THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Heather Elizabeth Sims, Appellant.

Appellate Case No. 2016-001385

Appeal From Horry County
J. Cordell Maddox, Jr., Circuit Court Judge

Opinion No. 5631
Heard December 4, 2018 – Filed February 27, 2019

REVERSED

L. Morgan Martin, of Law Offices of L. Morgan Martin, P.A., and Benjamin Alexander Hyman, of The Hyman Law Group, P.A., both of Conway; and Blake A. Hewitt, of Bluestein Thompson Sullivan, LLC, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General William Frederick Schumacher, IV, both of Columbia; and Solicitor Jimmy A. Richardson, II, of Conway, for Respondent.

GEATHERS, J.: Heather Sims appeals her conviction of voluntary manslaughter for which she was sentenced to twenty-five years' imprisonment, suspended to ten years' imprisonment and five years' probation. Sims argues the circuit court erred in instructing the jury on voluntary manslaughter. We reverse.

I. FACTS

The facts of the instant case are tragic for the individuals and the families involved. At 6:16 p.m. on August 11, 2013, authorities in Conway responded to a 911 call from Heather Sims, who claimed to have shot her husband, David, after he charged at her with a knife. First responders arrived on scene at 6:36 p.m.[1] Upon entering the house, first responders found Sims in the bathroom performing CPR on David, but David was already deceased. Sims was taken to the hospital for her injuries, which included three lacerations on her arm and a puncture wound to her stomach. In the bathroom, Officers found a 9mm Ruger handgun on the vanity and a paring knife in David's right hand. Officers also determined that David had suffered a single gunshot wound to the chest. Sims was indicted for murder on August 22, 2013.

A. The State's Case

From the beginning, the State's case centered on the theory that the killing was a premeditated murder motivated by financial gain. First, the State presented evidence to show that Sims gave inconsistent accounts of what happened.

To show Sims had a financial motive for killing David, the State offered evidence that David had been issued a life insurance policy on July 23, 2013. David's policy was valued at $750,000 and listed Sims as the beneficiary. Additionally, the State offered into evidence text messages between Sims and David from May 2013 in which Sims asked David to look into getting a life insurance policy.

The State theorized that Sims had taken steps to cover up a premeditated murder. First, the State alleged that Sims altered the scene of the crime. The State offered evidence that some of the blood on the floor had been wiped. Officer Cestare testified that while listening to the 911 call he heard Sims's father telling her to both "stop wiping" and to "wipe the blood from the door." The State also alleged that Sims placed the knife in David's hand after she shot him. The State offered evidence that David was holding the knife "upside down"[2] and the crime scene investigator testified that when a light was shined obliquely on the blade, there appeared to be a

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[1] There is a fire station approximately 200-300 yards from the scene, but EMS was staging for roughly twenty minutes as they waited for a police officer to arrive and clear the house.

[2] David was holding the knife in his right hand with his thumb near the blade and the sharp side of the blade facing towards him.

latent fingerprint.[3] Additionally, the State had an expert in blood spatter analysis testify that if David had been holding the knife, the motion of reaching for his gunshot wound would have left more blood on his palm or the tops of his fingers.

Consistent with its cover-up theory, the State alleged that Sims hid David's phone and later wiped the memory. Officers testified that they only removed one cell phone from the residence and that David's phone could not be found.[4] The State then offered evidence that Sims called AT&T asking how to bypass David's lock code and access his phone. Sims eventually restored the phone to factory settings, erasing the memory. Sims's father ultimately turned the phone over to police on August 15, 2013, claiming the phone had been in a drawer at Sims's residence. This drawer was the same drawer police searched on the night of the shooting.

The State also presented evidence suggesting Sims's wounds were self-inflicted. The State offered Dr. Werner Spitz as an expert in forensic pathology. Dr. Spitz testified that the wounds on Sims's arm were superficial and "meticulously drawn very carefully, very slowly on her skin." Dr. Spitz also indicated the positions of the wounds were inconsistent with defensive wounds and that Sims's arm exhibited a faint hesitation mark. Dr. Spitz testified that the puncture wound was also self-inflicted, claiming it was deliberately superficial so as not to penetrate the interior of her body. Dr. Spitz opined that the puncture wound was produced with the tip of the knife, claiming the hospital described the wound as being "less than a quarter of an inch." However, on cross examination, Dr. Spitz indicated he did not need to read Sims's CT scan because he "took for granted that what they told [him] in the medical record was correct," but conceded the depth of the wound was not indicated in the medical records. Additionally, the State presented testimony indicating Sims did not have any bruising on her arms on the night of the incident.

Ultimately, the State alleged that no altercation took place in the bathroom and that Sims was not acting in self-defense. Rather, the State alleged that Sims had been planning to murder David and calmly and coolly made the decision to accelerate her plan on the night in question. The State offered testimony from several witnesses indicating the house was "pristine" and contained no evidence of

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[3] However, the investigator also testified that the latent print was not detailed enough for further testing.

[4] The investigator and Officer Cestare both testified to finding a drawer of old phones. However, neither of them documented the phones or took photographs of the contents of the drawer. Sims later testified that David's phone was in this same drawer when police searched the house.

an altercation other than David's body. Dr. Spitz testified that the lack of gunshot residue on David's shirt indicated that Sims shot him from over two feet away. Additionally, the State introduced evidence of irregularities surrounding the gun. First, the gun was registered to a man named Michael White.[5] Second, the gun was loaded with only two rounds. Third, Sims claimed to have moved the gun to the bathroom in her attempts to child proof the house, but a .38 revolver was found in David's nightstand.[6] Finally, Sims claimed she drew the gun from the bathroom vanity, but Officer Cestare testified that the gun case was located in Sims's nightstand with the clasps unfastened. In its closing argument, the State argued Sims left the bathroom, walked around the bed to her nightstand, and returned with the gun to trap an unarmed David in the bathroom. At no point did the State offer any evidence to suggest Sims lost control or was overcome with an uncontrollable impulse to do violence when she shot David.

B. The Defense's Case

The Defense argued that Sims shot David in self-defense. Sims testified about her history with David and how the marriage eventually deteriorated. The defense also presented evidence of incidents in which David frightened Sims. Sims's friend, Lisa, testified that during a phone conversation Sims abruptly ceased communicating. When communication was reestablished, Sims explained that David had jerked the phone out of her hand because he wanted to see who she was talking to. Sims indicated David had been eavesdropping around the corner and she kept trying to recall whether she had said something that would have made him mad. Sims's friend testified that this was the first time she realized Sims was afraid of David. Sims also testified concerning two incidents. During one incident, David lost his temper after playing with their puppy. Sims indicated that the puppy scratched David and David's demeanor changed from playful to "I'm about to hurt this dog." Sims testified that the puppy hid behind her as David angrily demanded that she hand the puppy to him. Sims later texted David indicating her concerns about the incident, to which David replied, "So are you saying that the next time he needs discipline, that I should instead just punch you in the face?" Sims also described an incident in which David got physical with her. Sims, a nurse

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[5] Sims testified that her father purchased the gun from one of his employees, Mike White, over ten years prior to the incident and had given it to her after a woman had been kidnapped from the local Wal-Mart.

