APPENDIX

424 S.C. 106
Court of Appeals of South Carolina.

The STATE, Respondent,
v.
Preston SHANDS, Jr., Appellant.

Appellate Case No. 2015-001199
|
Opinion No. 5569
|
Heard November 8, 2017
|
Filed June 13, 2018
|
Rehearing Denied August 16, 2018
|
Certiorari Denied May 9, 2019

Synopsis

Background: Defendant was convicted in the Circuit Court, Laurens County, Edward W. Miller, J., of first-degree burglary, kidnapping, attempted murder, first-degree assault and battery, and possession of a weapon during the commission of a violent crime. Defendant appealed.

Holdings: The Court of Appeals, Thomas, J., held that:

[1] state's peremptory strikes were not based on purposeful discrimination;

[2] as a matter of first impression, probation and parole do not constitute confinement for purposes of the ten-year limit under the rule governing admissibility of a prior conviction for impeachment purposes;

[3] defendant opened the door to admission of his 40-year old conviction;

[4] evidence did not support issuance of involuntary intoxication instruction;

[5] prosecutor's emotionally charged closing comments and reference to kidnapping charges not discussed in initial closing argument did not prejudice defendant;

[6] instruction that malice could be inferred from the use of a deadly weapon in prosecution for attempted murder prejudiced defendant, and thus was reversible error;

[7] evidence supported finding that defendant restrained and confined his wife as required for a kidnapped prosecution.

Affirmed in part and reversed in part.

West Headnotes (42)

[1] Criminal Law
Summoning, impaneling, or selection of jury
Criminal Law
Jury selection

Generally, the trial court's findings regarding purposeful discrimination by a party in the exercise of peremptory strikes are accorded great deference and will be set aside on appeal only if clearly erroneous.

Cases that cite this headnote

[2] Criminal Law
Summoning, impaneling, or selection of jury

When the assignment of error is the failure to follow the *Batson* hearing procedure, the Court of Appeals must answer a question of law, for which the standard of review is plenary.

Cases that cite this headnote

[3] Constitutional Law
Peremptory challenges
Constitutional Law
Peremptory challenges

The Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States prohibits the striking of a potential juror based on race or gender. U.S. Const. Amend. 14.

Cases that cite this headnote

[4] **Jury**
Peremptory challenges

When one party strikes a member of a cognizable racial group or gender, the trial court must hold a *Batson* hearing to review its constitutionality if the opposing party requests one. U.S. Const. Amend. 14.

Cases that cite this headnote

[5] **Constitutional Law**
Equal protection

Constitutional Law
Peremptory challenges

Constitutional Law
Peremptory challenges

In evaluating whether a party executed a peremptory challenge in a manner which violated the Equal Protection Clause, first, the opponent of the peremptory challenge must make a prima facie showing that the challenge was based on race or gender; if a sufficient showing is made, the trial court will move to the second step in the process, which requires the proponent of the challenge to provide a neutral explanation for the challenge; if the trial court finds that burden has been met, the process will proceed to the third step, at which point the trial court must determine whether the opponent of the challenge has proved purposeful discrimination. U.S. Const. Amend. 14.

Cases that cite this headnote

[6] **Jury**
Peremptory challenges

To prove purposeful discrimination by a party exercising peremptory strikes, the opponent of the strike must show the race or gender neutral explanation was mere pretext, which generally is established by showing the party did not strike a similarly situated member of another race or gender.

Cases that cite this headnote

[7] **Jury**
Peremptory challenges

The burden of persuading the court that a *Batson* violation has occurred remains at all times on the opponent of the strike. U.S. Const. Amend. 14.

Cases that cite this headnote

[8] **Jury**
Peremptory challenges

Whether a *Batson* violation has occurred must be determined by examining the totality of the facts and circumstances in the record. U.S. Const. Amend. 14.

Cases that cite this headnote

[9] **Jury**
Peremptory challenges

On a *Batson* claim, a prior criminal conviction is a neutral reason to strike a potential juror.

