wished to enter the DVD and publish the first thirty-five (35) minutes of the film to the jury.⁶ (R. p. 147, lines 21-25, p. 148, lines 1-3.) At this point the State renewed its objection under Rule 403, arguing "Your Honor, we stand on the same objection. We think this is *cumulative*. We think it's a *waste of time*. We think it's *prejudicial*, Your Honor. He has

² Indeed, the State asserted because videos are treated as photographs, "they are to use the same 403 analysis." (R. p. 126, line 20.)

summarized what the movie is about. I think that is sufficient for the jury's benefit." (R. p. 148, lines 4-8.) (emphasis added). Significantly, Rule 403 is entitled, "Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time." The text of the rule provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." It is immediately apparent that the State's objection was based on Rule 403 because it used the same grounds as set forth in both the title of the rule and its contents—that the film was "cumulative," "a waste of time," and "prejudicial." (R. p. 148, lines 4-8.). While it is perplexing how the introduction of the film could be prejudicial to the State if it apparently was not even relevant, it is patently evident the State—the party that raised the objection—sought to exclude the video under Rule 403. Accordingly, the trial court's ruling should be viewed in light of the parties' arguments, rather than under Rule 402. While the question on appeal ultimately stems from the trial court's decision to exclude the film, characterizing the ruling as one under Rule 402 effectively transforms the State's basis for the objection. Moreover, even if the trial court ruled solely under Rule 402, which Appellant rejects, the State opened the door to the film's admissibility by vigorously questioning Appellant about the film during its cross-examination. There, the State repeatedly questioned Appellant about specific scenes, characters, and statements made in the film. (R. p. 190, lines 7-23.) Following cross-examination, Appellant re-offered the film, arguing that because the State went into specific statements made in the film, the film should be admitted in order to give jurors the opportunity to evaluate the film as a whole. (R. p. 191, lines 5-8.) The trial court again excluded the film, noting "I don't think that movie needs to come in, so I'm sticking -- I'm not going to allow the movie."

However, the Court overlooked the fact that there would have been little need for the State to extensively question Appellant about the film if it felt the film was not relevant. This is not what the State did, however, and therefore is another instance demonstrating the issue in the parties' eyes turned on Rule 403 rather than Rule 402.

Respectfully, the Court erred in concluding Appellant did not preserve the issue when it tailored its argument based on the ground the State advanced at trial. To hold otherwise would enable the State to reap the benefits of a ruling based on nothing the State presented to the court. Here, the State never raised Rule 402, and therefore, to the extent it is unclear as to the precise basis of the trial court's ruling, any confusion should be decided in favor of Appellant. See Atl. Coast Builders, 398 S.C. at 333, 730 S.E.2d at 287 (Toal, J., concurring) (noting preservation rules are not a game of "gotcha" and that "where the question of preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation"); State v. Williams, 417 S.C. 209, 229, 789 S.E.2d 582, 593 (Ct. App. 2016) ("Our supreme court has observed 'it may be good practice for us to reach the merits of an issue when error preservation is doubtful.'" (quoting Atl. Coast Builders, 398 S.C. at 330, 730 S.E.2d at 285)).

III. Harmless Error

While the Court correctly concluded the implied malice charge was error, it nevertheless concluded it was harmless. Appellant respectfully submits the Court erred in failing to find that he suffered prejudice because of this erroneous charge. Other than the weapon, the record is scant of evidence of actual malice. No witness testified about observing a fight between Appellant and Decedent on the date of her death. No witness testified about ill-will or hatred between the parties. The only evidence that could be deemed as reflecting malice came from Appellant himself, when

he told investigators about a confrontation that occurred immediately prior to her death. The story about the confrontation came during the interview where Appellant confessed to killing Decedent following his son being charged with murder. Appellant recanted this story at trial. (R. p. 161, lines 5-25, p. 162, lines 1-2.)

Appellant concedes numerous versions of what occurred surrounding Decedent's death were presented at trial. Respondent relies on parts of each account to argue actual malice was present: the alleged affair, the finances, alcoholism, and gambling. While these factors may supply an alleged motive for the crime, they do not constitute malice under the law charged at trial. Further, in conducting a harmless error analysis, appellate courts "must be careful not to weigh the evidence. In assessing the State's harmless error argument, we recognize that what we refer to as plausible conflicting evidence may not be viewed as such by the jury." State v. Herndon, 430 S.C. 367, 373 n.6, 845 S.E.2d 499, 502 (2020) (finding the failure to give a Logan charge was not harmless because there was conflicting evidence of guilt).³

Additionally, Appellant explained his confession to the murder was his attempt to protect his son, who he learned was charged with murder. While this Court relied on Wilkes subsequently recanted confession as evidence of malice, Appellant respectfully contends this is insufficient to demonstrate overwhelming evidence of malice and that the clearly erroneous jury charge did not contribute to the verdict. Further, the Court's recital of witness testimony for the proposition that Appellant's demeanor *after* Victim's death was "calm and unemotional" in no way supports a

³ While Herndon involved the failure to give the defendant's requested charge on circumstantial evidence, our Supreme Court's analysis is equally applicable here because the inquiry is not what the verdict would have been if the correct charge had been given, but instead whether the erroneous charge contributed to the verdict. See State v. Burdette, 427 S.C. 490, 496, 832 S.E.2d 575, 578-79 (2019). When there is conflicting evidence, it logically follows that there is a greater likelihood that the improper charge contributed to the verdict and cannot be harmless.

finding of malice at the time the alleged crime was perpetrated, and thus is far short of overwhelming evidence of malice. By erroneously charging the jury that it could infer malice by the use of a deadly weapon, the Court allowed the State to escape their burden of presenting evidence of actual malice.

Conclusion

Appellant respectfully requests this Court rehear the matter to address the points overlooked and misapprehended by this Court in rendering its opinion.

Respectfully Submitted,



Colin T.L. Spangler
Attorney for Appellant

This 28th day of July, 2021.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions
Eugene C. Griffith, Circuit Court Judge

Lower Court Case No. 2014GS3203246
Appellate Case No.: 2018-001556
Unpublished Opinion No.: 2021-UP-275

THE STATE,

Respondent,

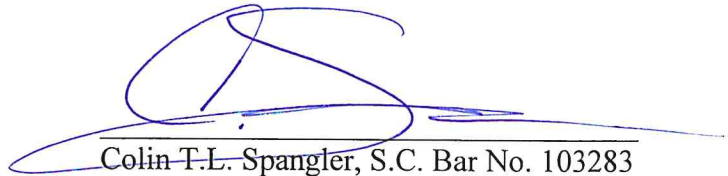
v.

MARION C. WILKES,

Appellant.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the PETITION FOR REHEARING in the above referenced case has been served upon: Tommy Evans via mail to: Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, South Carolina 29201; and Marion C. Wilkes, # 375614, via mail to: Kirkland Correctional Institution, 4344 Broad River Road, Columbia, South Carolina 29210.



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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY
The Honorable Eugene C. Griffith, Circuit Court Judge

Appellate Case No. 2018-001556
Unpublished Opinion No. 2021-UP-275

THE STATE,.....RESPONDENT

v.

MARION C. WILKES,.....APPELLANT

RETURN TO PETITION FOR REHEARING

On July 14, 2021, this court issued an unpublished opinion affirming the decision of the trial judge regarding issues raised by the Appellant. Pursuant to rule 221(a) of the South Carolina Appellant Court rules the Appellant filed a petition for rehearing on July 28, 2021. On November 22, 2021, this Court issued an order that the Respondent file a return no later than ten (10) days from the date of the order.

Within this petition for rehearing Appellant argues that this Court erred in determining he failed to preserve the issue concerning whether the trial court should have viewed the first thirty-five minutes of the movie “Where the Lillies Bloom.” Appellant also argues that this Court erred in determining the Appellant did not preserve their argument on the trial court’s decision based on Rule 402. The Appellant also argues that this Court erred in determining that the implied malice instruction given by the trial court was made in error but that error was harmless. The Respondent

would respectfully argue that the decision of this court was proper, lawful and not done in error. The Respondent would request this Court deny this petition for rehearing and allow the decision stand.

ARGUMENTS

- 1. The Appellant failed to object to the fact the trial judge refused to view the requested portion of the film, so this issue was not preserved for appeal. This court was correct in ruling that since it was not preserved this issue cannot be considered.**

Within his petition for rehearing the Appellant argues that the court should have been aware that the trial court's refusal to watch the movie was an issue that was preserved for appeal. According to the law any issue not raised during trial is not preserved and is not subject to being considered during an appeal.

During trial the Appellant moved to publish to the jury the first thirty-five minutes of the movie. The trial judge ruled, "Since it's a favorite movie of the family, but it's not directly probative of the events, I'm not going not to allow it. But you can crave [sic] reference to it, the story line or whatever, just as you've done. I'm not going to allow it. Number 7 will not be admitted." R. p. 422 l. 9-13. At the conclusion of the trial court's decision all that was said by Appellant counsel was, "Thank you, Your Honor." R. p. 422 l. 15. The Appellant failed to object nor make a request that the trial judge review the movie himself. Since he never offered for the court to view that portion of the movie this issue was not preserved. This Court made the correct decision regarding the Appellant's failure to preserve this issue for appeal.

It was incumbent on the Appellant to explain to the court the specific relevance, and as to why this portion of the movie should be viewed by the trial court prior to making a ruling. If he refused an objection to this decision it must be placed on the record in order for it to be preserved for appeal. "The objection should be addressed to the trial court in a sufficiently specific manner

that brings attention to the exact error.” *State v. Johnson*, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005).

The Appellant argues that since this issue was raised and the trial court ruled on its lack of admissibility twice, that was sufficient to preserve this particular issue for appeal. However, that is not how it works, it is “axiomatic that an issue cannot be raised for the first time on appeal.” *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). This law exists due to the fact no appellate court can make a ruling on the possible error of the trial court if the issue was not raised before the court in the first place. Imposing such a requirement on the appellant, “is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.” *I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). “Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review.” *Queen’s Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). Had the Appellant raised to the trial court that he should view the video before his ruling, it is possible he might have considered watching at least the requested thirty-five minutes. However, this was never raised by the Appellant so no ruling was ever made. This Court cannot rule on any possible error that has not been preserved. The decision by this Court regarding the lack of preserving this issue was correct.

The Respondent will also reiterate that the trial judge was well within his right to decide on the movie’s inadmissibility without viewing the film. “A trial judge is vested with a wide discretion in the conduct of a trial, He has the duty to see that the trial proceeds in an orderly fashion and should prevent unnecessary repetition, working to that end that the time of the court be preserved.” *State v. DeBerry*, 250 S.C. 314, 322, 157 S.E.2d 637 (1967). Even in accepting the

Appellant's argument that this was the victim's favorite movie and she wished to have a natural burial, the facts of the movie were not in any way close to the facts of this case. This movie was not relevant and the trial court was correct in its ruling.

Within their petition for rehearing the Appellant once again relies on the South Carolina Supreme Court decision of *State v. Goss*, 425 S.C. 101, 830 S.E.2d 373 (2018). This reliance on *Goss* is in error. In *Goss*, the PCR judge was tasked with making credibility findings concerning witnesses the court decided not to hear, but they took judicial notice of their testimony. The Supreme Court decided that the PCR judge's actions "diluted the process" of its fact findings. *Goss*, 425 S.C. at 108, 820 S.E.2d at 376. In *Goss*, the Supreme Court found actual fault in the PCR judge's factual findings, which it is obligated to do pursuant to the PCR statutes.¹ However, in a criminal trial the judge is not a fact finder, just the gatekeeper of evidence presented to the jury who ultimately are the fact finders. In the role of gatekeeper the trial judge must frequently exercise his discretion in the midst of trial to determine whether evidence is properly admissible.

- 2. Trial court acted within its discretion when they made the decision to find the movie, "Where the lilies bloom" irrelevant and therefore inadmissible, since the movie had no relationship to the actual facts of the trial, it was proper for this Court to affirm the decision of the trial judge.**

The Appellant argues that this Court erred in ruling that Appellant counsel failed to preserve any argument as to the movie's admissibility pursuant to Rule 402 of the South Carolina Rules of Evidence. The Appellant argues that this Court erred because the State first objected to this evidence being allowed pursuant to rule 403.² However, the trial court correctly deemed this

¹ "The Court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented." S.C. Code Ann. §17-27-80 (2020).

² Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Rule 403 SCRE.

evidence as not relevant pursuant to rule 402.³ The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice. *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 848-849 (2006). Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Rule 401 SCRE. The trial court has broad discretion in determining the relevancy of evidence and its decision to admit or exclude evidence will not be reversed on appeal absent an abuse of that discretion and a showing of prejudice. *State v. Holder*, 382 S.C. 278, 288, 676 S.E.2d 690, 696 (2009). The trial judge was within his right to exclude this evidence under rule 402. The fact the Appellant failed to address this ruling is not the fault of the court nor the State. Appellant made the decision not to address the ruling of the trial judge, therefore, not preserving this issue for appeal. The decision by this court was proper and should not be reconsidered.

3. Though the decision of the trial court to charge the jury on implied malice was done in error, this Court was correct to determine that this error was harmless.

At the conclusion of the evidence and final arguments the trial judge offered jury instructions. One of these instructions was that malice may be inferred from the use of a deadly weapon. In *State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019) the South Carolina Supreme Court decided that charging the jury that malice may be inferred from the use of a deadly weapon is in error regardless of the evidence presented at trial. *Burdette*, 427 S.C. at 504-505, 832 S.E.2d at 583. However, though it was an error to make this charge to the jury this did not affect the

³ All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible. Rule 402 SCRE.

outcome of the trial so this Court was correct in considering this mistake as harmless. In *State v. Kerr*, this Court made this determination regarding harmless error in jury instructions.

“Jury instructions must be considered as a whole, and if as a whole, they are reasonably free from error, isolated portions which might be misleading do not constitute reversible error. When reviewing a trial judge’s instruction for error, this court must consider the instructions in their entirety. **In order to find the error harmless, we must determine beyond a reasonable doubt that the error complained of did not contribute to the verdict.**” *State v. Kerr*, 330 S.C. 132, 144, 498 S.E.2d 212, 218 (1998)(emphasis added).

In reviewing the facts of the case and the testimony of the Appellant, the jury only had two possible outcomes, either the victim killed herself, or she was murdered by the Appellant. So offering the jury instruction of implied malice had no bearing on the outcome of this trial. If the jury believed that the Appellant killed his wife, there is obvious malice in stabbing someone and beating her on the head. The error made by the trial judge in making this charge to the jury was harmless. In making a harmless error analysis, our inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered. *Id.*, 330 S.C. at 145, 498 S.E.2d at 218.

There was also overwhelming evidence provided by the State revealing malice. The victim had multiple blunt force injuries to her head and one stab wound to the torso, just below the chest. R. p. 231 l. 14-22. The victim had at least five injuries that caused lacerations on her skin, and she had an underlying fracture to the skull. R. p. 232 l. 1-4. Appellant sought no medical treatment for the victim despite the close proximity to the hospital. There was no evidence ever submitted mitigating the murder charge to voluntary or involuntary manslaughter, accident or self-defense. It was clear by testimony and evidence the only two choices available to the jury, was murder or suicide. The element of malice was not an issue, the jury did not believe the Appellant’s version of the facts which he gave during his testimony so he was convicted of murder. The jury instruction

did not contribute to his verdict it was the jury not believing his story and the mounting evidence brought by the State against him. It is clear that the jury charge given may have been done in error, but that error was completely harmless. The ruling by this Court was correct and should not be subject to a rehearing.

CONCLUSION

The Respondent believes that the decision of this court was correct and followed current South Carolina law. The Appellant has revealed nothing that was overlooked or misapprehended by this Court. Therefore, this petition for rehearing should be dismissed.

Respectfully submitted,

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December 1, 2021

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Dec 01 2021

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY
The Honorable Eugene C. Griffith, Circuit Court Judge

Appellate Case No. 2018-001556
Unpublished Opinion No. 2021-UP-275

THE STATE,.....RESPONDENT

v.