[6] Sims testified that she did not know the .38 revolver was in David's nightstand, but assumed he kept it in his truck as she had purchased it for him after he indicated he liked the one Sims kept in her car.

anesthetist, explained that in July 2012, she had been on call when David took her phone to the other side of the house to go through it. Sims told David she needed her phone because she was on call, and David responded by stating that her job was "so important" and "so much more important than his," but he did not return the phone. As a result, Sims took the house phone to the bathroom to let the hospital know to call her at that number. Sims testified that David followed her into the bathroom and put his arms around her. Sims said she thought David was going to hug her, but instead he began to beat on her back with a closed fist. Sims indicated that she tried to push away from David but he grabbed her arms so tightly that it hurt. She continued to struggle with David and ultimately bloodied his lip. At that point, Sims, who was pregnant and in her first trimester at the time, testified that David wrapped his hands around her throat and slammed her into the wall. She indicated that David let go of her throat after she asked him what he was doing, and she then called 911.[7]

Sims then testified that on August 11, 2013—the day of the shooting—David had "woken up looking to argue." David wanted to go to Ruby Tuesdays and Bass Pro Shop, but he became frustrated with Sims as she was packing their baby's diaper bag and tidying the house. Once they were on their way, Sims indicated that David began questioning her and making snide remarks about the diet pills her OB/GYN had given her. Sims testified that David seemed frustrated throughout their outing, and that on the ride home he purposefully drove over the rumble strips on the highway in an attempt to get on her nerves. At some point on their ride home, Sims asked David if he wanted to separate. David indicated that they needed to talk and Sims said they could talk after she put their son to sleep.

Once they arrived home, David wanted to speak with Sims immediately and began calling her name louder and louder. However, Sims indicated that she wanted to wait until the baby was asleep to speak with David. Instead of engaging with David, Sims began doing chores so that she would not have anything to do after putting the baby to sleep. After doing some chores, Sims decided to take a bath. Sims began filling the tub, sitting on the edge while she texted her mother.

While waiting for the tub to fill up, Sims testified that David came into the bathroom with tools in his hands. Sims could tell David was frustrated, but assumed

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[7] The defense offered the Computer Aided Dispatch (CAD) report to corroborate Sims's story.

he had come in to work on the toilet because it had been having problems.[8] However, David told Sims he was going to talk to her "right now." David asked Sims if she wanted to separate and she responded no, but that she did not want to be married to someone who did not love her. David told Sims that he did not want to be married to a "d**n liar," indicating he had counted the number of diet pills she had taken. David then asked how many times Sims had been to see the marriage counselor by herself, as David did not want her talking to the counselor alone. Sims indicated she had gone to see the counselor once. David accused Sims of lying about being unable to schedule an appointment for both of them in the following two weeks because he had visited the counselor twice by himself. Sims then reached for her phone to show David the scheduling conflicts with the counselor, but David tried to wrestle it away, resulting in a struggle for the phone. At some point during the struggle, Sims was cut three times on her arm.

Sims testified that after David took her phone, he turned around with the knife in his hand. Sims claimed David got in her face, held the knife in her face, and called her a "stupid b***h." Sims asked David why he was so angry with her and began backing up, to which David responded by taunting her with the knife. Sims indicated that David was trying to scare her, calling her a "stupid b***h" and telling her he wanted to knock the "F'ing teeth out of [her] head." Sims testified, "I've seen him mad before, but I've never seen him this mad; this was something different. This was something that I had never experienced before, and I was scared." Sims indicated that, because she was scared, she reached for the gun she had placed in the bathroom vanity.[9]

Sims testified that after pulling the gun from the vanity drawer, she held it by her side. She indicated that after doing so, David asked her, "What the 'F' are you going to do with that?" Sims told David, "I'm not going to do anything with it, you're just scaring me, and I want you to stop." David responded by telling her, "You're not going to do s**t," and Sims indicated that the presence of the gun seemed to make him angrier. David continued to call her names and taunt her with the knife, and Sims indicated that she kept trying to back out of the bathroom. However, as

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[8] The parties stipulated that upon examination of the toilet, it did not work properly and needed to be repaired.

[9] Sims testified that she placed the gun in the vanity around July 21, 2013, after her pediatrician suggested childproofing the house when her son learned to roll over onto his stomach. Sims indicated she placed the gun in the bathroom vanity because she and David always kept the bathroom door closed and the couple did not own a gun safe.

she backed up, David again told her, "I would like to knock your F'ing teeth out of your head," and lunged at her with the knife, stabbing her in the stomach. When he lunged at her, Sims testified, "[M]y hand went up and I shot, and I shot out of reaction. I didn't think, nor did I ever want to do that, but it was a reaction because I was scared." After shooting David, Sims called 911 and began administering CPR.

To support its theory of self-defense and counter the allegations that Sims's wounds were self-inflicted, the defense offered Adrienne Hefney, the SLED agent who analyzed the DNA swabs collected by the Horry County Police Department. Agent Hefney testified that the DNA profile developed from one side of the knife handle matched David's profile, and the probability of selecting an unrelated individual having a matching DNA profile is "approximately 1 in 3.1 quintillion." Agent Hefney indicated this side of the knife handle tested positive for David's blood and touch DNA. Agent Hefney also testified that the partial DNA profile developed from the other side of the knife handle matched David's DNA and that such DNA was likely touch DNA. Conversely, Agent Hefney indicated that none of the DNA found on the knife handle matched Sims's DNA. Agent Hefney further explained that it would be highly unlikely for a person to self-inflict wounds with a knife without leaving touch DNA on the handle. Additionally, when testing one side of the knife blade, Agent Hefney indicated she found a mixture of blood DNA and that Sims was the major contributor. Agent Hefney also testified that Sims was the major contributor of the blood DNA found on the grip of the pistol.

The defense offered two experts to further corroborate Sims's self-defense theory. First, Dr. Joshua Tew was offered as an expert in radiology. Dr. Tew testified that Sims's puncture wound was consistent with a stab wound and the depth ranged from 3.2-3.5 cm, or approximately 1.3 inches. Dr. Tew explained that Sims's stab wound was superficial in the sense that it did not penetrate the peritoneal cavity,[10] but had it done so it would have penetrated the colon.

The defense also offered Dr. Kim Collins as an expert in forensic pathology. Dr. Collins testified that the wounds on Sims's arm were defensive wounds, noting they did not run in the same direction and were located on her dominant arm, whereas self-inflicted wounds are typically located on the non-dominant side. Dr.

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[10] "The peritoneum is a thin, translucent, serous membrane. . . ." Temel Tirkes, MD et al., *Peritoneal and Retroperitoneal Anatomy and Its Relevance for Cross-Sectional Imaging*, 32 RadioGraphics 437, 438 (2012). "The peritoneal cavity is a potential space between the parietal peritoneum, which lines the abdominal wall, and the visceral peritoneum, which envelopes the abdominal organs." *Id*.