Cases that cite this headnote

[10] **Jury**
Peremptory challenges

State's peremptory strikes on three male and one female with prior convictions were not based on purposeful discrimination in prosecution for attempted murder and first-degree assault and battery based on domestic violence, as required for a *Batson* violation, despite three of the four prospective jurors being men, where prospective female juror was not similarly situated to the two male jurors who had convictions for criminal domestic violence, it was understandable that State would want to strike jurors with convictions for domestic violence, female juror was not similarly situated to the third prospective male juror who had multiple convictions for violating the lottery law, and having multiple convictions was different than having only one conviction that is over a decade old.

Cases that cite this headnote

[11] **Indictments and Charging Instruments**

Weight and sufficiency

Defendant did not adequately present evidence that there was any grand jury abuse as grounds for quashing the otherwise lawful indictment, where defendant claimed that officer who testified at his grand jury hearing was not listed on his indictments and had no personal knowledge of his case, there was no recording of who testified, and defendant's claim was pure speculation.

Cases that cite this headnote

[12] **Indictments and Charging Instruments**

Composition and constitution of the grand jury

Indictments and Charging Instruments

Time for proceedings

When a defendant timely moves to quash an indictment, the trial court must determine whether the defendant's constitutional right to have the criminal allegations against him weighed by a properly constituted grand jury has been violated.

Cases that cite this headnote

[13] **Indictments and Charging Instruments**

Grand Jury Irregularities

Proceedings before the grand jury are presumed to be regular unless there is clear evidence to the contrary.

Cases that cite this headnote

[14] **Indictments and Charging Instruments**

Weight and sufficiency

Speculation about potential abuse of grand jury proceedings cannot substitute for evidence of actual abuse as grounds for quashing an otherwise lawful indictment.

Cases that cite this headnote

[15] **Witnesses**

Prejudice or unfairness; balancing probative value

In determining whether the probative value of a prior conviction outweighs its prejudicial effect, the trial courts should consider: (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness's subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue. S.C. R. Evid. 609(a)(1), 609(b).

Cases that cite this headnote

[16] **Witnesses**

Accusation or Conviction of Crime

Probation and parole following a prison term do not constitute "confinement" under the rule of evidence permitting admission of a prior conviction for impeachment purposes unless ten years has elapsed from the witness's release from confinement on the prior conviction; confinement ends when a defendant is released from actual imprisonment. S.C. R. Evid. 609(b).

Cases that cite this headnote

[17] **Pardon and Parole**

Parole

The term "parole" means a conditional release from imprisonment.

Cases that cite this headnote

[18] **Witnesses**

Time of prior conviction; remoteness

Evidence of defendant's prior conviction for purposes of impeachment was too remote in prosecution for first-degree burglary, kidnapping, attempted murder, first-degree assault and battery, and possession of a weapon during the commission of a violent crime, and thus was presumptively inadmissible, where defendant was a free citizen released on parole and not confined for his prior conviction of a violent felony over ten years prior to his trial. S.C. R. Evid. 609(b).

Cases that cite this headnote

[19] **Witnesses**

Prejudice or unfairness; balancing probative value

Probative value of defendant's remote prior conviction for a violent felony did not substantially outweigh its prejudicial effect, where defendant was convicted over 40 years ago and was released from prison over ten years ago, and defendant was being charged for a similar violent felony. S.C. R. Evid. 609(b).

Cases that cite this headnote

[20] **Criminal Law**

Evidence Admissible by Reason of Admission of Similar Evidence of Adverse Party

Defendant opened the door to admission of his 40-year old conviction for a violent felony which was presumptively inadmissible in prosecution for first-degree burglary, kidnapping, attempted murder, first-degree assault and battery, and possession of a weapon during the commission of a violent crime, where defendant elicited testimony during the cross-examination of numerous witnesses to show that he had never reacted violently before, defendant's counsel also elicited testimony from defendant's two sons about whether they had ever seen defendant act in a similar manner, defendant's counsel asked neighbor if defendant's behavior on the night of the incident was entirely out of character, and State was entitled to rebut his assertions of non-violent behavior with evidence of his prior conviction for a violent felony. S.C. R. Evid. 609(b).