MARION C. WILKES,.....APPELLANT

CERTIFICATE OF SERVICE

I, Donna D'Alessio, am an employee of the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Return to Petition for Rehearing, and Certificate of Service have been forwarded to Appellant's counsel, Colin T.L. Spangler, Esq., via email today, December 1, 2021 to colin@spanglerlawoffice.com.

I further certify that all parties required by Rule to be served have been served.

This 1st day of December, 2021.



Donna D'Alessio, Legal Assistant to
Tommy Evans, Jr.,
Assistant Attorney General

The South Carolina Court of Appeals

The State, Respondent,

v.

Marion C. Wilkes, Appellant.

Appellate Case No. 2018-001556

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



J.

Columbia, South Carolina

cc:

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Rhonda Wallace Patterson, Esquire

Alan McCrory Wilson, Esquire

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Tommy Evans, Jr., Esquire
The Honorable Eugene C. Griffith, Jr.

FILED
Dec 22 2021

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions
Judge Eugene C. Griffith

Lower Court Case No. 2014GS3203246
Court of Appeals Case No. 2018-001556

RECEIVED

JUN 20 2019

SC Court of Appeals

THE STATE,

Respondent,

v.

MARION C. WILKES,

Appellant.

Final Brief of Appellant

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Dated: This 19th Day of June, 2019

West Columbia, South Carolina

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STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court err in analyzing the admissibility of a DVD copy of the film Where the Lilies Bloom (1974) when the court failed to screen the film, either in whole or in part, prior to ruling on the film's admissibility?
- II. Did the trial court err in excluding a DVD copy of the film Where the Lilies Bloom (1974) when testimony reflected the alleged victim told Appellant she wished to be buried in a manner consistent with the film and for her death to be concealed from the public?
- III. Did the trial court err in charging the jury that malice may be inferred from the use of a deadly weapon when the trial court substantially deviated from the charge set forth in Elmore by omitting the charge's permissive inference instruction?

STATEMENT OF THE CASE

On November 3, 2014, grand jurors in Lexington County indicted Appellant for one count of murder. (R. p. 235). The State, represented by Rhonda Patterson and Gill Bell, called the case to trial before the Honorable Eugene C. Griffith and a jury on February 26, 2018. (R. p. 1.) Trial of this case concluded on March 2, 2018, when jurors returned a guilty verdict on the sole charge of murder. (R. p. 233, lines 13-19.) Judge Griffith sentenced Appellant to forty-five (45) years imprisonment. (R. p. 234, lines 6-7.) On August 16, 2018, Judge Griffith entered an Order denying Appellant's Motion for a New Trial and for Reconsideration of his Sentence.

On August 23, 2018 Appellant served his notice of appeal. This brief follows.

STATEMENT OF THE FACTS

Appellant and Susan Wilkes (hereinafter “Decedent”) married on December 6, 1979. (R. p. 132, lines 23-25.) The couple remained married until Decedent’s passing in early June 2014. (R. p. 133, lines 6-7.) During the marriage Appellant worked in retail grocery and Decedent worked office-jobs, including thirty-three (33) years at SCE&G. (R. p. 130, lines 23-24, p. 143, lines 14-25, p. 144, lines 1-2.) The couple bore no marital children, however, they adopted Decedent’s grandson, Joseph Wilkes, when Joseph was an infant.¹ (R. p. 149, lines 25, p. 150, lines 1-25.) The family relocated from Winnsboro, South Carolina to 106 Linnet Drive, West Columbia in 1999, where they lived until Decedent’s passing. (R. p. 149, lines 14-19.)

At trial, Appellant testified he and Decedent enjoyed a “quiet and peaceful” relationship. (R. p. 133, lines 9-10.) Outside of their respective careers, Appellant and Decedent spent a great deal of time outdoors, hiking, exploring, and hunting. (R. p. 133, lines 19-25, p. 134, 1-11, p. 143, lines 1-6.) Decedent was of Native American heritage and along with Appellant, often searched for artifacts left behind by tribe’s native to South Carolina. (R. p. 135, lines 11-16, p. 415, lines 1-4.) Artifacts recovered by Decedent included several dozen arrowheads from around South Carolina. (R. p. 135, lines 11-15.) Additionally, Appellant and Decedent traveled throughout the country during their marriage, where Decedent purchased additional artifacts and memorabilia relating to Native American culture. (R. p. 139, lines 21-25.) Photographs of many of these items were entered at trial, with jurors being shown the actual arrowheads and other memorabilia during Appellant’s testimony. (R. p. 135 – 141.)

¹ Appellant testified that Joseph is the biological son of Decedent’s daughter, of whom he is not the father. (R. p. 150, lines 9-10.)

In March 2013 Decedent lost her job at SCE&G. (R. p. 144, lines 3-8.) Appellant testified that in months following Decedent's termination, she applied to numerous jobs but was unable to secure employment. (R. p. 144, lines 9-19.) Appellant testified Decedent's unemployment caused her to become depressed; this depression worsened when her unemployment benefit was stopped and their son's dream of entering the military was stifled by a freeze in recruitment. (R. p. 144, lines 9-25.) Appellant testified he believes he spoke with their family doctor, Dr. Karen Greenfield, about Decedent's depression and believed that Decedent was prescribed anti-depressants prior to her death. (R. p. 168, lines 3-25, p. 169, lines 1-2.)

On the date of her death, Decedent was at home with Appellant.² (R. p. 425, lines 21-25, p. 426, lines 1-7.) Appellant testified Decedent fell at around 9 o'clock in the morning. (R. p. 425, lines 21-25, p. 426, lines 1-7.) Later that same day, Appellant testified Decedent was using a stepstool to reach into a cabinet in the home's kitchen. (R. p. 151, lines 21-25, p. 152, lines 1-7.) While reaching into the cabinet, she lost her balance and fell, striking her head on the seat of a kitchen chair. (R. p. 151, lines 21-25, p. 152, lines 1-7.) Appellant testified he rushed to Decedent's aid and tried to stop the bleeding. (R. p. 152, lines 8-14.) After controlling the bleeding, Appellant went to move his vehicle so he could easily carry Decedent outside and drive her to Lexington Medical Center.³ (R. p. 152, lines 8-14.)

When Appellant came back inside the home, he was shocked to find Decedent suffering from a stab wound to her chest. (R. p. 152, lines 15-25, p. 153, lines 1-3.) Appellant testified he found Decedent lying on the kitchen floor along with a kitchen paring knife lying beside her. (R.

² Dr. Janice Ross, a medical examiner called by the State, testified that no date of death could be established in this case for numerous reasons. Tr. 247, ll. 19-25, Tr. 248, ll. 1-14.

³ Law enforcement estimated the family home at 106 Linnet Drive was at most a half-mile from Lexington Medical Center. Tr. 383, ll. 2-11.

p. 152, lines 15-25, p. 153, lines 1-3.) This knife, Appellant testified, was a “special” knife that Decedent kept in a certain cabinet to ensure other family members would not use it. (R. p. 152, lines 23-25, p. 153, lines 1-3.)

Appellant testified he held Decedent in his arms until she passed away. (R. p. 153, lines 4-8.) In her final moments, Decedent told Appellant to make sure their son attended college. (R. p. 153, lines 4-8.)

Immediately after Decedent passed, Appellant testified he moved her body into the garage and wrapped her body in a tarp and duct tape that she set aside prior to her death. (R. p. 154, lines 17-25, p. 155, lines 16-19.) The following morning, Appellant informed Joseph Wilkes of Decedent’s passing.

Q: Tell us what happened the next day.

A: I just left her there till the next morning. Joseph got up. I told him exactly what she said to tell him, that she had been -- I guess the word would be euthanized because she had cancer, which that wasn't true. She said let him get over it and then later on, tell him what happened and tell him why I want to be buried up there.

Q: And so, did you tell Joseph the story that she told you?

A: Sir?

Q: Did you tell Joseph the story that she told you?

A: Yes, I did.

(R. p. 156, lines 5-16.)

Appellant testified that same day, along with the help of Joseph Wilkes, he moved Decedent into the trunk of the family’s Ford Taurus. (R. p. 157, 17-24.) Appellant and Joseph Wilkes then drove to a location in Little Mountain, South Carolina.⁴ (R. p. 157, lines 3-5.)

⁴ Testimony indicated the location was 127 Gardenia Court in Little Mountain, South Carolina. (R. p. 029, lines 21-23.)

Prior to her death, Decedent and Appellant visited this location in hopes of one day purchasing it and subdividing the land. (R. p. 153, lines 14-20, p. 154, lines 10-16.) Appellant testified during these visits Decedent marveled at the wonder of nature and told Appellant she wished to be buried in a specific spot underneath her favorite hickory tree. (R. p. 431, lines 13-21.)

Appellant testified he and Joseph Wilkes located the hickory tree previously selected by Decedent and dug a grave. (R. p. 157, lines 22-25, p. 158, lines 1-7.) They then placed Decedent's body in the grave along with a cinderblock to mark the spot, covering the body with soil from the property. (R. p. 157, 1-20.) Appellant took care to place Decedent's body in the grave on her side, the same position she slept in. (R. p. 257, lines 8-13.)

Appellant testified at length regarding why he chose to bury Decedent in a remote area and conceal the death.

Q: And did she talk about whether she wanted to go through a funeral home and that type of thing?

A: Oh no, that was out. No. She wanted to be – she knew the Bible as much as I did. She wanted to be dust to dust. She wanted to go back to where she came from and she wanted to be where only God knew where she was. I heard that since probably Renee died. Probably around '97, '98, '99, somewhere in there. After that, she made that statement behind the funeral home up there at Winnsboro.

(R. p. 142, lines 14-23.)

Appellant testified that he and Decedent often watched a film titled Where the Lilies Bloom (1974) where the main character, a single father, informed his family he wished to be buried outside, in nature, with specific instructions to not tell anyone about his passing; when he passed, the family followed his instructions. (R. p. 146, lines 8-25, p. 147, lines 1-4.) Appellant testified that after watching the film, Decedent relayed her desire to be buried like the character in the film. (R. p. 147, lines 5-20.)

Q: Now, what was Susan's thoughts about -- what did she tell you about that movie after she watched it?

A: That's what she wanted. She wanted to be somewhere quiet where nobody was at. She was a loner, one-hundred percent a loner. Quiet. She never got on the phone. You couldn't get her on a conversation on the phone. She wouldn't talk on the phone.

Q: Now, in that particular movie, okay, do they get an undertaker involved and embalming and all that?

A: No. Natural. Natural burial.

Q: Natural burial. And that's what Susan wanted?

A: That's what's all over up there in the woods in Fairfield County. Even white people and black people there.

Q: And this was a movie y'all would watch often?

A: Oh, yeah.

(R. p. 147, lines 5-20.)

At trial, Appellant offered into evidence a DVD copy of Where the Lilies Bloom, however, upon objection by the State, the Court excluded the film.⁵ (R. p. 148, lines 9-13.)

After burying Decedent, Appellant testified he and his son returned to their home in West Columbia, determined to follow Decedent's wish that her death be concealed. (R. p. 158, lines 21-25, p. 159 p. 160, lines 1-4.) When individuals became suspicious of Decedent's whereabouts, Appellant reported to law enforcement she had gone missing along a walking route near their home. (R. p. 159, lines 9-20.)

On June 15, 2014, Appellant agreed to a voluntary interview with Investigator Bruce Wade of the West Columbia Police Department. (R. p. 332, lines 1-5.) During this interview, Appellant continued to conceal the story of Decedent's suicide, stating Decedent had gone for a walk and not returned. (R. p. 094, lines 2-5.)

⁵ Prior to Appellant's testimony, the State objected to entry of the film under Rule 403; the trial court took this matter under advisement. During Appellant's testimony, Appellant offered the film and requested to publish the first thirty-five (35) minutes to the jury. The State renewed its objection under Rule 403; the trial court sustained this objection.

In the face of increasing suspicion, Appellant agreed to another meeting with law enforcement at the South Carolina Law Enforcement Division Headquarters on June 16, 2014. (R. p. 095, lines 19-24.) On June 18, 2014 law enforcement interviewed Appellant's son; immediately following this interview, Decedent's body was recovered from the location in Little Mountain. (R. p. 099, lines 5-25, (R. p. 100, lines 1-25, p. 101, lines 1-14.)

On June 18, 2014, after recovering Decedent's body, law enforcement again interviewed Appellant. (R. p. 121, lines 13-16.) Investigator Wade testified that during this interview Appellant relayed that his wife, after falling and injuring her head, took a knife and committed suicide. (R. p. 120, lines 7-20.) Investigator Wade also testified that Appellant told him Decedent instructed Appellant to conceal her suicide and desired a natural burial in Little Mountain. (R. p. 120, lines 21-25, p. 121, lines 1-12.)

On June 19, 2014, Appellant was again interviewed by Investigator Wade. (R. p. 103, lines 3-5.) During this interview, Investigator Wade told Appellant that Appellant's son, Joseph Wilkes, was charged with murdering Decedent. (R. p. 435, lines 5-13.) At this point Appellant tried to shift the blame onto himself, stating he killed Decedent. (R. p. 106, lines 9-16, p. 119, lines 18-25, p. 120, lines 1-4, p. 161, lines 5-16.) At trial, Appellant explained why he confessed to killing Decedent.

Q: Now, was there a point in time when you were speaking with Investigator Wade where he gave you some information that caused you to change the story?

A: Oh, yeah.

Q: What was that information that he told you?

A: That they were charging Joseph for something he didn't do.

Q: What were they charging Joseph with?

A: Charging him with murder.

Q: And once you heard him say they had charged Joseph with murder, what did you do at that point?

A: Well, I just said it was me.

Q: Now, when you told them it was you, were you being truthful? When you told him that you were the one that murdered her, were you being truthful?

A: No.

Q: So why did you tell them that lie?

A: Cover up for Susan and Joe.

Q: And --

A: I done lived my life. He needed to live a life.

Q: So when you told them that you murdered Susan, you were not being truthful?

A: That's correct.

(R. p. 161, lines 5-25, p. 436, lines 1-2.)

Appellant further testified he did not kill Decedent.

Q: Marion, I want you to look at the jury. Marion Wilkes, did you murder Susan Wilkes?

A: No, I did not.

Q: Are you sure of that?

A: I'm very positive.

(R. p. 162, lines 5-9.)

Appellant was taken into custody following the June 18, 2018 interview; he remained in custody until trial of this matter.

The parties differed on many facts at trial, none more important than the cause of Decedent's injuries. The State called Dr. Janice Ross, a forensic pathologist who performed an autopsy on Decedent. Dr. Ross testified that during the autopsy she found blunt force injuries, including a skull fracture and lacerations to Decedent's head, and a single stab wound to Decedent's chest. (R. p. 051, lines 19-22, p. 053, lines 1-4.) Dr. Ross testified on direct examination that she could not determine which injury occurred first. (R. p. 051, lines 23-25.) On cross examination Dr. Ross admitted she determined Decedent's death to be caused by exsanguination due to an incised wound of the heart. (R. p. 060, lines 21-25, p. 061, lines 1-4.) Dr. Ross testified that the exact location of the wound revealed it may have been self-inflicted, as there is no bone to stop a knife from penetrating all the way to the heart. (R. p. 064, lines 20-25,

p. 065, lines 1-13.) She also admitted it would not take a lot of pressure for a person to inflict the type of wound Decedent suffered. (R. p. 065, lines 8-11.)

Further, Dr. Ross acknowledged that a cement block could have caused the skull fractures she found during her autopsy. (R. p. 063, lines 6-9.) She admitted that law enforcement did not make her aware that a cement block was found in the grave. (R. p. 063, lines 6-9.) Dr. Ross also acknowledged that a laceration to the head could be caused by someone falling and hitting their head on a table. (R. p. 064, lines 9-12.)

ARGUMENT

- I. The trial court erred in analyzing the admissibility of a DVD copy of the film *Where the Lilies Bloom* (1974), when the court failed to screen the film, either in whole or in part, prior to ruling on the film's admissibility.