Collins indicated Sims's puncture wound was consistent with the knife found at the scene and came within one millimeter of puncturing the peritoneal cavity. Dr. Collins further indicated that had Sims's peritoneal cavity been penetrated, the injury could have been fatal as it may have resulted in a ruptured colon, spleen, or major blood vessel. With regard to Sims's bruises, Dr. Collins explained that bruising takes time to appear, and that it would not be unusual for bruises to appear a day or two after the injury. Additionally, based on the entry and exit wounds, Dr. Collins determined David was leaning forward with his right side forward and his left side back at the time the shot was fired. However, Dr. Collins testified that, without a ballistics test, there is no way to determine the distance from which Sims shot David, only that there was no visible gunshot residue. Concerning the knife, Dr. Collins testified that David could have maintained control of it after being shot and that the blood transfer pattern on his hand was consistent with reaching for a wound while gripping a knife.

C. Jury Charges and Deliberations

After the defense rested its case, the court asked both parties if they had reviewed its proposed charge. Defense counsel indicated he did not believe charges for voluntary and involuntary manslaughter were supported by the evidence, but the court said it would address counsel's concerns after the State presented its rebuttal witnesses. Later, during the charge conference, the State objected to the court charging the jury with involuntary manslaughter, as the State argued there was no evidence that the shooting was accidental. Similarly, defense counsel objected to the court charging voluntary and involuntary manslaughter, indicating he wanted the court to charge "murder or nothing." The court indicated it believed evidence of voluntary and involuntary manslaughter was in the record, stating,

> There is testimony from the defendant herself she pulled the weapon up and it just kind of went off. And like I said, I understand you both disagree . . ., but there are cases that are very specific about if you charge voluntary, you need to charge involuntary if the facts are sufficient.

Defense counsel maintained his position, stating, "I don't see evidence in the record for voluntary or involuntary manslaughter, but I understand your ruling."

Before the court gave its charge to the jury, defense counsel again objected to the decision to charge the jury on voluntary and involuntary manslaughter. Conversely, the State switched its position, arguing that facts in the record justified charging the jury on voluntary and involuntary manslaughter. The court ultimately

charged the jury with murder, self-defense, voluntary manslaughter, and involuntary manslaughter. Additionally, before the jury began deliberations, the court instructed the jury that, "The fact that there [are] three charges does not mean you have to find her guilty of anything. If you find the defendant not guilty of all three, then she's not guilty of anything."

During deliberations, the jury asked a question concerning unanimity. The court clarified the question asking, "Mr. Foreman, the question is: We understand that a guilty charge must be unanimous, but does a finding of not guilty on a particular charge have to be unanimous as well before moving onto another charge? Is that the question?" After the foreman replied affirmatively, the court answered, "The answer to that is, yes. So to move down, you have to unanimously do away with the one you are dealing with to move on. So, yes."

Ultimately, the jury found Sims guilty of voluntary manslaughter. Conversely, the jury acquitted her of murder and involuntary manslaughter, checking "not guilty" for both charges on the verdict form. After considering several factors, including the jury's plea that the court be merciful, the court sentenced Sims to "[twenty-five] years provided upon the service of [ten] years, balance suspended for probation for five."

D. New Trial Hearing

On December 16, 2015, the court held a hearing to rule on several motions, including whether Sims was entitled to a new trial as a result of the court instructing the jury on voluntary manslaughter. Defense counsel argued the court erred by charging voluntary manslaughter because there was no evidence in the record suggesting Sims lost control or was overcome by an uncontrollable urge to do violence. The court indicated it gave the voluntary manslaughter instruction because Sims testified that, "[the gun] went up and I shot. I shot out of reaction." In response, defense counsel relied on *Niles*[11] and *Cook*[12] for the proposition that reacting out of fear during an altercation by itself is not enough to charge voluntary manslaughter, but required further inquiry. The court found the cases distinguishable, stating,

> We had two people in a bathroom. And based upon her testimony, she's got a gun in the bathroom. . . . [S]he's got a gun in the bathroom in it, and he is fixing a toilet with a knife and some type of pliers. They have an argument. He

[11] *State v. Niles*, 412 S.C. 515, 772 S.E.2d 877 (2015).
[12] *Cook v. State*, 415 S.C. 551, 784 S.E.2d 665 (2015).

> says, I'm going to knock your effing teeth out. She says back to him, I just want a marriage. They have some verbal altercation. And then there's a gap, a very, very small gap, and he's dead with one bullet in his chest.

The court also stated, "That did strike me—quite frankly, at the time she testified that way, that was the first time I had heard that. That suddenly, oh, I was there and I fired a pistol and shot." Further, the court indicated the jury could have acquitted Sims of everything if it had believed her self-defense theory. Defense counsel continued to argue that the evidence suggested Sims shot David out of fear, not an uncontrollable urge to do violence. Ultimately, the court denied Sims's motion for a new trial, finding the verdict was justified by the evidence at trial. This appeal followed.

II. ISSUES ON APPEAL

1. Did the circuit court err by instructing the jury on voluntary manslaughter?[13]

2. Can the case be remanded for a new trial on involuntary manslaughter?

III. STANDARD OF REVIEW

Jury charges

"In criminal cases, the appellate court sits to review errors of law only." *State v. Wharton*, 381 S.C. 209, 213, 672 S.E.2d 786, 788 (2009). "The evidence presented at trial determines the law to be charged to the jury." *State v. Gilliland*, 402 S.C. 389, 400, 741 S.E.2d 521, 527 (Ct. App. 2012). "An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of

[13] Sims also alleges that the lack of evidence supporting the charge suggests an impermissible compromise verdict. However, we do not believe our state's jurisprudence concerning this issue has been fully accepted or developed. *See State v. Cooley*, 342 S.C. 63, 70, 536 S.E.2d 666, 670 (2000) ("Since the jury heard no evidence of legal provocation, Defendant's voluntary manslaughter conviction suggests that the jury may have compromised between murder and involuntary manslaughter or accident in reaching their verdict."). Moreover, we believe analyzing this issue would require this court to speculate as to what occurred during jury deliberations and ultimately why the jury reached its verdict. As such, we decline to address the issue of compromise verdicts and limit our analysis to whether a voluntary manslaughter charge was justified.

discretion." *Cook*, 415 S.C. at 556, 784 S.E.2d at 667. "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." *Id*.