RELEVANT FACTS

Appellant testified that he and Decedent watched the film *Where the Lilies Bloom* numerous times throughout their marriage. (R. p. 145, lines 12-17.) Appellant further testified that Decedent informed him she wanted to be buried like the main character: out in nature, where “only God knew where she was.” (R. p. 147, lines 5-20, p. 142, lines 14- 23.)

In anticipation of Appellant offering the film, the State objected to the films entry prior to Appellant taking the stand. (R. p. 126, lines 7-25, p. 127, p. 128, p. 129, lines 1-15.) The crux of the State's argument was that the film should be excluded under South Carolina Rule of Evidence 403. (R. p. 126, lines 21-22.) After hearing only from the State, the trial court took the matter under advisement. (R. p. 129, lines 16-17.)

Appellant took the stand and testified about the plot of the film and its characters. (R. p. 146, lines 8-25, p. 421, lines 1-4.) Appellant then identified and offered a DVD copy of the film, informing the court he wished to enter the DVD and publish the first thirty-five (35) minutes of

the film to the jury.⁶ (R. p. 147, lines 21-25, p. 148, lines 1-3.) At this point the State renewed its objection under Rule 403, arguing “Your Honor, we stand on the same objection. We think this is cumulative. We think it's a waste of time. We think it's prejudicial, Your Honor. He has summarized what the movie is about. I think that is sufficient for the jury's benefit.” (R. p. 148, lines 4-8.)

After hearing argument again from only the State, the trial court excluded the film, noting “Since it's a favorite movie of the family, but it's not directly probative of the events, I'm going to not allow it. But you can have reference to it, the story line or whatever, just as you've done. I'm not going to allow it. Number 7 will not be admitted.” (R. p. 148, lines 4-13.)

During cross examination, the State vigorously questioned Appellant about specific scenes, characters, and statements made in the film. (R. p. 190, lines 7-23.) Following cross-examination, Appellant re-offered the film, arguing that because the State went into specific statements made in the film, the film should be admitted in order to give jurors the opportunity to evaluate the film as a whole. (R. p. 191, lines 5-8.) The trial court again excluded the film, noting “I don't think that movie needs to come in, so I'm sticking -- I'm not going to allow the movie. Nothing in the movie is relevant to what happened in 2014. It's a story, it's been testified to and I'm going to leave it there.” (R. p. 191, lines 9-13.)

STANDARD OF REVIEW

“In criminal cases, the appellate court sits to review errors of law only.” State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006), (citing State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001)). “The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse

⁶ At trial, the film was marked as Defense Exhibit 7.

of discretion accompanied by probable prejudice.” State v. Wise, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004) (citing State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 92 (2002)). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” Id.

DISCUSSION

This issue raises concern not with the trial court’s ultimate decision on the admissibility of the film, but rather on the analysis the trial court employed in reaching its decision. After the State raised its objection to the film under Rule 403, the trial court was tasked with determining the both the probative value of the film and the danger of unfair prejudice it presented. Instead of screening the film to reach a conclusion on these issues, the court summarily ruled the film was not probative of the events in this case.

The question in this case is this: Could the court meaningfully evaluate the film’s probative value without first discerning the film’s contents, either by screening the film in whole or in part? Respectfully, Appellant asserts the answer to this question is no.

Here, the trial court did not and could not properly analyze the admissibility of the film without first screening it. Without actually looking at the piece of evidence, a trial court is in no position to determine its probative value or assess the danger of unfair prejudice it presents. The analysis employed by the trial court here is analogous to a judge ruling on the admissibility of photograph without even looking at the photograph itself. Unfortunately, this type of analysis is precisely what occurred in this case.

There is no bright-line rule in this State as to how much analysis a trial court must undertake before ruling on an objection brought under Rule 403. However, starting from the

presumption of admissibility set forth in Rule 402, it is clear the court must, at the very least, undertake *some* analysis of the contested evidence before excluding it at trial.⁷

Our Supreme Court's holding in Goss v. State is instructive here. Goss v. State, 425 S.C. 101, 820 S.E.2d 373 (2018). In Goss, a judge ruling on a PCR application chose not to hear testimony from alibi witnesses; rather the judge, along with consent of both parties, took judicial notice of the witness's testimony. Goss at 106, 375. The judge went on to rule these witnesses were not credible despite never actually hearing their testimony or performing any type of analysis into their credibility. Id. The Goss court found this analysis to be erroneous, noting: "When a factfinder evaluates the credibility of witnesses, the mental process employed often requires the credibility evaluations to be based upon a consideration of all the evidence, not simply the parts the factfinder choose to hear firsthand." Goss at 108, 376.

In this case, the trial court's decision to rule on the probative value of the film without even making a cursory attempt to evaluate its contents is clear error. Appellant contends that in light of Goss, when a court is makes credibility determinations or rules on the admissibility of evidence, the court must make decisions based on *all* the evidence, and cannot fail to examine the piece of evidence or its contents prior to ruling.

⁷ "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina." Rule 402.

- II. The trial court erred in excluding a DVD copy of Where the Lilies Bloom (1974) when testimony reflected the alleged victim told Appellant she wished to be buried in a manner consistent with the film and for her death to be concealed from the public.

RELEVANT FACTS

Appellant openly admitted at trial he did not contact authorities after his wife passed. (R. p. 155, lines 16-25, p. 156, lines 1-25, p. 157, lines 1-12.) Appellant attributed his actions, the burial, the coverup, the concealment, to his wife's wishes. He testified that the film played a major role in her decision to pursue a natural burial. (R. p. 147, lines 5-20.)

At trial, the State argued that Appellant's use of non-traditional means to bury his wife was probative of his guilt and merely an attempt to coverup his involvement with the alleged crime. Photographs of the gravesite were entered. State Ex. 108, 109, 110, 112. The effects of natural burial and decomposition on the body were discussed. (R. p. 050, lines 24-25, p. 191, lines 5-8.) Even the dimensions of the grave were discussed at length. (R. p. 169, lines 12-25.) Despite all of the negative comments and hysteria involving the method of burial, Appellant remained steadfast in his testimony that his wife wished to be buried in accordance with the film-to be buried in nature, where only God knew where she was. (R. p. 142, lines 14- 23, p. 147, lines 5-20.)

Despite testimony as to the importance of the film in Decedent's life and bearing on the actions Appellant took following Decedent's death, the trial court still excluded the film.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." State v. Wise,

359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” Id.

DISCUSSION

If this court is inclined to find the trial court’s decision to rule on the admissibility of the film without first undertaking to discern its contents was proper, Appellant asserts in the alternative the decision to exclude the film was an abuse of discretion. Here, the probative value of the film was not substantially outweighed by the danger of unfair prejudice. The reasons why the film is probative of facts of consequence in this case are numerous. The danger of unfair prejudice posed by the film is non-existent.

The film is probative of the manner in which Appellant chose to bury Decedent. At trial, the State offered significant evidence of the manner in which Decedent was buried and argued the specific burial method, in the woods, without formal ceremony, was probative of Appellant’s guilt and was an attempt for Appellant to conceal his involvement with the alleged crime. As early as the State’s opening statement, the State presented the manner and method of burial as indicative of Appellant’s guilt.

It was the 18th of June, 2014, and as it tends to go in the summer months in South Carolina, it's hot as a blaze. And that sun wasn't showing a bit of mercy as it cooked at 98 degrees while it beat down on Little Mountain, South Carolina. For those of you unfamiliar, Little Mountain is a place right north of Chapin, up towards the Newberry County line. And as that sun penetrated down through the trees in Little Mountain, it was reflecting off the minerals in a series of stones. Stones that had been intricately and purposely laid out to form a rectangle in the sand. A crucifix fastened together by two limbs laid down the center of the rectangle. Around the head, pictures, mementos. Mementos that would tell you that lying beneath that soil, a loved one. And, in fact, there was a loved one there. But beneath the sands of that crucifix laid no human, but a family dog some time passed. But, all the while, less than 10 feet away lie the body of Susan Wilkes

face down in the dirt in a two-foot red clay hole wrapped in a tarp with duct tape fastened around it. *A burial as malicious as the killing that put her there.*

(R. p. 002, lines 2-22.) (*emphasis added*).

The State argued the burial method was indicative of guilt throughout their closing, arguing: “[She said] Bury me in the tarp. I already got it. It’s in the garage. And take me to the place in Little Mountain so nobody will know. *Don’t let them insult intelligence. That just did not happen.*” (R. p. 199, lines 16-19.) (*emphasis added*). “Because this is not the way she wanted to go. This is not the way she wanted to be buried.” (R. p. 204, lines 273-275.) She was “stuffed in a cold, shallow grave.” (R. p. 194, lines 1-2.)

Had the film been admitted, jurors would have been able to determine whether the burial method was truly indicative of guilt, or whether it was Appellant attempting to carry out Decedent’s last wish, to be buried out in nature, in a manner consistent with the film. Exclusion of the film forced jurors to confront two very important questions with no guidance: Was Appellant accurately testifying about the storyline of the film, its characters, and the burial method shown? Was the manner of burial Appellant undertook consistent with that shown in the film? By excluding the film, jurors were without the crucial piece of evidence needed to answer these questions, to evaluate the defense theory of the case, and weigh the credibility of Appellant’s testimony.

Here, the court sustained an objection brought under Rule 403 and excluded the film; it is unclear, however, which type of unfair prejudice the court perceived as substantially outweighing any probative value.⁸ In her renewed objection, the Solicitor noted the film was cumulative, a waste of time, and prejudicial.

⁸ The trial court noted “Since it’s a favorite movie of the family, but it’s not directly probative of the events, I’m not going to allow it.” (R. p. at 148, lines 9-11.)

Cases are scant in South Carolina addressing Rule 403 in the context of waste of time or presentation of cumulative evidence. Wright v. Craft, a 2006 civil case which reached the Court of Appeals, presented an issue of this nature. Wright v. Craft, 372 S.C. 1, 640 S.E.2d 486 (Ct. App. 2006). In Wright, the complained of conduct involved the sale of a previously wrecked truck. Wright at 15, 494. The plaintiff alleged the seller was liable for not disclosing the truck's prior collision history and the fact the warranty may not cover future damage. At trial, jurors heard testimony about the truck from numerous witnesses. Wright at 34, 504. Photographs of the truck were also admitted. Id. When the truck itself was offered, the trial court excluded it under Rule 403, noting its probative value was substantially outweighed by the danger of unfair prejudice, specifically, being cumulative and a waste of time. Id. The Court of Appeals affirmed, noting that the combination of photographs and witness testimony negated the need for the actual truck to be entered, and its entry would indeed waste time and needlessly present cumulative evidence. Id.

In this case, other than Appellant's testimony as to the plot of the film, there was no other evidence of the film's content. Further, in the interest of judicial economy, Appellant did not wish to publish the entire film during the trial, rather, the record shows he wished to only play the first thirty-five (35) minutes. In light of the minimum *thirty (30) year sentence* Appellant was facing, it is beyond comprehension that *thirty-five (35) minutes* could be called a waste of time so substantial it outweighed the film's significant probative value.

As for the State's objection that the film was "prejudicial," Appellant notes prejudicial evidence is not what Rule 403 is designed to exclude; the rule deals only with evidence which presents a danger of unfair prejudice that *substantially outweighs* its probative value. In the same vein, all evidence presented at trial is prejudicial to the other side, this does not mean such

evidence must be excluded. As noted in Stokes, “Unfair prejudice means an undue tendency to suggest a decision on an improper basis.” Stokes v. State 381 S.C. 390, 404, 673 S.E.2d 434, 441 (2009), (citing State v. Dickerson 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000)).

The State stood to suffer no unfair prejudice if the film was admitted. Allowing jurors to watch the film would only provide them with a basis for evaluating Appellant’s actions and testimony. The film does not evoke emotion or sympathy for Appellant. It is not designed to elicit an emotional decision from the jury. Therefore, no framework set forth in our case law or Rule 403 supports a finding that the probative value of the film was substantially outweighed by the danger of unfair prejudice. The film was certainly probative of the actions Appellant took following Decedent’s death and it certainly meets the definition set forth in Rule 401 for relevant evidence, as it made Appellant’s testimony, that he was following the manner of burial set forth in the film, more likely.⁹

Given the film’s materiality and relevancy to the facts at issue in the case, it should have been admitted; exclusion of the film under Rule 403 was an abuse of discretion.

III. The trial court erred in charging the jury that malice may be inferred from the use of a deadly weapon when the trial court substantially deviated from the charge set forth in Elmore by omitting the charge’s permissive inference instruction.

RELEVANT FACTS

At the close of evidence, a charge conference took place off the record. (R. p. 193, lines 3-4.) Following each side’s closing argument, the jury was charged on the law of the case. When charging the jury on malice, the trial court stated the following:

Malice may also be inferred from conduct showing a total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon.

⁹ “Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Rule 401 (internal quotations omitted).

A deadly weapon is any article, instrument which would likely cause death or great bodily harm. Several examples of instruments which may be deadly weapons is a pistol, rifle, dagger, a knife, razor, fire bomb, things of that sort.

(R. p. 225, lines 4-11.)

After excusing the jury to deliberate, each side was given the opportunity to note any objections to the charges. Appellant objected to two charges; as relevant here, Appellant noted an objection to the charge dealing with the inference of malice. “We also object to a portion of your malice instruction which deals with the inference of malice can be implied. That is our position that that is a burden-ship.”¹⁰ (R. p. 232 lines 3-6.)

STANDARD OF REVIEW

“In reviewing jury charges for error, this Court must consider the circuit court's jury charge as a whole in light of the evidence and issues presented at trial.” State v. Simmons, 384 S.C. 145, 178, 682 S.E.2d 19, 36.(Ct. App. 2009). When reviewing the trial judge’s jury instructions, the appropriate test involves determining what a reasonable juror would have understood the charge to mean. State v. Jackson, 297 S.C. 523, 527, 377 S.E.2d 570, 572 (1989). A jury charge is appropriate if correctly and adequately states the correct law of South Carolina. Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472-473 (2004), (citing State v. Burkhardt, 350 S.C. 252, 565 S.E.2d 298 (2002)).

DISCUSSION

The trial court erred in charging the jury that malice may be inferred from the use of deadly weapon without including in the charge the permissive inference language set forth in

¹⁰ From the context, it appears the wording “burden-ship” is a transcription error. Appellant’s position is that “burden-shift” is the appropriate wording.

Elmore. In 1983, our Supreme Court set forth the standard charge for the permissive inference of malice as follows:

The law says if one intentionally kills another with a deadly weapon, the implication of malice may arise. If facts, are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive.

State v. Elmore, 279 S.C. 417, 421, 308 S.E.2d 781, 784 (1983), (overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991)).

The Elmore court went on to note “We caution the bench, that hereafter only slight deviations from this charge will be tolerated.” Elmore at 421, 781.

In 2009, the Supreme Court was called on to analyze the Elmore charge in Belcher. State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). The Court in Belcher noted two distinct and important components within the Elmore charge: The first, the standard implied malice charge, and the second, the permissive inference instruction. Belcher at 612, 810. In a footnote, the Belcher Court recognized “[t]he standard implied malice charge remains valid, as does the general permissive inference instruction.” Belcher at 612, 810 n.9.

Here, the trial court significantly and substantially deviated from the Elmore charge. While the court properly gave the first component of the charge set forth in Elmore, “Inferred malice may also arise when the deed is done with a deadly weapon” the trial court omitted the second component, referred to in Belcher as the general permissive inference instruction, and did not charge jurors on the meaning of a permissive inference.

A similar jury charge was analyzed by our Supreme Court in Gibson v. State, wherein the Supreme Court granted certiorari following the denial of Gibson’s PCR application. Gibson v.

State, 416 S.C. 260, 786 S.E.2d 121 (2016). In Gibson, the defendant was convicted of murder and unlawful possession of a pistol. The trial court charged the jury as follows:

Malice can be inferred from conduct showing a total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon. A deadly weapon is any article, instrument, or substance which is likely to cause death or great bodily harm. Whether an instrument has been used as a deadly weapon depends upon the facts and circumstances of each case. I'll just give you some examples of deadly weapons. There's [sic] a lot of them, and I'm not—this is obviously not an exhaustive list. It could be a knife, a dagger, a slingshot, metal knuckles, a rifle, a shotgun, a pistol, a razor, gasoline. Any number of things that you determine from the facts would be a deadly weapon.

Gibson at 263, 123.

The Gibson Court found this charge to be erroneous because it deviated from the charge suggested in Elmore and omits the permissive inference component. “The charge given by the trial judge in this case clearly deviates from the suggested Elmore charge as it does not contain the permissive inference language.” Gibson at 264-265, 123-124. Important here, the Gibson Court went on to note “The complete omission of the permissive inference language is not a “slight deviation” that would be permissible under Elmore. ” Id.

The charge given by the trial court here is almost identical to the charge the Court found to be erroneous in Gibson. Both charges omit any reference what an inference is, what evidentiary weight it bears, and how jurors should consider it during deliberations. The omission of this legally significant language in this case is clear, reversible error.

Appellant suffered prejudice because of this erroneous charge. Other than the weapon, the record is scant of evidence of actual malice. No witness testified about observing a fight between Appellant and Decedent on the date of her death. No witness testified about ill-will or hatred between the parties. The only evidence that could be deemed as reflecting malice came from Appellant himself, when he told investigators about a confrontation that took place between

he and Decedent immediately prior to her death. The story about the confrontation came during the interview where Appellant confessed to killing Decedent following his son being charged with murder. Appellant recanted this story at trial. (R. p. 161, lines 5-25, p. 162, lines 1-2.)

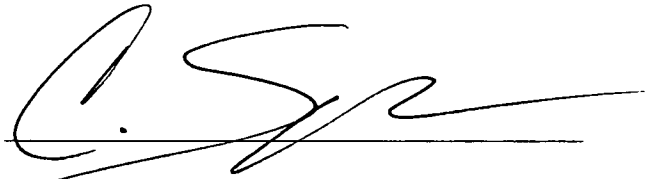
CONCLUSION

In light of the foregoing errors, Appellant respectfully requests this court reverse his conviction and remand this case for a new trial.

RESPECTFULLY SUBMITTED

This 19th Day of June, 2019

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This 19th day of June, 2019

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JUN 20 2019
SC Court of Appeals

ORIGINAL

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Lexington County
The Honorable Eugene C. Griffith, Circuit Court Judge

RECEIVED

JUN 20 2019

SC Court of Appeals

THE STATE,

Respondent,

v.

MARION C. WILKES,

Appellant.

Appellate Case No. 2018-0001556

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court err in analyzing the admissibility of a DVD copy of the film Where the Lilies Blume (1974) when the court failed to screen the film, either in whole or in part, prior to ruling on the film's admissibility?
- II. Did the trial court err in excluding a DVD copy of the film Where the Lilies Blume (1974) when testimony reflected the alleged victim told Appellant she wished to be buried in a manner consistent with the film and for her death to be concealed from the public?
- III. Did the trial court error in charging the jury that malice may be inferred from the use of a deadly weapon when the trial court substantially deviated from the charge set forth in Elmore by admitting the charges permissive inference instruction?

RESPONDENT'S COUNTER STATEMENT OF ISSUES ON APPEAL

- I. The trial court's analysis of the film prior to ruling on its admissibility is not preserved for this Court's review. Even so, the trial court acted within its discretion to rule on the admissibility of evidence based on its context.
- II. The trial court acted within its discretion to find the film irrelevant and therefore inadmissible when the movie was not probative of any of the events surrounding the victim's death.
- III. The trial court's use of the standard implied malice charge was not error given the facts of the case because no evidence mitigated the crime to manslaughter, accident, or self-defense. Even if the court erred, the instruction was harmless because malice was not an issue in dispute under any theory of the case.

STATEMENT OF THE CASE

In November of 2014, a Lexington County Grand Jury indicted Appellant, Marion C. Wilkes, for murder. (R. p. 235.) Appellant proceeded to a jury trial on February 26, 2018, before the Honorable Eugene C. Griffith. (R. p. 1.) Appellant was represented by Wayne Floyd, Esquire, and Colin Spangler, Esquire. (R. p. 1.) Assistant Solicitors Rhonda Patterson and Gill Bell, of the Eleventh Circuit Solicitor's Office, represented the State. (R. p. 1.)

The jury found Appellant guilty of murder. (R. p. 511, lines 13-15.) Judge Griffith sentenced Appellant to forty-five years' imprisonment. (R. p. 518, lines 6-7.) This appeal follows.

STATEMENT OF FACTS

Marion Wilkes reported his wife, Susan Wilkes, missing on Saturday, June 14, 2014. Investigator Thomas Griffin was assigned to the missing person's case. (R. p. 18, line 22 – p. 19, line 15.) Upon receiving the report, Griffin went to the Wilkes home to interview Wilkes along with his son, Joseph Wilkes. (R. p. 19, line 15 – p. 20, line 4.) Griffin was told Susan disappeared after going for a walk Thursday morning. Her cell phone, purse, and vehicle were left behind at the house, however. (R. p. 20, line 9 – p. 21, line 1.) Griffin reviewed Susan's phone and realized there was no activity after June 8, 2014. (R. p. 21, lines 3-11.)

Griffin also examined Susan's vehicle. When he opened the trunk of the car, he noticed the carpet that would ordinarily cover the spare tire was missing. (R. p. 22, lines 1-7.) Griffin requested assistance from other law enforcement agencies, who brought dogs to search the area Wilkes reported as his wife's last known route. (R. p. 22, lines 11-24.) Marion Wilkes mentioned to Griffin that if anyone took his wife, it would have required more than one person because she would have put up a fight. (R. p. 23, lines 3-9.) Griffin created a bulletin to disseminate to the media and other law enforcement agencies detailing Susan's disappearance. (R. p. 23, lines 14-20.)

On Sunday, June 15, Griffin returned to the Wilkes home to find Marion, Joseph, Susan's sisters, and local news outlets gathered there. (R. p. 24, lines 11-21.) Susan's sister, Patti Smith, learned Susan was missing when Marion Wilkes called her Saturday morning, asking her, "What's going on in the 'Boro?" and then explaining about her sister's disappearance. (R. p. 10, line 19 – p. 11, line 8.) Smith said Wilkes did not seem concerned about his wife. (R. p. 11, lines 9-17.) Smith traveled to West Columbia in an effort to learn more information. Smith said she had trouble talking to Joseph without Marion interrupting their conversation. (R. p. 12, lines 1 –

23.) When the television station arrived to do an interview about Susan Wilkes, Marion insisted he do all the talking to the weekend reporter for WACH Fox 57 news. (R. p. 4, line 19 – p. 5, line 18; p. 8, lines 8-12; p. 13, lines 2-15.) The reporter later testified she found Wilkes' demeanor odd because he did not seem concerned about his wife. (R. p. 7, lines 2-10.)

The following day, on June 16, Griffin asked the men to return for another interview, but this interview took place at SLED. (R. p. 26, lines 17-25.) While Griffin transported the men to SLED, other SLED agents executed a search warrant for the Wilkes home. (R. p. 26, lines 4-15.) Agents found female walking shoes and a purse on top of a dresser in one bedroom. Inside the purse was Susan's wallet with her identification. (R. p. 32, line 1 – p. 33, line 1.) Agents also discovered Susan's phone in a jewelry box on the dresser. (R. p. 33, lines 4-15.) A weekly medication container indicated pills had been taken for the days of Sunday through Wednesday, but Thursday through Saturday's medications remained in the container. (R. p. 33, line 16 – p. 34, line 10.) In Marion's bedroom and bathroom, the shower curtain was missing. (R. p. 34, lines 16-18.) In the kitchen of the home, there were blood stains on the door leading to the garage and on the kitchen floor. (R. p. 35, lines 14-23; p. 37, lines 9-18.) Agents also observed what appeared to be blood on the passenger side frame of Susan's car, which was parked in the garage. (R. p. 38, lines 10-21.) Several other bloodstains were found inside the car. (R. p. 172, lines 2-11.)

At SLED, Marion and Joseph were interviewed separately and the men gave similar statements. After the interviews, however, agents placed the men together in the same room and observed their interaction from behind a two way mirror in the next room. (R. p. 27, lines 3-22.) Marion asked Joseph, "You didn't change up on me, did you?" and also commented that the

police needed physical evidence. (R. p. 28, lines 16-19.) Marion looked around and then said, "I ain't changing up." (R. p. 28, lines 18-21.)

On June 18, 2014, Patti Smith and Joseph Wilkes met at the police station to talk, and Joseph agreed to lead officers to the location of his mother's body. (R. p 29, lines 1-20.) Joseph told officers the body was in Little Mountain, South Carolina, about a thirty-five minute drive away. (R. p. 29, line 22 – p. 30, line 3.) Joseph led police to the burial site, which was in the back corner of a residential property owned by a man named Eric Bassett. (R. p. 30, lines 13-25.) After determining where the grave site was, the crime scene team began to remove the loose dirt from the area. (R. p. 43, lines 2-11.) The grave site was approximately three and one-half feet long by one and three-quarters feet wide by two feet deep. (R. p. 46, lines 21-23.) Under some of the dirt was a cement block, and below the block was the body of Susan Wilkes, wrapped in a comforter and a brown tarp. (R. p. 43, line 9 – p. 44, line 9.) The tarp was wrapped with duct tape, and inside the tarp, Susan's head was wrapped with a yellow towel. (R. p. 44, line 21 – p. 45, line 2.)

After Joseph revealed the death of his mother on June 18, Marion Wilkes changed his story and told investigators his wife committed suicide by stabbing herself in the heart. Wilkes claimed his wife wanted to be buried somewhere natural. (R. p. 120, lines 7-23.) Wilkes also claimed his wife had fallen and hit her head, which is why they wrapped her head in a towel. (R. p. 121, lines 2-4.) Marion claimed he and Susan had been to the place he buried her body, and Susan told him it was a favorite place of hers and that she wanted to be buried there. (R. p. 122, lines 1-21.) Wilkes said Susan stabbed herself in the chest with the knife, pulled the knife out and put it in the sink, then fell backward and hit her head on the oven handle. After collapsing on

the ground, Susan had a five minute conversation with Marion.¹ (R. p. 124, lines 8-22.) Wilkes claimed Susan told him to get a tarp from the backyard and bury her in it. (R. p. 125, lines 2-7.)

The pathologist found multiple blunt force injuries to Susan's head and one stab wound to the torso, just below the chest. (R. p. 52, lines 14-22.) She had five injuries, at least, that caused lacerations on the skin and she had an underlying fracture of the skull. (R. p. 53, lines 1-4.) The pathologist opined that a straight object, consistent with a frying pan, could have caused the injuries. Dr. Ross also testified the injuries could not have been self-inflicted because of the number of the injuries and the location about the head. (R. p. 54, lines 4-20.)

The stab wound was just beneath the sternum. The wound continued upward and backward and penetrated the heart. (R. p. 55, lines 20-25.) The weapon that caused the wound would have been two to four inches long to travel into the heart. (R. p. 57, lines 5-10.) Dr. Ross examined the rest of Susan's body and found no evidence of damage to any other organs or damage resulting from any natural disease processes. (R. p. 58, line 11 – p. 59, line 3.) The cause of death was homicide due to exsanguination from the stab wound, contributed by the blunt force injury to the head. (R. p. 59, lines 21-25.) The toxicology report showed sub-therapeutic levels of Butalbital, a sedative, and Trazodone, an antidepressant. (R. p. 66, line 8 – 74, line 12.)

Susan's family doctor of five years testified Susan was prescribed medication for her high blood pressure and headaches. (R. p. 86, line 16 – p. 87, line 25.) Susan never complained of depression to her doctor. (R. p. 88, lines 8-11.) Several years before, Susan was prescribed a low dose of Elavil, an antidepressant, in an effort to relieve her headaches triggered by muscle tension. (R. p. 90, lines 1-8.) In 2013, the Elavil was replaced by Trazodone because Trazodone

¹ The Wilkes home was located approximately one-half of a mile from Lexington Hospital; and typical emergency response time is two minutes or less from the time of the 911 call. (R. p. 220, lines 5-8.)

had fewer side effects. (R. p. 91, lines 2-8.) Susan was additionally prescribed Fiorinal with codeine to relieve her headaches. One of the active ingredients in Fiorinal is the sedative Butalbital. (R. p. 92, lines 4-17.)

After confirmation that the body was recovered, Griffin arrested Marion and Joseph Wilkes for murder. (R. p. 31, lines 2-11.) After he was arrested and Mirandized, Marion Wilkes changed his story again and gave a statement to police in which he confessed to killing his wife. (R. p. 102, line 11 – p. 107, line 1.) In his interview with police, Wilkes mentioned his wife's brokerage account with approximately \$120,000, of which he was the beneficiary, as well as a life insurance policy. (R. p. 107, lines 16-24.) Wilkes also described his wife as gaining weight, having an affair, and being an alcoholic. (R. p. 108, lines 3-5.) Wilkes also said there was a "confrontation" between him and his wife. (R. p. 120, lines 2-6.)

Marion Wilkes' Version of Events

Marion Wilkes testified his wife was depressed at the time of her death because she had been laid off from her job of thirty years. (R. p. 143, line 14 – p. 144, line 21.) Defense counsel asked Wilkes if Susan had a favorite movie, and Wilkes said they would watch *Where the Lilies Bloom* several times each year in the winter. (R. p. 145, lines 1-17.) Marion explained that in the movie the a father of several young children dies of black lung, but tells the children before he dies that he wants to be buried in the mountains. The children bury their father and follow his wishes not to tell anyone about his death. (R. p. 146, line 20 – p. 147, line 4.) Wilkes said Susan was a loner who wanted to be somewhere quiet after her death and wanted a natural burial. (R. p. 147, lines 5-17.)

Counsel questioned Wilkes about Susan's demeanor in the year after she lost her job. (R. p. 148.) Wilkes claimed Susan was depressed about not finding a job and hurting her back, so he and his son would try to do "the best [they] could to keep her going." Wilkes claimed Susan was also depressed because Joseph intended to join the military but no recruits were being admitted to the Air Force at the time. (R. p. 151, lines 8-18.)

Wilkes said that on the day of her death, Susan first fell when she was trying to fix her breakfast at 9:00 in the morning. (R. p. 151, lines 22-24.) Wilkes said she hit her head again later that day when they were making sandwiches for lunch. Susan was reaching for salt on the top cabinet when she fell off a two-step stool and hit her head on the seat of a chair. (R. p. 151, line 25 – p. 152, line 7.) Marion claimed he left to go move his car to prepare to take her to the hospital, but when he returned, Susan had stabbed herself with a paring knife she kept in the kitchen drawer. (R. p. 152, lines 9-25.) Wilkes said Susan told him she wanted Joseph to go to college. (R. p. 153, lines 4-8.) Wilkes claimed Susan had the duct tape and the brown tarp ready, told him how deep to bury her, and where to put her body, so she could "be out there with God." (R. p. 154, line 23- p. 155, line 5.)

Wilkes said after Susan killed herself, he wrapped up her body and slid it out into the garage. (R. p. 155, lines 7-19.) Wilkes left the body there until the next morning, when he told Joseph his mother had been euthanized because she had cancer. Susan did not have cancer, but told Marion to tell Joseph that to "let him get over it." (R. p. 156, lines 6-10.) Around 10:00 am, the men put Susan's body in the trunk and drove the 40 miles to Little Mountain to bury Susan under a hickory tree. (R. p. 156, line 17 – p. 157, line 21.) Wilkes claimed he tried to position the body on its side, and put a concrete block in the grave "as a marker." (R. p. 158, lines 2-17.)

When he returned to Columbia, he did not tell anyone about Susan's death because "she didn't want nobody to know nothing." (R. p. 158, line 21 – p. 159, line 6.)