Lesser-included offenses

"A trial judge must charge a lesser included offense if there is any evidence from which the jury could infer the defendant committed the lesser rather than the greater offense." *State v. White*, 361 S.C. 407, 412, 605 S.E.2d 540, 542 (2004). "To justify charging the lesser crime, the evidence presented must allow a *rational* inference the defendant was guilty only of the lesser offense." *State v. Geiger*, 370 S.C. 600, 607, 635 S.E.2d 669, 673 (Ct. App. 2006) (emphasis added). As such, "[t]he court looks to the totality of evidence in evaluating whether such an inference has been created." *Id*. "In determining whether the evidence requires a charge on a lesser included offense, the court views the facts in a light most favorable to the defendant." *State v. Brayboy*, 387 S.C. 174, 179, 691 S.E.2d 482, 485 (Ct. App. 2010); *see also Niles*, 412 S.C. at 522, 772 S.E.2d at 880 ("When determining whether the evidence requires a charge on voluntary manslaughter, the court must view the facts in the light most favorable to the defendant."). "The trial court should refuse to charge the lesser included offense when there has been no evidence tending to show the defendant may have committed solely the lesser offense." *Geiger*, 370 S.C. at 607, 635 S.E.2d at 673. Further, "[a] mere contention that the jury might accept the State's evidence in part and reject it in part will not support a request for the lesser charge." *State v. Morris*, 307 S.C. 480, 483, 415 S.E.2d 819, 821 (Ct. App. 1991); *see also State v. Funchess*, 267 S.C. 427, 430, 229 S.E.2d 331, 332 (1976) ("[T]he mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice." (internal quotation marks omitted) (quoting *State v. Hicks*, 84 S.E.2d 545, 547 (N.C. 1954))).

IV. LAW/ANALYSIS

A. Voluntary Manslaughter Charge

1) The relationship between fear and sudden heat of passion

Sims argues the circuit court erred in charging voluntary manslaughter because there is no evidence to support the charge. We agree.

"Voluntary [] manslaughter [is a] lesser-included offense[] of murder." *State v. Sams*, 410 S.C. 303, 309, 764 S.E.2d 511, 514 (2014). "Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient

legal provocation." *Id*. (quoting *State v. Cole*, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000)). "Both heat of passion and sufficient legal provocation must be present at the time of the killing," *id*., and there must be evidence of both to receive a voluntary manslaughter charge. *See Niles*, 412 S.C. at 522, 772 S.E.2d at 880. As such, "[a] defendant is not entitled to a voluntary manslaughter charge merely because he was in a heat of passion." *State v. Starnes*, 388 S.C. 590, 596, 698 S.E.2d 604, 608 (2010). Similarly, "a defendant is not entitled to [a] voluntary manslaughter [charge] merely because he was legally provoked." *Id*. at 597, 698 S.E.2d at 608. Rather, "there must be evidence that the heat of passion was caused by sufficient legal provocation." *Id*.

Conversely, a person is justified in using deadly force in self-defense when:

> 1. The defendant was without fault in bringing on the difficulty;
> 2. The defendant . . . actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger;
> 3. If the defense is based upon the defendant's actual belief of imminent danger, a reasonab[ly] prudent man of ordinary firmness and courage would have entertained the same belief . . . ; and
> 4. The defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

State v. Dickey, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011).

Our supreme court has cautioned that, "[circuit] courts often struggle with the difficult interplay between murder and the lesser-included offense of voluntary manslaughter, especially where a defendant claims he acted in self-defense." *Starnes*, 388 S.C. at 597–98, 698 S.E.2d at 608. "This struggle may be due to [the supreme court's] opinions which, when taken out of the evidentiary context, appear to set no boundaries as to what circumstances give rise to 'sudden heat of passion upon sufficient legal provocation.'" *Id*. at 598, 698 S.E.2d at 608.

> The sudden heat of passion need not dethrone reason entirely or shut out knowledge and volition, but it must be such as would naturally disturb the sway of reason and render the mind of an ordinary person incapable of cool

> reflection and produce what may be called an uncontrollable impulse to do violence.

Sams, 410 S.C. at 309, 764 S.E.2d at 514.

"Where death is caused by use of a deadly weapon, words alone, however opprobrious, are not sufficient to constitute a legal provocation." *State v. Locklair*, 341 S.C. 352, 360, 535 S.E.2d 420, 424 (2000). "Rather, . . . the opprobrious words must be accompanied by the appearance of an assault." *Id*. Accordingly, our supreme court has held, "an unprovoked attack with a deadly weapon or an overt threatening act can constitute sufficient legal provocation," and "fear resulting from an attack can constitute a basis for voluntary manslaughter." *Starnes*, 388 S.C. at 598, 698 S.E.2d at 608–09. However, "the presence of fear does not end the inquiry regarding the propriety of a voluntary manslaughter instruction." *Id*. at 598, 698 S.E.2d at 609. "[T]he fear must be the result of sufficient legal provocation **and** cause the defendant to lose control and create an uncontrollable impulse to do violence." *Id*. In "determining whether an act [that] caused death was impelled by heat of passion or by malice, all the surrounding circumstances and conditions are to be taken into consideration, including previous relations and conditions connected with the tragedy, as well as those existing at the time of the killing." *State v. Pittman*, 373 S.C. 527, 575, 647 S.E.2d 144, 169 (2007).

In *State v. Starnes*, our supreme court took the opportunity to clarify the law regarding how a defendant's fear following an attack or threatening act relates to voluntary manslaughter. 388 S.C. at 597–99, 698 S.E.2d at 608–09. Prior to the incident, Starnes and two friends, Bill and Jared, had been hanging out at Starnes's restaurant, eventually leaving to go to a bar. *Id*. at 593, S.E.2d at 606. After leaving the bar, Bill asked Starnes to take them to buy drugs from a drug dealer, but Starnes refused, choosing to drop them off at his home instead. *Id*. at 595, 698 S.E.2d at 607. Starnes then picked up the drug dealer and took him to Starnes's house. *Id*.

Starnes testified that he saw Jared pointing a gun at the drug dealer and swearing at him. *Id*. Starnes said he went into his bedroom to retrieve his gun and, as he exited the bedroom, Bill said "whoa" and was pointing a gun at him. *Id*. Starnes then shot Bill before turning to shoot Jared, killing them both. *Id*. Conversely, Starnes's girlfriend testified that, at some point during the night, Starnes returned to his restaurant with a mark on his temple and informed her that Bill had pistol whipped him in the bar bathroom. *Id*. at 594, 698 S.E.2d at 606. Starnes's girlfriend further testified that Starnes retrieved his gun and bullets from a shelf in the kitchen and told her he was going to kill "them." *Id*. The drug dealer testified that Starnes had unexpectedly arrived at his house claiming he needed the drug

dealer to come watch his back because Starnes had been having trouble with his friends. *Id*. at 595, 698 S.E.2d at 607. The drug dealer indicated that upon arriving at Starnes's house, Starnes immediately went into the bedroom and started fumbling around. *Id*. The drug dealer claimed Jared charged at him with a gun, but Bill took the gun away from him and everyone calmed down. *Id*. The drug dealer testified that Starnes then came out of the bedroom and fired three shots at Bill and then fired at Jared. *Id*. The circuit court ultimately charged the jury on murder and self-defense. *Id*. at 596, 698 S.E.2d at 607.

Before addressing the facts of the case, the supreme court distinguished the relationship between fear and self-defense from the relationship between fear and voluntary manslaughter, stating,

> A person may act in a deliberate, controlled manner, notwithstanding the fact that he is afraid or in fear. Conversely, a person can be acting under an uncontrollable impulse to do violence and be incapable of cool reflection as a result of fear. The latter situation constitutes sudden heat of passion, but the former does not.