Wilkes said he was in shock when he spoke to police about his wife's supposed disappearance. (R. p. 160, lines 3-8.) He only changed his story to confess to the killing after he learned Joseph was being charged with murder. (R. p. 161, lines 5-22.) On cross-examination, Wilkes acknowledged he heard rumors his wife was having an affair with one of her co-workers. (R. p. 166, lines 4-14.) Wilkes denied telling investigators his wife had a gambling problem, claiming the captain made him say things about his wife that were not true. (R. p. 169, lines 3-22.)

I. The trial court's analyzation of the film prior to ruling on its admissibility is not preserved for this Court's review. Even so, the trial court acted within its discretion to rule on the admissibility of evidence based on its context.

Appellant sought to introduce evidence that Susan Wilkes wanted a natural and secretive burial in the woods; in part because of her interest in one of her favorite films, *Where the Lilies Bloom*, and in part because of her "loner" personality. (See BOA, p. 8; R. p. 147, lines 5-20.) The trial judge, acting within his discretion, found some of that information relevant while properly excluding other offers of evidence as not probative of any the events surrounding Susan's death. The trial court's refusal to admit the film into evidence is an issue wholly without merit.

STANDARD OF REVIEW (ISSUES I AND II)

In criminal cases, the appellate court only reviews errors of law. *State v. Jacobs*, 393 S.C. 584, 586, 713 S.E.2d 621, 622 (2011). "[T]he admission of evidence is within the discretion of the trial court and will not be reversed by this Court absent an abuse of discretion." *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000) (citing *State v. Smith*, 337 S.C. 27, 34, 522 S.E.2d 598, 601 (1999)). "An abuse of discretion occurs when the trial court's ruling is based on an error of law." *Id.* (citing *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)).

"A trial [court's] decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." *State v. Huckabee*, 419 S.C. 414, 423, 798 S.E.2d 584, 589 (Ct. App. 2017). The Court of Appeals must review a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment. *State v. Collins*, 409 S.C. 524, 534, 763 S.E.2d 22, 28 (2014); *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003)).

HOW THE ISSUES AROSE AT TRIAL (ISSUES I AND II)

Following the Court's colloquy with Wilkes concerning his right to testify, the State alerted the Court to the intention of the defense to introduce a movie, to which the State objected. (R. p. 126, lines 7-11.) The State objected on the grounds the introduction of the movie, *Where the Lilies Bloom*, was calculated to arouse the sympathy of the jury, was irrelevant or did not substantiate material facts, and suggested an opinion of the jury based on an improper basis. (R. p. 126, line 13 – p. 127, line 6.) The State also argued that only Marion Wilkes would testify the movie had some relevance to the crime itself, and that relevance was only minimal because the facts of the case differed from the events depicted in the movie. (R. p. 129, lines 2-15.) The court reserved its ruling until the defense sought to admit the film into evidence. (R. p. 129, lines 16-24.)

During direct examination of Wilkes, when he testified Susan wanted a natural burial, defense counsel asked to publish the first thirty-five minutes of the movie to the jury, saying:

Your Honor, we'd like to introduce the movie into evidence. We would only like to publish about 35 minutes of it, the first 35 minutes. Then, of course, if the jury wants to watch it all later, but that's got the significant part of it.

(R. p. 147, line 24 – p. 148, line 3.) The State objected again, saying the evidence was cumulative to Wilkes' testimony and prejudicial. (R. p. 148, lines 4-8.) The Court ruled: "Since it's a favorite movie of the family, but it's not directly probative of the events, I'm going to not allow it. But you can crave [sic] reference to it, the story line or whatever, just as you've done. I'm not going to allow it. Number 7 will not be admitted." (R. p. 148, lines 9-13.) Defense counsel said, "Thank you, Your Honor." (R. p. 148, line 15.) Appellant did not object to the Court's failure to review the movie before making its ruling, nor did he explain the why he sought to introduce the entirety of the movie into evidence.

The court took a break following direct examination, and the State renewed its motion to introduce statements made by Wilkes at bond court. (R. p. 162, lines 20-25.) The defense also again argued its position in favor of publishing the video to the jury. The Court declined to change its ruling and said the video was not admissible. (R. p. 163, lines 3-19.) Again, Wilkes did not argue the trial court should have viewed the video before making the ruling.

ARGUMENT

As a stand-alone issue, the trial court's failure to preview the film *Where the Lilies Bloom* before ruling on its admissibility is not preserved for this Court's review. Defense counsel moved to admit the film into evidence and publish the first thirty-five minutes to the jury. (R. p. 148.) The trial court declined to admit the film based on counsel and Appellant's representations of the film's relevance. Appellant did not object to the court's ruling on the basis the court failed to review the movie before making its finding. Further, Appellant did not specify why the entirety of the movie was relevant and should have been admitted into evidence. He only argued the relevance of the first thirty-five minutes he sought to publish.

It is incumbent on Appellant to explain to the court the specific relevance of the evidence he seeks to introduce. "The objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error." *State v. Johnson*, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005). "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct.App.2006). It is "axiomatic that an issue cannot be raised for the first time on appeal." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Imposing such a requirement on the appellant "is meant to enable the lower court to rule properly

after it has considered all relevant facts, law, and arguments.” *I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). A party is not required to use the exact name of a legal doctrine in order to preserve the issue. *See State v. Russell*, 345 S.C. 128, 546 S.E.2d 202 (Ct.App.2001) (finding issue was preserved even though defendant did not use exact words “corpus delicti” in his request for a directed verdict). Nonetheless, the issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge. *Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733.

In the instant case, Appellant should have objected to the trial judge’s method for determining admissibility and given the judge a fair opportunity to consider the objection, preview the film if he thought it necessary, and modify his previous ruling if his view of the film changed his mind. Appellant did not make this particular argument to the court, however. Appellant also sought to introduce the entirety of the film, Exhibit 7, without arguing the relevance of the entire film, only the first thirty-five minutes. Appellant did not sever the arguably relevant portion from the remainder of the movie and specifically request the trial court view this portion before ruling.

Even if Appellant had properly preserved this issue with the trial court, the court was still within its discretion to rule on the admissibility of the movie without stopping to preview the movie and unnecessarily delaying the progress of the trial. “A trial judge is vested with a wide discretion in the conduct of a trial. He has the duty to see that the trial proceeds in an orderly fashion and should prevent unnecessary repetition, working to the end that the time of the court be preserved.” *State v. DeBerry*, 250 S.C. 314, 322, 157 S.E.2d 637, 641 (1967). In this case, even accepting Appellant’s argument the movie was a favorite of Susan’s and she had expressed an interest in a natural burial, perhaps as a result of watching this movie, the film was not

relevant to the circumstances of Susan's death. Marion Wilkes testified his wife told him where she wanted to be buried, as she'd seen in the movie. That information was presented to the jury. The trial court was certainly within his discretion not to delay the proceedings by reviewing a film that had no relevance to Susan's death.

Appellant's reliance on *State v. Goss*, 425 S.C. 101, 830 S.E.2d 373 (2018) is misplaced. In *Goss*, the PCR court was tasked with making credibility findings about witnesses the court elected not to hear, but took judicial notice of their testimony. In finding error, the court said the PCR court's actions "diluted the process" of its fact findings. *Goss*, at 108, 820 S.E.2d at 376. In *Goss*, the Supreme Court found fault in the PCR court's factual findings, which it is obligated to do under the PCR statutes. *See* S.C. Code Ann. § 17-27-80 ("The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented.") In a criminal trial, however, the judge is not the fact finder, but the gatekeeper of evidence presented to the jury. In that role, the trial judge must frequently exercise his discretion in the midst of trial to determine whether evidence is properly admissible. Indeed, Rule 103, SCRE, titled "Rulings on Evidence" states:

- a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence **unless a substantial right of the party is affected**, and
 - (1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or
 - (2) Offer of Proof. In case the ruling is one excluding evidence, **the substance of the evidence** and the specific evidentiary basis supporting admission were made known to the court by offer or **were apparent from the context**.

Rule 103, SCRE (emphasis added). It was apparent from the context of Marion Wilkes' testimony,² in which he described the substance of the plot of the movie, that viewing the film would not assist the factfinders in their assessment of Marion Wilkes' credibility because the movie had no rational relationship the circumstances of Susan's death and burial, other than that which had already been communicated to the jury. Because the jury was already aware of Susan's interest in the film, the screening of the movie affected no substantial right of Wilkes. The trial court's ruling was properly in accordance with the Rules of Evidence.

II. The trial court acted within its discretion to find the film *Where the Lilies Bloom* Irrelevant, and therefore inadmissible, when the movie had no bearing on the events surrounding the victim's death.

Marion Wilkes sought to introduce a copy of the film *Where the Lilies Bloom* into evidence because it was a favorite of Susan Wilkes and because the film allegedly explained why Wilkes concealed his wife's death from law enforcement. The trial court allowed into evidence testimony from Marion Wilkes about the film. That testimony – that the movie was a favorite of Susan's and inspired her desire for a secret, natural burial – was admitted as relevant. The thirty-five minute movie itself, however, was not relevant. The court properly distinguished between information about the movie, which arguably made a matter at issue more probable, and the movie itself, which served no probative value.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. The trial court has broad discretion in determining the relevancy of evidence and its decision to admit or exclude evidence will not be

² (R. p. 146, line 9 – p. 148, line 4.)

reversed on appeal absent an abuse of that discretion and a showing of prejudice. *State v. Holder*, 382 S.C. 278, 288, 676 S.E.2d 690, 696 (2009). Stated another way, “evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy.” *State v. Salley*, 398 S.C. 160, 169, 727 S.E.2d 740, 744 (2012) (citing Rule 401, SCRE). Only relevant evidence is admissible. See *State v. Petit*, 144 S.C. 452, 142 S.E. 725 (1928).

Moreover, the right to present a defense is not unlimited, but must “bow to accommodate other legitimate interests in the criminal trial process.” *Rock v. Arkansas*, 483 U.S. 44, 55 (1987) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973)). While defendants are entitled to a fair opportunity to present a defense, that right does not encompass the right to present any evidence, regardless of its admissibility under the rules of evidence. See *United States v. Lancaster*, 96 F.3d 734 (4th Cir.1996). In the case before the Court, Appellant presented the trial judge with evidence purporting to corroborate his version of the events surrounding Susan’s death and burial. The trial court, acting within its discretion, determined information about Susan’s interest in the film was relevant, but the film itself was not properly admissible under the rules of evidence.

Appellant offered the film during the direct examination of Marion Wilkes. (R. p. 147, line 24 – p. 148, line 3.) The State objected on the grounds the video was cumulative, a waste of time, and prejudicial. (R. p. 148, lines 4-8.) Appellant argues the trial court was unclear as to “which type of unfair prejudice that the court perceived as substantially outweighing any probative value.” That is a misreading of the court’s finding, however. Although the State might have objected based upon Rule 403, SCRE, the trial court’s ruling was based upon Rule 402, SCRE, finding the movie “was not directly probative of the event” surrounding Susan’s death.

(R. p. 148, lines 9-11.) Thus, in finding the film “not probative,” the trial court found the evidence was not relevant and therefore not admissible. *See* Rule 402, SCRE.³ Appellant’s Rule 403 analysis is misplaced because irrelevant evidence never progresses to a Rule 403 consideration. It simply is not admissible regardless of any prejudicial impact and no matter how wasteful of the jury’s time.

As for the substance of Appellant’s claim, that the jury should have seen *Where the Lilies Bloom* because the film made Appellant’s version of events more probable, a review of the film leaves no rational relationship between the plot of the movie and Marion Wilkes description of his wife’s final moments. In the first thirty-five minutes of *Where the Lilies Bloom*, the jury would have seen the following: An impoverished family of four children and their father, Roy Luther, stricken with black-lung, try to survive by sharecropping off the land of their mountain home before the man who bought their foreclosed property in a tax sale evicts them. While their father is dying, the children care for the landlord, who also almost dies of pneumonia, but agrees to sign over the land back to the children in exchange for nursing care. Meanwhile, townsfolk warn the children they will be institutionalized when orphaned if their father dies. The children decide to research medicinal herbs and to treat their father naturally. Unfortunately, they are too late, and Roy Luther dies. The children then bury their father on the mountain where their family has lived for 200 years. (See Defense Exhibit 7.)

The only factual similarity between the movie and the circumstances surrounding Susan’s death involve the burial of the body in natural setting, as opposed to a cemetery. In the film, the

³ Rule 402, SCRE reads: “All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible.”

father is buried in a wooden coffin he built himself, not in a tarp with duct tape wrapped around his head. In the film, the children are afraid of being institutionalized because they are minors. Marion Wilkes cannot claim such a fear. In the film, the father dies of a terminal illness. According to Marion Wilkes, Susan committed suicide after a nasty fall. In the film, the children bury their father on family property. Marion and Joseph put Susan's body in the trunk of a car and drove her to a secluded piece of property owned by a friend. In sum, virtually nothing about the movie tends to make Marion Wilkes' version of event more probable. The only evidence of relevance, that Susan liked the movie and expressed an interest in natural burial, was presented to the jury. The movie itself was not relevant. The trial court committed no error in excluding the film from evidence.

Harmless Error

Even assuming the film was relevant under the Rules of Evidence, any error in its exclusion would be harmless beyond a reasonable doubt. Appellant cannot show how he was prejudiced by the jury's failure to view the film. The State presented direct evidence of Appellant's guilt when he confessed to killing his wife in their kitchen. Marion Wilkes admitted he fabricated his wife's missing person's story, and then changed his version of events multiple times. Further, there was significant circumstantial evidence of his guilt: the injuries to Susan's body were not consistent with Wilkes' description of how Susan died; Lexington Hospital was within a few minutes' drive of the Wilkes' home, yet Wilkes did not seek medical help; Susan's family doctor reported no history of depression; Wilkes appeared unaffected by his wife's disappearance to her sister and a reporter; Wilkes made incriminating comments to Joseph about changing his story to investigators; Wilkes was aware of Susan's investments and believed he would inherit the money after her death; and Wilkes made many disparaging comments to

investigators about his wife's fidelity and gambling habits. The jury heard that *Where the Lilies Bloom* was one of Susan's favorite films and that in the film a character has a natural burial. Viewing the film would not have imparted the jury with any more knowledge or insight into Susan's death. The jury determined Wilkes' claim his wife committed suicide not credible in light of the overwhelming evidence against him.

Even if the trial court erred by refusing to admit the film into evidence, any error was harmless beyond a reasonable doubt.

III. The trial court's use of the standard implied malice charge was not error given the facts of the case because no evidence mitigated the crime to manslaughter, accident, or self-defense. Even if the court erred, the instruction was harmless because malice was not an issue in dispute under any theory of the case.

Marion Wilkes either murdered his wife, or he had nothing to do with her death. There was no lesser included offense charged, and there was no evidence of accident or self-defense. In his appeal, however, Wilkes contends the trial court erred in giving an abbreviated version of an approved charge on the inference of malice from the use of a deadly weapon. Wilkes argues two seminal cases in South Carolina jurisprudence support his position. A closer reading of those cases, however, indicates an unsettled area of law concerning the permissive inference of malice under facts in which no mitigation evidence is presented. Nevertheless, regardless of whether the instruction was error, any error was harmless in light of the overwhelming evidence of malice presented during trial and because the issue of malice was not in dispute. Wilkes' conviction should be affirmed.

STANDARD OF REVIEW

In reviewing jury charges for error, this Court considers the trial court's jury charge as a whole and in light of the evidence and issues presented at trial. *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 604 (2011). A jury charge is correct if, when read as a whole, the charge adequately covers the law. *Id.* "A jury charge that is substantially correct and covers the law does not require reversal." *Id.* (citing *State v. Foust*, 325 S.C. 12, 16, 479 S.E.2d 50, 52 (1996)).

HOW THE ISSUE AROSE AT TRIAL

Following the defense's presentation of its case, the trial court elected to take a ten minute break to have a charging conference off the record. (R. p. 192, line 15 – p. 193, line 4.)

Appellant indicated to the court he had some proposed charges, but the record is not clear what was discussed in the charging conference. (R. p. 193, lines 1-4.)

When the trial resumed, the parties gave their closing arguments to the jury (R. pp. 193 – 194.) Before the court gave its instruction to the jury, Appellant told the trial court he objected to any charge on accomplice liability and “the hand of one charge.” (R p. 221, lines 6-7.) The court noted Appellant’s objection. Appellant did not object to the inference of malice charge prior to the court giving the instruction.

During the charge, the court instructed on the State’s burden of proof at the beginning of the instruction, and then more thoroughly just before its instruction on criminal intent. (R. p. 222, line 10 – p. 223, line 7.) The court also cited to the State’s burden to prove their case beyond a reasonable doubt on numerous occasions throughout the charge. During its explanation of express and inferred malice, the court said the following:

Malice may also be inferred from conduct showing a total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon. A deadly weapon is any article, instrument which would likely cause death or great bodily harm.

(R. p. 225, lines 4-9.) Following the jury instruction, Appellant renewed his objection to the hand of one, hand of all instruction and also objected “to a portion of your malice instruction which deals with the inference of malice that can be implied,” arguing the language was a burden shift.⁴ (R. p. 232, lines 2-6.) The court responded, “And your objection on both of those is noted but I am not going to change them. We talked about that in pretrial.” (R. p. 232, lines 7-9.) The court did not elaborate on what was discussed among the parties.

⁴ Respondent agrees with Appellant’s contention to word “burden-ship” reflected in the transcript is likely a transcription error.

ARGUMENT

Appellant argues⁵ the trial court's instruction on the permissive inference of malice from the use of a deadly weapon was error because it deviated from the charge given in *State v. Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983). Appellant argued the charge shifted the burden on Appellant in the element of malice. Appellant did not argue the charge was confusing or prejudicial. The trial judge did give an abbreviated version of the *Elmore* charge, but whether that charge was error is not clear, in light of the Supreme Court of South Carolina's comments in *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009), and because this case only involved a charge of murder, not any lesser included offenses or self-defense or accident.

Until 1983, the instruction routinely given on the use of a deadly weapon included a presumption of malice. *Belcher*, at 608, 685 S.E.2d at 807. In *State v. Elmore*, the Supreme Court of South Carolina found the presumption unconstitutional, in light of the Supreme Court of the United States decisions on mandatory presumptions as violative of Due Process. Those cases

⁵ It is questionable whether Wilkes' objection to the jury instruction is preserved for this Court's review. "If a party fails to properly object, the party is procedurally barred from raising the issue on appeal." *State v. Johnson*, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005). The South Carolina Rules of Criminal Procedure provide specific guidance in regards to raising and preserving an objection to a jury charge. See Rule 20, SCRCrimP. A defendant must object to the jury charge as given or request an additional charge when afforded the opportunity to do so in order to properly preserve an objection to a charge. *State v. Stone*, 285 S.C. 386, 387, 330 S.E.2d 286, 287 (1985); "The rule in this State is firmly established that failure to object to a charge, or failure to request an additional charge when the opportunity is afforded, constitutes a waiver of any right to complain on appeal of an alleged error in the charge." *State v. Williams*, 266 S.C. 325, 335, 223 S.E.2d 38, 43 (1976).

Here, Wilkes arguably failed to preserve his objection to the inference of malice jury charge by not timely and contemporaneously objecting to the jury charge during the charge conference. The record indicates the parties discussed the proposed charges in an off the record conference, and at the conclusion, Wilkes noted an objection only to the hand of one charge. (R. p. 221, lines 6-7.) Only after the charge was given, did Wilkes object to the inferred malice instruction on the grounds of burden shifting. Because he did not object to the charge at his first opportunity to do so, this issue is arguable unpreserved for review.

forbade “burden-shifting presumption[s]” or “conclusive presumption[s]” by the state because the presumption placed the burden on the accused to prove his actions or intent reduced the crime to a lesser charge. *See Mullaney v. Wilbur*, 421 U.S. 684, 703–704 (1975); *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979). With little elaboration, the *Elmore* Court fashioned a jury charge it felt comported with the Due Process Clause.

The law says if one intentionally kills another with a deadly weapon, the implication of malice may arise. If facts[] are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive.

Elmore, at 421, 308 S.E.2d at 784. The Court noted that “only slight deviations from this charge will be tolerated.” *Id.*

In 2009, *Belcher* overruled *Elmore* by holding the permissive inference of malice charge was error when there was evidence mitigating the crime to manslaughter, self-defense, or accident. *Belcher* addressed the confusion caused by the permissive inference charge when mitigation exists, saying, “instructing a jury that ‘malice may be inferred by the use of a deadly weapon’ is confusing and prejudicial where evidence is presented that would reduce, mitigate, excuse or justify the homicide. A jury charge is no place for purposeful ambiguity.” *Belcher*, at 611, 685 S.E.2d at 809. In effect, *Belcher* says the *Elmore* charge, regardless of its addition of the permissive inference language, is not permissible in some circumstances. For example, if the charge presented a mandatory presumption of malice, the charge could never be harmless in accordance with *Sandstrom* and its progeny. However, if the charge contains a permissive inference, and is absent evidence mitigating the crime to a lesser offense, the charge can be harmless.

Belcher indicates the *Elmore* court sought only to rectify the unconstitutional **mandatory** presumption of malice while *Belcher* sought to rectify the **confusion** caused by the inference in **cases of mitigation**, but neither *Belcher* nor *Elmore* addressed the permissive inference of malice instruction when no mitigation evidence existed. The only indication of the Court's opinion of such a scenario can be found in *Belcher*'s footnote 9, which says the following:

The standard implied malice charge remains valid, as does the general permissive inference instruction: "If facts, are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive."

Belcher, at 612, 685 at 810 (emphasis added). The footnote suggests **the standard implied malice charge**, the charge given in the instant case, remains valid when no mitigation evidence is presented. Thus, Respondent reads *Elmore* and *Belcher*, the same cases cited by Appellant, as finding the trial court's instruction in the instant case a "valid" charge. In sum, Appellant's argument the charge constituted a burden shift is not supported by the case law because the charge gave a permissive inference of malice, not a mandatory presumption. Further, Appellant does not argue the charge is prejudicial and confusing, as addressed in *Belcher*, because there is no mitigation. It is incumbent on Appellant to bring attention to the exact error he alleges the trial court to have made. *Johnson*, at 58, 609 S.E.2d at 523.

Moreover, despite Appellant's arguments to the contrary, *Gibson v. State*, 416 S.C. 260, 786 S.E.2d 121 (2016), does not clarify the propriety of the instruction given in this case because although the instruction is similar, the facts of the case are not. In *Gibson*, the abbreviated instruction was given even though there was mitigating evidence of accident or involuntary manslaughter. *Gibson*, at 266, 786 S.E.2d at 124. ("[T]he only evidence of petitioner shooting

the gun indicated he shot his weapon in the air after other shots were fired. Petitioner admitted in one of his statements that it was possible his gun ‘may have dropped down’ toward the victim while he was driving away and shooting in the air.”). *Gibson*, in which the defendant could have accidentally or recklessly killed the victim, is not on point with the facts of this case, in which Wilkes either maliciously killed his wife or had nothing at all to do with her death.

Harmless Error

As noted earlier, and critical to the Court’s analysis in *Belcher*, Susan’s death was either a murder or Wilkes was innocent. Even assuming, arguendo, the instruction was error, any error was harmless beyond a reasonable doubt. In *Belcher* the Court subjected the erroneous instruction to a harmless error analysis. *Belcher* at 611, 685 S.E.2d at 809. The Court said that the evidence of self-defense presented highlighted the prejudice of the charge. *Id.* at 612, 685 S.E.2d at 810. In *Gibson*, as part of its prejudice analysis of the ineffective assistance of counsel claim, the Court cited Petitioner’s admission of how he handled his gun while shooting into the air. *Gibson*, at 266, 786 S.E.2d at 124. The harmless error and prejudice analysis in both cases illustrate the differences between these cases and in the instant case.

Here, the State theorized Wilkes murdered his wife in their kitchen because he wanted to inherit her money and because he thought she was having an affair. (R. pp. 217-220.) The defense’s theory of the case was that Susan committed suicide after hitting her head. (R. pp. 210-211.) Either Marion Wilkes was guilty of murder or he was innocent of the crime. Marion Wilkes gave a statement to police saying he and his wife had a confrontation in the kitchen and he killed her. Susan had multiple blunt force injuries to her head and one stab wound to the torso, just below the chest. (R. p. 52, lines 14-22.) She had five injuries, at least, that caused lacerations on the skin and she had an underlying fracture of the skull. (R. p. 53, lines 1-4.) Wilkes sought

no medical treatment for his wife, despite the close proximity of a hospital. These facts constituted evidence of malice. On the other hand, there was no evidence presented mitigating the murder charge to voluntary or involuntary manslaughter, accident, or self-defense. The element of malice was not an issue in dispute if the jury did not believe Marion Wilkes' version of events when he testified on the stand. It was not the instruction on malice that contributed to the verdict of guilt. It was the implausibility of Wilkes' story in light of the evidence against him.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the appeal must be dismissed and the judgment, conviction, and sentence of the trial court should be affirmed.

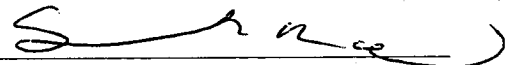
Respectfully submitted,

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June 20, 2019.

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Lexington County
The Honorable Eugene C. Griffith, Circuit Court Judge

RECEIVED
JUN 20 2019
SC Court of Appeals

THE STATE,

Respondent,

v.

MARION C. WILKES,

Appellant.

Appellate Case No. 2018-0001556

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 20th day of June, 2019.



SUSANNAH R. COLE
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions
Judge Eugene C. Griffith

Lower Court Case No. 2014GS3203246
Court of Appeals Case No. 2018-001556

RECEIVED
JUN 20 2019
SC Court of Appeals

THE STATE,

Respondent,

v.

MARION C. WILKES,

Appellant.

Final Reply Brief of Appellant

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Dated: This 19th Day of June, 2019

West Columbia, South Carolina

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II. Respondent’s argument concerning the irrelevancy of the film <u>Where the Lilies Bloom</u> must fail when the State introduced evidence of the manner and method of Decedent’s burial as well as specific scenes and characters from the film, arguing this evidence was probative of Appellant’s guilt.	
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APPELLANT'S ARGUMENTS IN REPLY

- I. Appellant's Issues 1 and 2, whether the trial court erred in analyzing and/or excluding the film Where the Lilies Bloom, were properly preserved at trial when the film was offered twice by Appellant as evidence, its admissibility argued by both sides, and an on-the-record ruling issued by the trial court.
- II. Respondent's argument concerning the irrelevancy of the film Where the Lilies Bloom must fail when the State introduced evidence of the manner and method of Decedent's burial as well as specific scenes and characters from the film, arguing this evidence was probative of Appellant's guilt.
- III. Failure of the trial court to give the "general permissive inference" charge set forth in *Elmore* was erroneous and prejudicial to Appellant when evidence presented at trial refuted the presence of actual malice during the alleged commission of the crime.

STATEMENT OF THE FACTS

Appellant adopts and incorporates by reference the Statement of the Case and Statement of the Facts set forth in Appellant's initial brief.¹ The factual history raised below is limited to replying to issues raised by Respondent's Statement of the Facts.

Respondent's Statement of the Facts concludes Appellant admitted a financial and malicious motive to kill Decedent; this is not reflective of testimony at trial. During the direct examination of Investigator Bruce Wade, Wade stated when Appellant was interviewed following Decedent's disappearance, Appellant did not know the specific amount of money in Decedent's bank account. (R. p. 107, lines 16-24.) Further, Appellant testified he and Decedent enjoyed a quiet and peaceful marriage. (R. p. 133, lines 8-13.) No evidence was presented at trial as to prior law enforcement involvement surrounding the couple or marriage.

Respondent's Statement of the Facts further characterizes the testimony of Dr. Ross as indicating a frying pan was the likely object which inflicted Decedent's head wounds. This characterization does not fairly reflect the testimony at trial, where Dr. Ross admitted the head wounds could have been caused by a cement block, like the one found in the grave, or from Decedent striking her head on a chair. (R. p. 063, lines 6-9, p. 064, lines 9-12.)

ARGUMENT

- I. **Appellant's Issues 1 and 2, whether the trial court erred in analyzing and/or excluding the film Where the Lilies Bloom, were properly preserved at trial when the film was offered twice by Appellant as evidence, its admissibility argued upon by both sides, and an on-the-record ruling issued by the trial court.**

At trial, the admissibility of Defense Exhibit 7, *Where the Lilies Bloom*, was argued on three separate occasions: immediately prior to Appellant taking the stand; during Appellant's

¹ Appellant further incorporates by reference all Argument set forth in Appellant's Initial Brief.

testimony on direct examination; and at the beginning of Appellant's testimony on re-direct examination.² Each of these arguments followed an objection by the State to the admissibility of the film.

Case law in this State supports Appellant's argument that Issues 1 and 2 are preserved for review. "In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal. A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground." State v. King, 424 S.C. 188, 199, 818 S.E.2d, 204, 209 citing State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-694 (2003). Here, Appellant offered the film as evidence on-the-record two (2) times; both times the Court excluded the film in an on-the-record ruling. This issue was properly preserved pursuant to King and Dunbar.

While Appellant concedes that no explicit request was made for the trial court to view the film in camera, Appellant was not required to provide specific instructions to the trial court on how to examine the evidence in order to preserve this issue. Respondent's contend Appellant should have explicitly asked the trial judge to watch the film; this explicit request is not required, as the proper way to determine the admissibility of the film was evident from its medium- to view it.

Respondent's argument that specific instructions by Appellant were required to preserve Issues 1 and 2 is analogous to requiring a party offering a photograph or written material to

² Although argument on the film's admissibility was heard three (3) separate times, the film was only offered by Appellant twice: during his direct examination and at the conclusion of his cross examination. The other argument occurred when the State objected to the film prior to Appellant's testimony, before the film was offered by Appellant.

explicitly tell the judge, on-the-record, to look at the photograph or read the written material.

Explicit instructions such as those proposed by Respondent are not supported by the framework set forth in Dunbar.

Notably, the instant case differs from most issue-preservation cases, as the State, not Appellant, raised the objection to Defense Exhibit 7 pursuant to Rule 403. At trial, the duty of Appellant was to raise the issue of the film's admissibility; Appellant satisfied his duty by offering the film as evidence and securing an on-the-record ruling; therefore, this issue is preserved for review.

II. Respondent's argument concerning the irrelevancy of the film Where the Lilies Bloom must fail when the State introduced evidence of the manner and method of Decedent's burial as well as specific scenes and characters from the film, arguing this evidence was probative of Appellant's guilt.

At trial the State spent significant time and effort detailing the manner and method of Decedent's burial. These efforts began with the State's opening statement, wherein the Solicitor painted a vivid picture of a body decomposing in a shallow grave, telling jurors they would hear about "a burial as malicious as the killing that put her (Decedent) there," and that Decedent was buried beside a family pet, with the pet's grave covered in mementos and ceremonial items that were absent from Decedent's. (R. p. 002, lines 2-22.)

The State continued with testimony about the gravesite, including photographs of Decedent in the grave. State Ex. 108, 109, 110, 112, Tr. 211, ll. 24-25, (R. p. 191, lines 5-8, p. 046, lines 12-25.) The State's focus on the burial concluded in the Solicitor's closing argument, wherein she told jurors Decedent was "stuffed in a cold, shallow grave." (R. p. 194, lines 1-2.) In each of these examples the manner of burial was argued as being probative of Appellant's guilt. Admitting the film, in whole or in part, would have permitted jurors to decide whether the burial

was truly “malicious,” or if it was Appellant’s attempt to follow Decedent’s instructions, that she be buried in the manner shown in the film.