Id. at 599, 698 S.E.2d at 609. Applying this distinction to the facts of the case, the *Starnes* court affirmed the circuit court's refusal to charge voluntary manslaughter, finding while Starnes testified he shot his friends out of fear, there was no evidence to indicate he was out of control as a result of his fear or was acting under an uncontrollable impulse to do violence. *Id*. Accordingly, the *Starnes* court determined, "[t]he only evidence in the record is that Appellant deliberately and intentionally shot Jared and Bill and that he either shot the men with malice aforethought or in self-defense." *Id*. The court further stated,

> to hold that Appellant was entitled to a voluntary manslaughter charge under the facts of this case would impermissibly blend the elements of voluntary manslaughter and self-defense. In effect, such a holding would render voluntary manslaughter a lesser-included offense of self-defense, for where there is an intentional killing based on fear alone, a defendant would be entitled to a voluntary manslaughter charge.

Id. at 599–600, 698 S.E.2d at 609.

Similarly, in *State v. Niles*, our supreme court found the circuit court properly refused to charge the jury on voluntary manslaughter. 412 S.C. at 518, 772 S.E.2d at 878. In that case, Niles, Mokeia Hammond, and Ervin Moore met the victim in a Best Buy parking lot to buy marijuana. *Id*. Moore testified that Niles set up the meeting with the victim and had made the decision to rob him. *Id*. at 518–19, 772 S.E.2d at 878. Moore claimed he was responsible for identifying the marijuana and entered the victim's vehicle to do so. *Id*. at 519, 772 S.E.2d at 879. As he returned to Niles's car, Moore testified that Niles had already exited and was leaning in the passenger-side door of the victim's vehicle. *Id*. Moore heard two gunshots and saw Niles leap back in the car. *Id*. Moore heard the victim fire a weapon in response and indicated the victim and Niles shot back and forth multiple times. *Id*. at 520, 772 S.E.2d at 879.

Conversely, Niles testified that he had merely set up the meeting, but that Moore had acted alone in robbing the victim. *Id*. Niles indicated that he had been sitting in his car with Hammond when he saw Moore and the victim fighting in the victim's vehicle before Moore exited with the stolen drugs and dove back into Niles's car. *Id*. Niles saw the victim draw his gun and shoot at them knocking out the rear passenger windows, so he grabbed his gun and returned fire. *Id*. Niles asserted he shot back because he was concerned with stopping the shooter and for Hammond's safety, testifying,

> So, while he was shooting in the car . . . I grabbed my pistol and that's when I shot two times. My eyes were closed. I wasn't even looking. I shot two times. I went pow, pow. I wasn't trying to hit nobody . . . I was just trying to get him to stop shooting. That's all I was trying to do. I didn't know if my fiancé got shot or nothing. That's the first thing that came to my head, you know.

Id.

In determining Niles was not entitled to a voluntary manslaughter charge, the supreme court found Niles's own testimony did not establish that he was overtaken by a sudden heat of passion such that he had an uncontrollable urge to do violence. *Id*. at 522, 772 S.E.2d at 880. Rather, the court indicated that voluntary manslaughter required a criminal intent to do harm and Niles's testimony demonstrated that he lacked the intent to harm the victim. *Id*. at 523, 772 S.E.2d at 881. Further, the court noted that "it was undisputed that Niles, Hammond, and Moore met the victim in the parking lot to rob the victim during the drug transaction." *Id*. Niles admitted that Hammond and Moore were unarmed, and that he was the one who shot and killed

the victim. *Id*. As such, the court determined that the scheme to rob the victim, coupled with the fact that Niles brought a deadly weapon, discounted any claim that Niles acted in a sudden heat of passion. *Id*. Under these facts, the court found there was nothing sudden about Niles's decision to shoot the victim, as he had clearly planned for the possibility that he might have to fire his weapon to accomplish the robbery. *Id*. at 523–24, 772 S.E.2d at 881.

Our supreme court further expounded on the relationship between voluntary manslaughter and self-defense in *Cook v. State*, finding the circuit court erred by charging the jury on voluntary manslaughter. 415 S.C. at 553, 784 S.E.2d at 666. Cook lived in an apartment above the victim, who constantly berated Cook for testifying in a murder trial against one of his associates and for telling their landlord that the victim sold drugs. *Id*. On the day of the incident, Cook and the victim had been exchanging hostile text messages. *Id*. at 554, 784 S.E.2d at 666. Later that night, Cook, his girlfriend, and his cousin returned to Cook's apartment complex to find the victim sitting outside on the porch. *Id*. The victim made a series of threatening comments directed at Cook that echoed similar sentiments from the texts he had sent earlier. *Id*. The victim's last comment was directed at both Cook and his girlfriend which really upset Cook; however, he continued up the stairs without saying anything to the victim. *Id*.

While in his apartment, Cook ate some watermelon, placed the rinds inside a plastic bag, and grabbed his gun before going downstairs to discard the bag. *Id*. Cook testified that once he was downstairs, he did not have an opportunity to get to the dumpster because the victim approached him, grimacing and threatening to shoot him in broad daylight. *Id*. Cook indicated that the victim had one of his hands in his back pocket and Cook was concerned that the victim would pull out a gun and shoot him. *Id*. At the same time, the victim's nephew was approaching from the opposite direction and Cook feared he was about to be jumped. *Id*. Cook claimed that he tried to walk away from the victim, but that the victim kept cutting him off and threatening him. *Id*. at 555, 784 S.E.2d at 667. At that point, Cook said "the dude was coming up" and "before I knew it, I fired a shot." *Id*. Cook indicated he fired a second shot and ran. *Id*. Cook said he fired the second shot "to make sure he was gone," explaining that "[a]s soon as I saw him reaching I just shot." *Id*. Additionally, the victim's nephew testified that Cook and the victim were talking so softly that he could hardly tell they were arguing. *Id*. He also indicated that Cook stepped back, pulled out a gun and shot the victim before walking over the victim and shooting him again. *Id*. Cook's girlfriend also testified that Cook shot the victim a second time after he had fallen to the ground. *Id*.

The supreme court found the facts of the case did not support a finding that Cook shot the victim in a sudden heat of passion. *Id*. at 557, 784 S.E.2d at 668. The court pointed out that Cook had tried to walk away from the victim, stating, "[t]he fact that Cook was trying to walk away from the conflict does not suggest Cook was incapable of cooling off." *Id*. Additionally, the court found that at no point during Cook's statement did he indicate he lacked control over his actions. *Id*. As such, the court determined the facts of the case suggested Cook either shot the victim with malice or in self-defense. *Id*.

The *Cook* court noted the circuit court's decision to charge manslaughter relied on the following facts: 1) that Cook was in fear; 2) Cook shot the victim twice; and 3) Cook's statement "before I knew it, I fired a shot." *Id*. The court indicated that, without more, these facts were insufficient to establish Cook acted in a sudden heat of passion, stressing that neither the fact that Cook shot the victim twice nor his statement "before I knew it, I fired a shot" constituted evidence that Cook's fear manifested itself in an uncontrollable impulse to do violence. *Id*. at 557–58, 784 S.E.2d at 668. The State argued Cook's statement demonstrated that he lacked self-control when he shot the victim. *Id*. at 558, 784 S.E.2d at 668. The court disagreed, stating,

> Due to the short, swift motion of firing a gun, we believe this statement could be heard in any case in which the defendant is charged with firing a weapon, even out of self-defense. Thus, we do not believe this statement is indicative as to whether Cook was acting under an uncontrollable impulse to do violence.

Id.

Here, taken in the light most favorable to Sims, we find there is no evidence to support the inference that Sims shot David in a sudden heat of passion. *See Niles*, 412 S.C. at 522, 772 S.E.2d at 880 ("To receive a voluntary manslaughter charge, there must be evidence of sufficient legal provocation and sudden heat of passion."). Sims indicated that she was in the bathroom alone when David entered with pliers and a knife and began calling her a liar. Sims then indicated that David got physical with her over control of her phone. Sims claimed that David then began threatening her and taunting her with the knife, causing her to grab the gun out of fear. Even though she was afraid, Sims said she held the gun by her side and asked David to stop what he was doing, indicating she did not want to use the gun. *See id*. at 523, 772 S.E.2d at 881 ("Because [Appellant], by his own testimony, lacked the intent to

harm the victim, we cannot see how a voluntary manslaughter charge would have been appropriate under these facts.").

Sims also told police she grabbed the gun hoping to "scare" David so he would stop his threatening behavior, adding that she had never meant to shoot him. *See Cole*, 338 S.C. at 102, 525 S.E.2d at 513 ("[B]y Appellant's own testimony, he shot at the men *to scare them away*. Appellant's testimony appears designed to *support a charge of self defense, not heat of passion*.") (emphases added). According to Sims, David became even angrier, continuing to threaten her as she tried to back out of the bathroom. *See Cook*, 415 S.C. at 557, 784 S.E.2d at 668 ("The fact that [Appellant] was trying to walk away from the conflict does not suggest [Appellant] was incapable of cooling off."). As she tried to back out, Sims testified that David lunged at her and "my hand went up and I shot, and I shot out of reaction. I didn't think, nor did I ever want to do that, but it was a reaction because I was scared." *See id*. at 558, 784 S.E.2d at 668 ("We do not believe . . . [Appellant's] statement 'before I knew it, I fired a shot' is evidence that [Appellant's] fear manifested in an uncontrollable impulse to do violence."). While Sims acknowledged that she shot out of fear, she never indicated that she lost control or was overcome with an uncontrollable impulse to do violence. *See Starnes*, 388 S.C. at 599, 698 S.E.2d at 609 ("A person may act in a deliberate, controlled manner, notwithstanding the fact that he is afraid or in fear."); *id*. at 598, 698 S.E.2d at 609 ("[T]he fear must . . . cause the defendant to lose control and create an uncontrollable impulse to do violence."); *Cook*, 415 S.C. at 557, 784 S.E.2d at 668 ("[A]t no point during [Appellant's] statement does he indicate he lacked control over his actions. Accordingly, we believe the facts of this case suggest [Appellant] shot [v]ictim either with malice or in self-defense."). The record is clear that Sims only shot David once. *See Cook*, 415 S.C. at 558, 784 S.E.2d at 668 ("We do not believe the fact that [Appellant] shot [v]ictim twice . . . is evidence that [Appellant's] fear manifested in an uncontrollable impulse to do violence."). After shooting David, Sims immediately began administering CPR and called 911. *See State v. Oates*, 421 S.C. 1, 28, 803 S.E.2d 911, 926 (Ct. App. 2017) (finding "Appellant's behavior and words immediately after the shooting were relevant to his state of mind immediately before and during the shooting"); *see also Niles*, 412 S.C. at 523, 772 S.E.2d at 881 ("Because [Appellant] . . . lacked the intent to harm the victim, we cannot see how a voluntary manslaughter charge would have been appropriate under these facts."). Accordingly, like the defendants in *Starnes*, *Niles*, and *Cook*, we find the only evidence in the record is that Sims deliberately and intentionally shot David and that she either shot him with malice aforethought or in self-defense.

In deciding to charge voluntary manslaughter, the circuit court erred in relying on Sims's testimony that her hand went up and she shot out of reaction.[14] *See Cook*, 415 S.C. at 558, 784 S.E.2d at 668 ("We do not believe . . . [Appellant's] statement 'before I knew it, I fired a shot' is evidence that [Appellant's] fear manifested in an uncontrollable impulse to do violence.").[15] Furthermore, we find a voluntary manslaughter charge was not justified by a gap between the altercation and David's death,[16] as there is no evidence supporting the conclusion that Sims was overcome with an uncontrollable impulse to do violence. *See Niles*, 412 S.C. at 522, 772 S.E.2d at 880 ("To receive a voluntary manslaughter charge, there must be evidence of sufficient legal provocation and sudden heat of passion."); *see also State v. Cain*, 419 S.C. 24, 30, 795 S.E.2d 846, 849 (2017) ("The State may not obtain a conviction when its proof as to any one element requires the jury to speculate or guess whether the defendant engaged in the [criminalized conduct].").

2) Evidence of an altercation prior to the killing

The State argues the circuit court properly charged the jury on voluntary manslaughter because Sims and David were engaged in a heated argument and David had or was about to initiate a physical altercation. The State relies on *Lowry*[17] and *Knoten*[18] for the proposition that charging voluntary manslaughter is appropriate where there is evidence that the defendant and the victim were engaged in a heated altercation prior to the killing. However, we find both cases factually distinguishable from the case at bar.

In *Lowry*, our supreme court held the circuit court erred in failing to charge the jury on voluntary manslaughter. 315 S.C. at 399, 434 S.E.2d at 274. Lowry was drinking with some friends outside of a grocery store when the victim approached and began berating him. *Id*. at 398, 434 S.E.2d at 273. The two men began arguing and "bumped chests," but no punches were thrown. *Id*. Lowry aimed a pistol at the victim and pulled the trigger, but the pistol was unloaded. *Id*. One of Lowry's friends broke up the fight and the victim went into the grocery store. *Id*. A short time later, Lowry loaded his pistol, fired a shot into a nearby sign, and followed the victim

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[14] *See supra* §§ I(C) & (D).
[15] However, we note that *Cook* was issued after the completion of the instant trial. As such, the circuit court did not have the benefit of the *Cook* decision when issuing its initial ruling on the voluntary manslaughter charge.
[16] *See supra* § I(D).
[17] *State v. Lowry*, 315 S.C. 396, 434 S.E.2d 272 (1993).
[18] *State v. Knoten*, 347 S.C. 296, 555 S.E.2d 391 (2001).

inside. *Id*. Once inside, the two men began arguing again. *Id*. According to the State's witnesses, Lowry then challenged the victim to "take it outside," and the victim responded, "Man, I am unarmed. Do you expect me to walk outside and let you kill me?" *Id*. To demonstrate he was unarmed, the victim spread his arms from his body. *Id*.