Assuming arguendo the trial court did not err in excluding the film when offered during Appellant’s direct examination, the State opened the door to its admissibility when the State questioned Appellant about specific scenes and characters on cross examination. When the State delved into specific portions and passages, the film’s probative value certainly rose above the low-threshold for admissibility under Rules 401 and 402. Further, once the State opened the door to admitting the film, it seems disingenuous to allow the State to successfully argue the film’s probative value was significantly outweighed by the danger of unfair prejudice, as required to warrant exclusion under Rule 403.

Appellant concedes that an issue such as this, a film being probative of a manner of burial in a murder prosecution, has not been clearly addressed by this Court. However, in this case, the film was directly probative of the manner and method of Decedent’s burial and should have been considered by jurors while deliberating.

Respondent’s own brief supports Appellant’s argument that the jury should have been permitted to view the film: Respondent goes into painstaking detail of each factual difference in the death of Decedent and the death of the film’s main character. This analysis is then used as an attempt to draw out dissimilarities and argue against the film’s admissibility. *This analysis, however, was only made possible through viewing the film and its contents.* This analysis is one that jurors should have been permitted to conduct, unfortunately, the trial court foreclosed on that opportunity when it excluded the film. This exclusion is clear error.

III. Failure of the trial court to give the “general permissive inference” charge set forth in Elmore was erroneous and prejudicial to Appellant when evidence presented at trial refuted the presence of actual malice during the alleged commission of the crime.

Respondent’s brief alleges that because the trial court issued the first portion of the Elmore charge, the second portion, referred to in Belcher as the “general permissive inference” instruction, is not needed nor required in this State. State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983). This assertion must fail given the current case law governing this charge.

Here, Appellant is not relying on Belcher to draw factual similarities between the alleged crime or raise an issue of mitigation; rather, Appellant draws on Belcher solely for its two-pronged analysis of the Elmore charge. Belcher reinforced the ideal that both portions of the Elmore charge remain valid in this State. Despite the clear language of Belcher and Elmore, the trial court failed to give both portions of the Elmore charge, instead choosing to abbreviate the charge down to one (1) sentence: “Inferred malice may also arise when the deed is done with a deadly weapon.” (R. p. 225, lines 4-11.) When the trial court omitted all mention of the second prong of Elmore, jurors were given no explanation or instruction as to the weight of an inference, how it arises, or how it is to be used in deliberations. In this case, the trial court significantly deviated from the charge set forth in Elmore - this is clear, reversible error.³

Further, Respondent’s assertion that any error in the charge constitutes harmless error must fail. Appellant concedes numerous versions of what occurred surrounding Decedent’s death were presented at trial. Respondent relies on parts of each account to argue actual malice was

³ This issue (Issue 3 of Appellant’s Initial Brief) was properly preserved at trial given the framework for issue preservation set forth in King and Dunbar. Following the erroneous charge, Appellant objected to the specific charge and secured an on-the-record ruling. (R. p. 232, lines 3-6.)

present: the alleged affair, the finances, alcoholism, and gambling. While these factors may supply an alleged motive for the crime, they do not constitute malice under the law charged at trial. Additionally, Appellant explained his confession to the murder was his attempt to protect his son, who he learned was charged with murder.

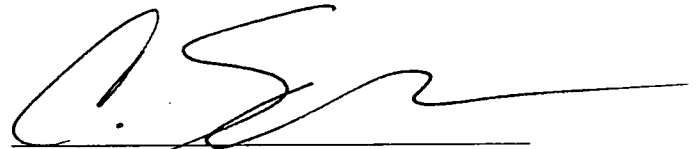
Based on the transcript, the State's presentation of evidence of actual malice is scant. Here, there is no ill-will or hatred between Appellant and Decedent reflected in the record, other than a passing reference to a confrontation in the story Defendant recanted. There is no evidence of a struggle in the home or reports of previous domestic violence between the parties. By erroneously charging the jury on inferred malice, the Court allowed the State to escape their burden of presenting evidence of actual malice- this error was not harmless.

CONCLUSION

For these reasons, as well as those set forth in Appellant's Initial Brief, this case should be reversed and remanded for a new trial consistent with the findings of this Court.

RESPECTFULLY SUBMITTED

This 19th Day of June, 2019
West Columbia, South Carolina



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Counsel for Appellant certifies that this Final Brief and Final Reply Brief conforms with Rule 211(b).

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This 19th day of June, 2019

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JUN 20 2019

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions
Judge Eugene C. Griffith

Lower Court Case No. 2014GS3203246
Court of Appeals Case No. 2018-001556

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SC Court of Appeals

STATE OF SOUTH CAROLINA,

Respondent,

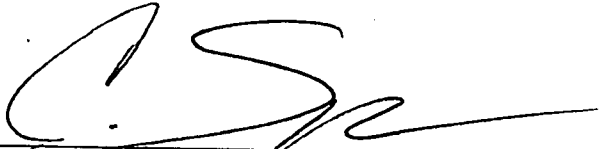
v.

MARION C. WILKES,

Appellant.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the following: Appellant's Final Brief, Appellant's Final Reply Brief, in the above referenced case has been served upon: Susannah Cole at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, South Carolina 29201 on June 19, 2019, by hand delivery.



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SEP 03 2019
SC Court of Appeals

RE: The State v. Marion C. Wilkes, Appellate Case No. 2018-001556
Supplemental Citation

Dear Ms. Kitchings,

I hope this letter finds you well. The above referenced case is currently pending before the Court of Appeals. Pursuant to Rule 208(b)(7), SCACR, I would respectfully draw the Court's attention to additional authority that bears on the issues to be decided:

1. State v. Burdette, No. 2017-001990, 2019 WL 3437783 (S.C. July 31, 2019)
(holding regardless of the evidence presented at trial, a trial court shall not instruct a jury that the element of malice may be inferred when the deed is done with a deadly weapon.)

By copy of this letter, I am notifying opposing counsel, Susannah R. Cole, of this submission of additional authority. If you have any questions concerning this matter, please do not hesitate to contact me.

Sincerely,


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Enclosures: State v. Burdette, No. 2017-001990, 2019 WL 3437783 (S.C. July 31, 2019)

cc: Susannah R. Cole, Esquire (with enclosures)

2019 WL 3437783

Only the Westlaw citation is currently available.
Supreme Court of South Carolina.

The STATE, Respondent,

v.

Shane Adam BURDETTE, Petitioner.

Appellate Case No. 2017-001990

Opinion No. 27910

Heard February 21, 2019

Filed July 31, 2019

Synopsis

Background: Defendant was convicted in the Circuit Court, Oconee County, J. Cordell Maddox Jr., J., of voluntary manslaughter and possession of a weapon during the commission of a violent crime. Defendant appealed. The Court of Appeals, 2017 WL 4676135, affirmed. Defendant petitioned for writ of certiorari, which was granted.

Holdings: The Supreme Court, James, J., held that:

instruction on inferred malice was error;

such error was not harmless; and

regardless of the evidence presented at trial, a trial court shall not instruct the jury that it may infer the existence of malice when the deed was done with a deadly weapon; overruling *Gibson v. State*, 416 S.C. 260, 786 S.E.2d 121; *State v. Stanko*, 402 S.C. 252, 741 S.E.2d 708; *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802; *Sheppard v. State*, 357 S.C. 646, 594 S.E.2d 462; *Gibson v. State*, 355 S.C. 429, 586 S.E.2d 119; *Tate v. State*, 351 S.C. 418, 570 S.E.2d 522; *State v. Harvin*, 345 S.C. 190, 547 S.E.2d 497; and other cases.

Reversed and remanded.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Oconee County, J. Cordell Maddox Jr., Circuit Court Judge

Attorneys and Law Firms

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Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, Senior Assistant Attorney General William M. Blitch Jr., and Assistant Attorney General Susannah Rawl Cole, all of Columbia; and Solicitor David Rhys Wagner Jr., of Anderson, all for Respondent.

Opinion

JUSTICE JAMES:

*1 Shane Adam Burdette was indicted and tried for murder and possession of a weapon during the commission of a violent crime. Over Burdette's objection, the trial court charged the jury that it could infer the element of malice from the use of a deadly weapon. The jury convicted Burdette of the lesser-included offense of voluntary manslaughter and possession of a weapon during the commission of a violent crime. The court of appeals affirmed Burdette's conviction, holding that although the trial court erred in giving the inferred malice jury instruction, Burdette suffered no prejudice. *State v. Burdette*, Op. No. 2017-UP-237 (S.C. Ct. App. filed June 7, 2017). We granted Burdette's petition for a writ of certiorari to review the court of appeals' decision. We hold the trial court's erroneous jury instruction was not harmless beyond a reasonable doubt. We therefore reverse and remand for a new trial on the offenses of voluntary manslaughter and possession of a weapon during the commission of a violent crime. We also hold, regardless of the evidence presented at trial, a trial court shall no longer instruct a jury that malice may be inferred from the use of a deadly weapon.

I. FACTUAL AND PROCEDURAL HISTORY

Burdette shot and killed Evan Tyner (Victim). Victim died from a single shotgun pellet wound to the back of his neck. After the shooting, Burdette gave several inconsistent statements to law enforcement. The State's theory of the case and Burdette's theory of the case were substantially different. The State claimed murder; Burdette claimed

accident. Burdette was indicted for murder and possession of a weapon during the commission of a violent crime.

At trial, evidence was presented in support of both the State's and Burdette's theories of the case. Following the close of the presentation of evidence, the trial court informed the parties it intended to charge the jury on the law of murder, voluntary manslaughter, involuntary manslaughter, and accident. The trial court gave the parties a copy of its proposed jury charge for review. Burdette objected to the trial court's proposed instruction that inferred malice could arise when a deadly weapon is used. Citing *State v. Belcher*,¹ Burdette argued the instruction was inappropriate because there was evidence presented that could reduce, excuse, justify, or mitigate the homicide. The trial court gave the charge over Burdette's objection.

The trial court charged the law of murder, voluntary manslaughter, involuntary manslaughter, and accident. When charging the law of murder, the trial court defined murder as a killing with malice aforethought and stated to the jury, "Inferred malice may also arise when the deed is done with a deadly weapon." When charging the law of voluntary manslaughter, the trial court did not specifically inform the jury that malice is not an element of that offense. However, when charging the law of involuntary manslaughter, the trial court specifically informed the jury that malice is not an element of that offense. Of course, malice is not an element of either voluntary or involuntary manslaughter.

*2 After deliberating for about one hour, the jury requested additional instruction from the trial court on the law of murder, voluntary manslaughter, and involuntary manslaughter to provide the jury with "a better understanding" of the different charges. The trial court essentially repeated its previous instruction and again included in the murder instruction that the jury could infer the element of malice from the use of a deadly weapon. The trial court again did not inform the jury that malice is not an element of voluntary manslaughter but did inform the jury that malice is not an element of involuntary manslaughter.

The jury found Burdette not guilty of murder but guilty of voluntary manslaughter and possession of a weapon during the commission of a violent crime. The trial court sentenced Burdette to twenty-five years in prison, suspended upon the service of fifteen years and five years' probation for voluntary manslaughter. The trial court also sentenced Burdette to

a consecutive prison term of five years for the weapon possession charge.

Burdette appealed, arguing the trial court erroneously instructed the jury that malice may be inferred from the use of a deadly weapon because evidence was presented tending to reduce, mitigate, excuse, or justify the homicide. The court of appeals affirmed in an unpublished opinion. *State v. Burdette*, Op. No. 2017-UP-237, 2017 WL 4676135 (S.C. Ct. App. filed June 7, 2017). Although the court of appeals agreed the inferred malice jury instruction was erroneous, it held Burdette "suffered no prejudice" from the erroneous instruction. *Id.* The court of appeals reasoned Burdette was convicted of voluntary manslaughter—not murder—and because malice is not an element of voluntary manslaughter, the inferred malice instruction could not have contributed to the verdict. *Id.* This Court granted certiorari to review the court of appeals' decision.

II. ISSUES PRESENTED

1. Did the trial court err in giving the inferred malice instruction?
2. If error, was the error harmless beyond a reasonable doubt?
3. Does the inferred malice instruction continue to have validity?

III. DISCUSSION

A. The Inferred Malice Jury Instruction

1. Was the Jury Instruction Erroneous?

There was evidence presented at trial that tended to reduce, mitigate, excuse, or justify Burdette's killing of Victim—making the trial court's inferred malice instruction inappropriate. See *State v. Stanko*, 402 S.C. 252, 260, 741 S.E.2d 708, 712 (2013) ("A jury charge instructing that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse, or justify the homicide." (citing *State v. Belcher*, 385 S.C. 597, 600, 685 S.E.2d 802, 803-04 (2009))). The State rightly concedes this point. The court of appeals therefore correctly held the giving of the instruction in this case was error.

2. Was the Trial Court's Error Harmless?

An erroneous instruction alone is insufficient to warrant this Court's reversal. "Errors, including erroneous jury instructions, are subject to harmless error analysis." *Belcher*, 385 S.C. at 611, 685 S.E.2d at 809. "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.'" *State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014) (quoting *State v. Kerr*, 330 S.C. 132, 144-45, 498 S.E.2d 212, 218 (Ct. App. 1998)). "In making a harmless error analysis, our inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered." *Id.* (quoting *Kerr*, 330 S.C. at 145, 498 S.E.2d at 218).

*3 The State maintains, and the court of appeals held, Burdette was not prejudiced by the trial court's erroneous inferred malice instruction (1) because Burdette was convicted of voluntary manslaughter, and (2) since malice is not an element of voluntary manslaughter, the inclusion of the inferred malice instruction in the jury instruction on murder could not have contributed to the verdict. Burdette argues a reading of the jury charge as a whole compels the conclusion that the trial court's error was not harmless. We agree with Burdette.

The trial court's charge to the jury of the elements of murder, voluntary manslaughter, and involuntary manslaughter take up a mere six pages of the overall trial transcript. Absent a self-defense instruction, that is the typical length of this portion of the jury instruction. As is customary, the trial court first instructed the jury on the offense of murder, then the lesser-included offense of voluntary manslaughter, and then the lesser-included offense of involuntary manslaughter.

In many instances, a lesser-included offense is deemed to exist because the lesser offense is "one whose elements are wholly contained within the crime charged." *State v. Dickerson*, 395 S.C. 101, 118, 716 S.E.2d 895, 904 (2011) (citing *State v. Northcutt*, 372 S.C. 207, 215, 641 S.E.2d 873, 877 (2007)). This is known as the "elements test." See *Northcutt*, 372 S.C. at 215, 641 S.E.2d at 877. In those cases, the trial court simply explains to the jury that the lesser offense includes all of the elements of the greater offense except for one or more elements, and the trial court then lists those elements that are not included in the lesser offense. In

those cases, the trial court is able to explain the distinction between the greater and lesser offense in an orderly and very understandable fashion. For example, possession of cocaine is a lesser-included offense of possession of cocaine with intent to distribute (PWID) because possession of cocaine contains all the elements of PWID except for the intent to distribute.

In other instances, such as in the case at bar, one offense may be considered a lesser offense of another not by virtue of the elements test, but rather because it "has traditionally been considered a lesser included offense of the greater offense charged." *Northcutt*, 372 S.C. at 216, 641 S.E.2d at 877-78. In those instances, the elements of the lesser offense are not "wholly contained" within the greater offense, and the trial court cannot simply list for the jury those elements not included in the lesser offense. Therefore, there is greater potential for jury confusion when the lesser offense has traditionally been considered a lesser offense of the greater offense. Because there is greater potential for jury confusion, there is a great need for clarity when the trial court explains the greater and lesser offenses to the jury.

Voluntary manslaughter is a lesser offense of murder not by virtue of the elements test, but because it has traditionally been considered a lesser offense of murder. Therefore, a trial court must allow the jury to consider the lesser offense of voluntary manslaughter if there is evidence from which it could be inferred that a defendant committed voluntary manslaughter rather than the greater offense of murder. "Voluntary and involuntary manslaughter are both lesser-included offenses of murder." *State v. Sams*, 410 S.C. 303, 309, 764 S.E.2d 511, 514 (2014). Obviously, neither of these offenses are considered lesser offenses of murder by virtue of the elements tests, as the elements of neither offense are "wholly contained" in the elements of murder.

*4 In *State v. Scott*, we repeated the general rule that involuntary manslaughter is "the unintentional killing of another without malice while engaged in either (1) the commission of some unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm, or (2) the doing of a lawful act with a reckless disregard for the safety of others." 414 S.C. 482, 487, 779 S.E.2d 529, 531 (2015) (quoting *Sams*, 410 S.C. at 309, 764 S.E.2d at 514). Involuntary manslaughter mandates a showing of criminal negligence, defined as "the reckless disregard of the safety of others." S.C. Code Ann. § 16-3-60 (2015). "Recklessness is a state of mind in which the actor is aware of his or her conduct, yet consciously disregards a risk which his or her conduct is

creating.” *State v. Pittman*, 373 S.C. 527, 571, 647 S.E.2d 144, 167 (2007).

When considering whether an incorrect jury instruction constitutes harmless error, we are required to review the trial court’s charge to the jury in its entirety. *See Stanko*, 402 S.C. at 264, 741 S.E.2d at 714 (“Jury instructions should be considered as a whole, and if as a whole, they are free from error, any isolated portions which may be misleading do not constitute reversible error.”). We will therefore review the trial court’s instructions on the offenses of murder, voluntary manslaughter, and involuntary manslaughter. Because voluntary and involuntary manslaughter are lesser offenses of murder under the more cumbersome “traditional” test, it was particularly important for the trial court to clearly explain the elements of all three offenses in this case.

As to the count of murder, the trial court charged the following points to the jury: the State must prove the defendant killed another person with malice aforethought; malice is hatred, ill will, or hostility towards another person; malice is the intentional doing of a wrongful act without just cause or excuse and with an intent to inflict an injury or under circumstances that the law will infer an evil intent; malice need not exist for any particular time before the act is committed, but malice must exist in the mind of the defendant just before and at the time the act is committed; therefore, there must be a combination of the previous evil intent and the act; malice aforethought may be expressed or inferred, but the terms “expressed” or “inferred” do not mean different kinds of malice, but instead mean the manner in which the malice can be proven to have existed, and that is by direct or circumstantial evidence; “expressed malice” is shown when a person speaks words which express ill will or hatred for another, or when the person prepared beforehand to do the act which was later accomplished, with the examples being given of a person “lying in wait” for a person or other acts of preparation going to show that the deed was in the defendant’s mind ahead of time; malice may be inferred from conduct showing a total disregard for human life; “inferred malice” may arise when the deed is done with a deadly weapon; the trial court defined “deadly weapon” and gave examples of deadly weapons.

The trial court then instructed the jury that if it found the State failed to prove beyond a reasonable doubt that the defendant committed murder, it must consider whether the State proved beyond a reasonable doubt that the defendant committed

the lesser-included offense of voluntary manslaughter. The trial court charged the following: the State must prove beyond a reasonable doubt that the defendant took the life of another person in the sudden heat of passion based on sufficient legal provocation; both heat of passion and sufficient legal provocation must be present at the time of the killing; sudden heat of passion may, for a time, affect a person’s self-control and temporarily disturb a person’s reason; this sudden heat of passion must be the type that would make an ordinary person unable to coolly reflect on his actions and would produce an uncontrollable influence or impulse to do violence; sufficient legal provocation must be the type that would make a person of ordinary reason and caution become enraged and lose control temporarily; such provocation necessary for voluntary manslaughter must come from some act by the victim or related to the victim; words alone are insufficient to support legal provocation; where death is caused by the use of a deadly weapon, the words must be accompanied by some overt threatening act which could have produced the heat of passion; exercising a legal right, no matter how offensive it may be to another, is never sufficient legal provocation to support voluntary manslaughter; if the heat of passion cools or if there was enough time between the provocation and the killing for the passion of a reasonable person to cool, the killing would not be voluntary manslaughter; when considering whether a reasonable person would have had enough time to cool down or cool off, all of the circumstances surrounding the killing must be considered; it is permissible to consider the nature of the provocation, if any, the defendant’s mental and physical state, and the circumstances and relationship between the parties.

*5 Importantly however, the trial court did not explain to the jury that malice is not an element of voluntary manslaughter, despite section 16-3-50 of the South Carolina Code (2015) referring to “manslaughter” as “the unlawful killing of another without malice, express or implied.”

After concluding the voluntary manslaughter instruction, the trial court instructed the jury that if it found the State failed to prove beyond a reasonable doubt that the defendant committed murder or voluntary manslaughter, it must consider whether the State proved beyond a reasonable doubt that the defendant committed the lesser-included offense of involuntary manslaughter. Specifically, the trial court instructed the jury: the State must prove beyond a reasonable doubt that the defendant unintentionally killed the victim “without malice” but while engaged in an unlawful

activity not naturally tending to cause death or great bodily harm, or that the defendant unintentionally killed the victim without malice while engaged in a lawful activity with reckless disregard for the safety of others; “unintentional” means the defendant did not intend for anyone to be killed or seriously injured; “reckless disregard for the safety of others” requires more than mere negligence or carelessness; “mere negligence” or “carelessness” is the failure to use the care that a person of ordinary reason would use under the same or similar circumstances; “recklessness” is a conscious failure to use ordinary care; exercising “reckless disregard for the safety of others” means that one is not interested in the consequences of his acts or the rights and safety of others; if a person who knows or should know that ordinary care requires certain precautions to be taken for the safety of others when using a dangerous instrumentality such as a gun or car, but that person fails to use those precautions without concern, the person’s actions are considered reckless; the State must prove beyond a reasonable doubt that the defendant’s act was the proximate cause of death; “proximate cause” is direct, immediate, and efficient cause; “proximate cause” is the cause without which the death of the person would not have resulted; there must be a chain of causation from the time of the injury inflicted by the defendant until the time of the victim’s death; proximate cause does not necessarily mean that it occurred immediately prior to the victim’s death.

The trial court twice instructed the jury on voluntary manslaughter but did not include the fact that it is a killing without malice. The trial court twice instructed the jury that involuntary manslaughter is the unintentional killing of another *without malice*. Burdette contends that while the trial court correctly charged the law of involuntary manslaughter, the trial court should have similarly instructed the jury that malice is not an element of voluntary manslaughter. Burdette claims the charge as a whole likely led the jury to incorrectly believe that malice is an element of voluntary manslaughter. Consequently, Burdette argues, the jury was left with the impression that it could use the inference of malice deriving from the use of a deadly weapon as a basis for convicting him of voluntary manslaughter.

*6 After consideration of the jury instructions as a whole, we are compelled to agree with Burdette. When the trial court instructed the jury that malice was not an element of involuntary manslaughter, but did not instruct the jury that malice was not an element of voluntary manslaughter, the jury was left with the incorrect impression that malice is an element of voluntary manslaughter, which allowed the jury

to use the improperly charged inference of malice from the use of a deadly weapon to find Burdette guilty of voluntary manslaughter. The prejudice stemming from the erroneous and confusing instructions was compounded when, during deliberations, the jury requested the trial court to provide a “better understanding” of the charges of murder, voluntary manslaughter, and involuntary manslaughter, and the trial court repeated its original instructions which (1) included the erroneous inferred malice instruction and (2) did not include an instruction that malice is not an element of voluntary manslaughter. The charge as a whole necessarily resulted in confusion that contributed to the verdict that Burdette was guilty of voluntary manslaughter. Therefore, we cannot conclude the trial court’s erroneous instruction was harmless beyond a reasonable doubt.

B. Continuing Validity of the Inferred Malice Instruction in South Carolina

In *Belcher*, we held the trial court could no longer give the inferred malice from the use of a deadly weapon charge in cases in which evidence was presented that would reduce, mitigate, excuse, or justify a homicide or an assault and battery with the intent to kill. 385 S.C. at 612, 685 S.E.2d at 810. We now consider whether the permissive inference charge may be given in *any setting*, even those in which no evidence is presented that would reduce, mitigate, excuse, or justify the commission of an offense containing the element of malice. We have held in other settings that it is improper to give examples of conduct the jury may consider when determining whether the State has proven an element of a crime or when determining whether certain other facts have been proven or disproven. *See, e.g., State v. Grant*, 275 S.C. 404, 407-08, 272 S.E.2d 169, 171 (1980) (holding it was improper for the trial judge to charge the jury that the defendant’s flight may be considered as evidence of guilt); *State v. Hughey*, 339 S.C. 439, 452, 529 S.E.2d 721, 728 (2000) (holding, in a voluntary manslaughter case, the trial court correctly refused the defendant’s request to charge the jury specific examples of conduct that might be considered as evidence of legal provocation, as the giving of such examples would be an impermissible charge on the facts), *overruled on other grounds by Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009); *State v. Cheeks*, 401 S.C. 322, 328-29, 737 S.E.2d 480, 484 (2013) (holding, in a drug trafficking case, that the trial court must not charge the jury that actual knowledge of the presence of a drug is strong evidence of a defendant’s intent to control its disposition or use).

In *Cheeks*, we noted, “Simply because certain facts may be considered by the jury as evidence of guilt in a given case where the circumstances warrant, it does not follow that [the jury] should be charged that these facts are probative of guilt. It is always for the jury to determine the facts, and the inferences that are to be drawn from these facts.” 401 S.C. at 328, 737 S.E.2d at 484. When the trial court tells the jury it may use evidence of the use of a deadly weapon to establish the existence of malice, a critical element of the charge of murder, the trial court has directly commented upon facts in evidence, elevated those facts, and emphasized them to the jury. Even telling the jury that it is to give evidence of the use of a deadly weapon only the weight the jury determines it should be given does not remove the taint of the trial court’s injection of its commentary upon that evidence. Such an instruction is no different than an instruction that the jury may use evidence of flight as evidence of guilt. A jury instruction that malice may be inferred from the use of a deadly weapon is an improper court-sponsored emphasis of a fact in evidence—that the deed was done with a deadly weapon—and it should no longer be permitted.

*7 We decide this issue solely under the common law; pursuant to our policy-making role under the common law, we hold, regardless of the evidence presented at trial, a trial court shall not instruct the jury that it may infer the existence of malice when the deed was done with a deadly weapon. Of course, whether the deed was done with a deadly weapon or not, the State and the defendant are free to argue the existence or nonexistence of malice based on the evidence in the record. For example, if evidence is introduced that the deed was done with a deadly weapon, the State is free to argue to the jury that it should infer the existence of malice based on that fact and any other facts that would naturally and logically allow a jury to conclude the defendant acted with malice aforethought.² Similarly, if the deed was not done with a deadly weapon, a defendant is free to argue the absence of malice based on that fact and any other facts that would naturally and logically allow a jury to conclude the State failed to prove beyond a reasonable doubt that the defendant acted without malice aforethought. “It is axiomatic that some matters appropriate for jury argument are not proper for charging. ‘Do jurors need the court’s permission to infer something? The answer is, of course not.’ ” *Belcher*, 385 S.C. at 612 n.9, 685 S.E.2d at 810 n.9 (quoting Bruce A. Antkowiak, *The Art of Malice*, 60 RUTGERS L. REV. 435, 476 (2008)).

Of course, our ruling does not prohibit a trial court from citing outside the presence of the jury the proposition that malice may be inferred from the use of a deadly weapon. For example, when ruling on a defendant’s motion for directed verdict on the ground the State failed to prove the element of malice, a trial court may take into account the fact that the deed was done with a deadly weapon.

IV. CONCLUSION

We hold the trial court’s erroneous inferred malice instruction was not harmless beyond a reasonable doubt. We reverse Burdette’s convictions and remand for a new trial on the charges of voluntary manslaughter and possession of a weapon during the commission of a violent crime. Because Burdette was acquitted of murder, he cannot be retried for murder. *See State v. Parker*, 391 S.C. 606, 612, 707 S.E.2d 799, 801 (2011) (providing that pursuant to the law of double jeopardy, a defendant may not be prosecuted for the same offense after an acquittal).

We further overrule our precedent to the extent it permits a jury instruction that malice may be inferred from the defendant’s use of a deadly weapon.³ Regardless of the evidence presented at trial, trial courts shall not instruct a jury that the element of malice may be inferred when the deed is done with a deadly weapon. Our ruling today is effective in this case and in those cases which are pending on direct review or are not yet final, so long as the issue is preserved. *See Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987) (holding “a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases ... pending on direct review or not yet final”). However, today’s ruling will not apply to convictions challenged on post-conviction relief. *See Belcher*, 385 S.C. at 613, 685 S.E.2d at 810 (citing *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989)).

*8 REVERSED AND REMANDED.

BEATTY, C.J., KITTREDGE, HEARN, and FEW, JJ., concur.

All Citations

--- S.E.2d ----, 2019 WL 3437783

Footnotes

- 1 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009).
- 2 However, we repeat our comment in *State v. Cartwright*: "We do not suggest there are no limits to a party's jury argument, for the law provides limits, as enhanced by Due Process protections." 425 S.C. 81, 93 n.3, 819 S.E.2d 756, 762 n.3 (2018).
- 3 Our decision today overrules in part a considerable amount of South Carolina case law. We overrule those cases insofar as it can be construed that we have approved a trial court's charge that a jury may infer the existence of malice from the defendant's use of a deadly weapon. The following represents a non-exhaustive list of such cases: *Gibson v. State*, 416 S.C. 260, 786 S.E.2d 121 (2016); *State v. Stanko*, 402 S.C. 252, 741 S.E.2d 708 (2013); *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009); *Sheppard v. State*, 357 S.C. 646, 594 S.E.2d 462 (2004); *Gibson v. State*, 355 S.C. 429, 586 S.E.2d 119 (2003); *Tate v. State*, 351 S.C. 418, 570 S.E.2d 522 (2002); *State v. Harvin*, 345 S.C. 190, 547 S.E.2d 497 (2001); *State v. Von Dohlen*, 322 S.C. 234, 471 S.E.2d 689 (1996); *Plyler v. State*, 309 S.C. 408, 424 S.E.2d 477 (1992); *Carter v. State*, 301 S.C. 396, 392 S.E.2d 184 (1990); *State v. Smith*, 288 S.C. 329, 342 S.E.2d 600 (1986); *State v. Peterson*, 287 S.C. 244, 335 S.E.2d 800 (1985); *State v. Lucas*, 285 S.C. 37, 328 S.E.2d 63 (1985); *State v. Campbell*, 287 S.C. 377, 339 S.E.2d 109 (1985); *State v. Woods*, 282 S.C. 18, 316 S.E.2d 673 (1984); *State v. Jennings*, 280 S.C. 62, 309 S.E.2d 759 (1983); *State v. Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983); *State v. Koon*, 278 S.C. 528, 298 S.E.2d 769 (1982); *State v. Friend*, 276 S.C. 552, 281 S.E.2d 106 (1981); *State v. Hyman*, 276 S.C. 559, 281 S.E.2d 209 (1981); *State v. Crocker*, 272 S.C. 344, 251 S.E.2d 764 (1979); *State v. Robinson*, 149 S.C. 439, 147 S.E. 441 (1929); *State v. Portee*, 122 S.C. 298, 115 S.E. 238 (1922); *State v. Jackson*, 36 S.C. 487, 15 S.E. 559 (1892); *State v. Levelle*, 34 S.C. 120, 13 S.E. 319 (1891); *State v. King*, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015); *State v. Frazier*, 401 S.C. 224, 736 S.E.2d 301 (Ct. App. 2013); *State v. Price*, 400 S.C. 110, 732 S.E.2d 652 (Ct. App. 2012); *State v. Kinard*, 373 S.C. 500, 646 S.E.2d 168 (Ct. App. 2007); *State v. Franklin*, 310 S.C. 122, 425 S.E.2d 758 (Ct. App. 1992); *State v. Merriman*, 287 S.C. 74, 337 S.E.2d 218 (Ct. App. 1985). We have not included the cases that were previously overruled by *Belcher*.

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