Conversely, Lowry's witnesses indicated that the victim said, "You think you are a big man because you got a gun." *Id*. The victim then moved towards Lowry in a menacing fashion with his arms and hands outstretched in an attempt to grab him. *Id*. It is undisputed that after the victim raised his arms, Lowry shot him in the chest. *Id*. After the victim fell, Lowry cursed him and shot him again in the head. *Id*. The supreme court held the circuit court erred in refusing to charge the jury on voluntary manslaughter because the evidence indicated the victim and Lowry were in a heated argument and the victim was about to initiate a physical encounter when the shooting occurred. *Id*. at 399, 434 S.E.2d at 274. Thus, the jury could have discerned that Lowry was under the heat of passion. *Id*. at 400, 434 S.E.2d at 274.

Similarly, in *Knoten*, our supreme court reversed Knoten's murder conviction, finding that a jury charge on voluntary manslaughter was required by the evidence presented at trial. 347 S.C. at 313, 555 S.E.2d at 400. After the disappearance of Kimberly Brown (Brown) and her daughter, police discovered that Knoten was the last person to have seen Brown alive. *Id*. at 300, 555 S.E.2d at 393. After further investigation, police questioned Knoten about the disappearances, and he provided three different versions of events. *Id*. at 300–01, 555 S.E.2d at 393–94. In his first statement, Knoten indicated he had left Brown's apartment between 10 and 10:30 p.m. the night she disappeared. *Id*. at 301, 555 S.E.2d at 394. Knoten claimed he got in his car, drove away from the complex, and then blacked out. *Id*. He woke up the next morning near a boat ramp and went to work. *Id*. He said he did not know if he had killed Brown or her daughter. *Id*. In his second statement, Knoten indicated that he and Brown had consensual sex the night she disappeared, and that she became agitated afterwards, arming herself with a knife and threatening him. *Id*. Knoten claimed Brown then cut him on the leg and chased him outside while he was nude. *Id*. Knoten retrieved a foot-long steel bar from his trunk and reentered the apartment. *Id*. Upon reentering, Brown cut him again and he hit her over the head with the steel bar. *Id*. Knoten's third statement was consistent with his second, except he admitted to raping Brown. *Id*.

The supreme court noted that, according to Knoten, he had been chased out of the apartment into near freezing temperature while he was nude. *Id*. at 305 n.5, 555 S.E.2d at 396 n.5. Construing the facts in the light most favorable to Knoten, including his assertion that he had consensual sex with Brown, the court determined

Knoten had armed himself in response to Brown's original unprovoked knife attack and reentered the house to retrieve his clothes and personal items. *Id*. Once inside, Brown attacked him again before Knoten killed her. *Id*. Under these facts, the court found a voluntary manslaughter charge was appropriate because there was evidence that Knoten and Brown were in a heated encounter before Knoten struck and killed her. *Id*. at 306, 555 S.E.2d at 396.

We find *Lowry* and *Knoten* distinguishable from the case at bar. It is true that in both cases, a physical altercation took place before the killing. However, in both cases, there is a period between the initial altercation and the killing in which the defendant was separated from his victim by four walls and a door. And in both cases the defendant armed himself, entered the building, and reengaged with the victim before the killing. The pursuit of the victim is one of the factors our supreme court considered in distinguishing *Cook* from *Lowry*, finding, "Lowry actively pursued the victim, whereas Cook attempted to walk away from [v]ictim." *Cook*, 415 S.C. at 559, 784 S.E.2d at 669. Here, there is no evidence that Sims and David were separated or that David stopped his assault. Rather, Sims indicated that she was attempting to back out of the bathroom when David lunged at her with a knife and she shot him. As our supreme court held in *Starnes*, to find that a voluntary manslaughter charge was justified "under the facts of this case would impermissibly blend the elements of voluntary manslaughter and self-defense." 388 S.C. at 599, 698 S.E.2d at 609.

While there is evidence that David attacked Sims and Sims resisted, we find the facts in this case are more akin to *State v. Dickey*, in which our supreme court reversed Dickey's conviction for voluntary manslaughter, finding he was entitled to a directed verdict on self-defense.[19] 394 S.C. at 495, 716 S.E.2d at 98. Dickey, a security guard at Cornell Arms, was asked to evict a resident's guest, the victim, for being drunk and hostile toward the neighbors. *Id*. at 495, 716 S.E.2d at 98–99. Dickey asked the victim to leave twice, but the victim angrily refused, shouting expletives at Dickey and slamming the door both times. *Id*. at 495–96, 716 S.E.2d at 99. Dickey then called the police to report the disturbance. *Id*. at 496, 716 S.E.2d at 99. Eventually, the victim's friend convinced the victim to leave the apartment, and a witness testified that the victim tucked a liquor bottle in his shorts on the way out. *Id*.

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[19] We want to emphasize that we compare Sims's case to *Dickey* only to demonstrate that voluntary manslaughter was not supported by the evidence in the record.

Dickey followed the victim and his friend into the lobby, opting to take the stairs rather than share the elevator with them. *Id*. Once in the lobby, Dickey followed the victim and his friend as they approached the exit, choosing to go outside after he thought the police had arrived. *Id*. After walking halfway down the block, the victim and his friend resumed shouting obscenities at Dickey. *Id*. The victim threatened to assault Dickey and began advancing towards him quickly. *Id*. at 496–97, 716 S.E.2d at 99. When the victim was about fifteen feet away from Dickey, Dickey pulled a gun from his pocket. *Id*. at 497, 716 S.E.2d at 99–100. The victim continued to move towards Dickey and started reaching under his shirt. *Id*. Dickey, claiming that he thought the victim was reaching for a weapon, fired three shots without warning, put the gun back in his pocket and called 911. *Id*. Officers found a broken liquor bottle at the scene containing the victim's blood DNA. *Id*. Dickey was convicted of voluntary manslaughter and this court affirmed his conviction. *Id*. at 498, 716 S.E.2d at 100.

However, our supreme court found Dickey was entitled to a directed verdict on self-defense. *Id*. at 503, 716 S.E.2d at 103. In determining Dickey did not bring about the harm, the court noted that Dickey did not brandish his weapon at the victim when he got outside, but pulled it from its holster when the victim and his friend began advancing towards him aggressively. *Id*. at 500, 716 S.E.2d at 101. Similarly, the court found Dickey feared for his life and that a reasonable person would have also been in fear for his life because the victim, "began advancing toward Petitioner quickly with the purpose of assaulting him, [] continued advancing toward Petitioner after Petitioner pulled the gun, and there was great disparity in the physical stature and capabilities of [the victim] and Petitioner." *Id*. at 501, 716 S.E.2d at 102. Finally, the court determined Dickey had no reasonable alternative to self-defense, finding, "[h]ad Petitioner turned his back, he would have likely been attacked from behind as he tried to get through the first set of glass doors." *Id*. at 502–03, 716 S.E.2d at 102–03.

In comparing Sims's case to *Dickey*, we focus on three facts in particular. First, like in *Dickey*, Sims did not brandish the weapon when David entered the bathroom, nor did she brandish the weapon after David began threatening and insulting her. Rather, David physically assaulted Sims, cutting her on the arm, before she drew the gun. Second, Sims indicated that she shot David because she was in fear for her life. *See Starnes*, 388 S.C. at 598, 698 S.E.2d at 608–09 ("[T]he presence of fear does not end the inquiry regarding the propriety of a voluntary manslaughter instruction."). Moreover, like Dickey, we find that Sims's fear was reasonable. Similar to the victim advancing toward Dickey, David began advancing toward Sims with the purpose of assaulting her, continued advancing toward Sims

after she drew the gun, and there was great disparity in the physical stature and capabilities of Sims and David.[20] *See Dickey* 394 S.C. at 501, 716 S.E.2d at 102 (finding Dickey's fear was reasonable because the victim, "began advancing toward Petitioner quickly with the purpose of assaulting him, [] continued advancing toward Petitioner after Petitioner pulled the gun, and there was great disparity in the physical stature and capabilities of [the victim] and Petitioner"); *see also Starnes*, 388 S.C. at 599, 698 S.E.2d at 609 ("A person may act in a deliberate, controlled manner, notwithstanding the fact that he is afraid or in fear."). Finally, like Dickey, Sims called 911 immediately after shooting David, in addition to promptly administering CPR. *See Oates*, 421 S.C. at 28, 803 S.E.2d at 926 (finding "Appellant's behavior and words immediately after the shooting were relevant to his state of mind immediately before and during the shooting"). Accordingly, we find the facts of Sims's case, including the altercation with David, are more analogous to the facts of *Dickey*, rather than those of *Lowry* or *Knoten*.

Furthermore, the State cites evidence that David assaulted Sims and asks us to infer that Sims engaged in a "heated argument" and was under a sudden heat of passion when she shot David. However, inferences must be grounded in fact and not mere speculation. *See Cain*, 419 S.C. at 30, 795 S.E.2d at 849 ("The State may not obtain a conviction when its proof as to any one element requires the jury to speculate or guess whether the defendant engaged in the [criminalized conduct]."); *State v. Palmer*, 413 S.C. 410, 422–23, 776 S.E.2d 558, 564 (2015) (affirming the reversal of a petitioner's conviction where there was "no evidence other than rank speculation that such an incident occurred"). The State does not cite to any evidence that Sims was a mutual participant in the altercation or that she was overcome by an uncontrollable urge to do violence. Instead, the State asks us to infer from the fact that David attacked Sims, and Sims resisted, that the two were engaged in an "intense fight." The State then asks us to infer that, because the parties were engaged in an "intense fight," Sims was under a sudden heat of passion when she shot David. In other words, the State cites evidence that Sims was legally provoked and asks us to infer that she was under a sudden heat of passion. *See Starnes*, 388 S.C. at 597, 698 S.E.2d at 608 ("[A] defendant is not entitled to [a] voluntary manslaughter [charge] merely because he was legally provoked."). However, we do not find any evidence to support these conclusions, only speculation. Accordingly, we find a voluntary manslaughter charge is not justified where the State asks us to theorize on whether Sims was under a sudden heat of passion, especially where the totality of the evidence suggests she was not. *See supra* § IV(A)(1).

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[20] David's autopsy report indicated he was six foot two and two hundred fifty pounds.

The State also argues that, based on Allyson Brown's testimony,[21] the jury could have inferred that David assaulted Sims without intending to maim or kill her and that he disengaged when Sims allegedly dropped her phone. Brown testified, concerning her understanding of the altercation, that David wrapped his arms around Sims to try and wrestle the phone away, and that Sims dropped the phone after David bit her finger. Interpreting Brown's testimony, the State argues David turned around to retrieve the phone and Sims then drew the gun. The State further contends that once Sims drew the gun, the jury could infer that David lunged at her with the knife in self-defense. Thus, the State argues that Brown's testimony supports a voluntary manslaughter charge, as the jury could have concluded that Sims was not acting in self-defense because she caused the shooting and was not without fault in causing the shooting to occur. However, in addition to asking the jury to rely upon speculative argument, the State ignored key parts of Brown's testimony. We find the State cannot justify a voluntary manslaughter charge by using bits and pieces of Brown's statement. *See Morris*, 307 S.C. at 483, 415 S.E.2d at 821 ("A mere contention that the jury might accept the State's evidence in part and reject it in part will not support a request for the lesser charge."). Brown also testified that Sims drew the gun after she realized she had been cut during her struggle with David for control of her phone, that Sims held the gun by her side rather than pointing it at David, and that Sims was backing out of the bathroom when David lunged at her and tried to stab her. Crucially, Brown testified that Sims had never given her a reason for shooting David other than self-defense. When considering all of Brown's testimony, which is largely similar to Sims's testimony, we do not find any evidence suggesting Sims was overcome with an uncontrollable urge to do violence.

B. Remand for New Trial on Involuntary Manslaughter

The State argues that if this court determines the circuit court erred in charging voluntary manslaughter, the case should be remanded for a new trial on involuntary manslaughter. We disagree.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . ." U.S. Const. amend. V. Accordingly, the United States Supreme Court has held, "the Double Jeopardy Clause attaches special weight to judgments of acquittal. A verdict of not guilty, whether rendered by the jury or directed by the trial judge, absolutely shields the defendant from retrial."

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[21] The State offered Allyson Brown to testify that Sims told her a differing version of events than the one Sims had previously testified to.

Tibbs v. Florida, 457 U.S. 31, 41 (1982). Similarly, our courts have found, "[u]nder the law of double jeopardy, a defendant may not be prosecuted for the same offense *after an acquittal*, a conviction, or an improvidently granted mistrial." *State v. Parker*, 391 S.C. 606, 612, 707 S.E.2d 799, 801 (2011) (emphasis added) (quoting *State v. Coleman*, 365 S.C. 258, 263, 616 S.E.2d 444, 446 (Ct. App. 2005)).

The State relies on *Cooley*,[22] for the proposition that conviction of a lesser-included offense acts as implicit acquittal of the greater offense. The State argues that, because involuntary manslaughter is a lesser-included offense of voluntary manslaughter, Sims's conviction for voluntary manslaughter does not act as an implicit acquittal of the lesser involuntary manslaughter charge, only the greater murder charge. However, the State ignores the fact that the jury checked "not guilty" on the verdict form for both the murder charge and the involuntary manslaughter charge, thus acquitting Sims of involuntary manslaughter at trial. As such, because an acquittal "absolutely shields the defendant from retrial," we find the case cannot be remanded for retrial on involuntary manslaughter.

V. CONCLUSION

In the instant case, the State sought and secured an indictment for murder and predicated its entire case on the theory that Sims killed David with malice aforethought. As a result, the record is devoid of any evidence that Sims was under a sudden heat of passion when she shot David. Accordingly, we find the circuit court erred in charging the jury on voluntary manslaughter and we reverse Sims's conviction. Further, we find remanding the case for retrial on involuntary manslaughter is precluded by the Double Jeopardy Clause. Therefore, we decline the State's request to do so.

REVERSED.

LOCKEMY, C.J., and MCDONALD, J., concur.

[22] 342 S.C. at 69, 536 S.E.2d at 669.