Cases that cite this headnote

[21] **Criminal Law**

Evidence Admissible by Reason of Admission of Similar Evidence of Adverse Party

Otherwise inadmissible evidence may be properly admitted when opposing counsel opens the door to that evidence.

Cases that cite this headnote

[22] **Criminal Law**

Admission of evidence

A party cannot complain of prejudice from otherwise inadmissible evidence to which he opened the door.

Cases that cite this headnote

[23] **Criminal Law**

Intoxication

Voluntary intoxication or use of drugs does not constitute a defense to a crime.

Cases that cite this headnote

[24] **Criminal Law**

Intoxication

Homicide

Involuntary intoxication

Evidence did not support issuance of involuntary intoxication instruction in prosecution for first-degree burglary, kidnapping, attempted murder, first-degree assault and battery, and possession of a weapon during the commission of a violent crime; defendant admitted he voluntarily drank homemade moonshine, an illegal, unregulated liquor, and did not know who made it, he knew the moonshine was stronger than a typical alcoholic beverage because his coworkers told him that the moonshine was the granddaddy of all, the cremator of all whiskey, that he could not say had drunk anything until he tasted the granddaddy, defendant admitted he had no idea what was in the moonshine, he had no idea how he was going to react to it, but he decided to drink it anyway, and he could not assume the moonshine would have a predictable intoxicating effect. S.C. Code Ann. § 61-6-4010(A).

Cases that cite this headnote

[25] **Criminal Law**

Inferences from and Effect of Evidence

In its closing argument, the State may argue its version of the testimony presented, and furthermore may comment on the weight to be accorded such testimony.

Cases that cite this headnote

[26] **Criminal Law**
Appeals to sympathy or prejudice; argument as to punishment

Prosecutor's closing comments referring to defendant as a jealous, controlling husband who was not going to let his property leave the house did not prejudice defendant in prosecution for first-degree burglary, kidnapping, attempted murder, first-degree assault and battery, and possession of a weapon during the commission of a violent crime; defendant responded affirmatively when State asked if he got jealous and controlling and if things started falling apart, wife who defendant stabbed multiple times said defendant was controlling in the months leading up to the incident and she walked on pins and needles every day, neighbor recalled defendant got a little jealous at times if someone tried to talk to wife and defendant would try to get her attention, and defendant did not allow wife to leave the house.

Cases that cite this headnote

[27] **Homicide**
Malice

In prosecution for attempted murder, the implication of malice may arise from the use of a deadly weapon.

Cases that cite this headnote

[28] **Homicide**
Presumptions and inferences

The use of a deadly weapon implied malice instruction has no place in a murder or assault and battery with intent to kill prosecution when evidence is presented that would reduce, mitigate, excuse, or justify the killing or the alleged assault and battery with intent to kill.

Cases that cite this headnote

[29] **Weapons**
Dangerous or deadly weapons in general

"A deadly weapon" is generally any article, instrument, or substance that is likely to produce death or great bodily harm.

Cases that cite this headnote

[30] **Criminal Law**
Attempts

In prosecution for an attempt crime, "specific intent" means that the defendant consciously intended the completion of acts comprising the completed offense.

Cases that cite this headnote

[31] **Indictments and Charging Instruments**
Assault and battery

Indictments and Charging Instruments
Homicide

Assault and battery of a high and aggravated nature is a lesser-included offense of attempted murder.

Cases that cite this headnote

[32] **Assault and Battery**
Instructions

An assault and battery of a high and aggravated nature charge is appropriate when the evidence demonstrates the defendant lacked the requisite intent to kill.

Cases that cite this headnote

[33] **Assault and Battery**
Aggravated assault

Assault and battery of a high and aggravated nature is the unlawful act of violent injury to another accompanied by circumstances of aggravation.

Cases that cite this headnote

[34] **Assault and Battery**
Aggravated assault

Sex Offenses
Degrees and aggravated sex offenses in general

Circumstances of aggravation for an assault and battery of a high and aggravated nature charge include the infliction of serious bodily injury, great disparity in the ages or physical conditions of the parties, a difference in sexes, the purposeful infliction of shame and disgrace, taking indecent liberties or familiarities with a female, and resistance to lawful authority.

Cases that cite this headnote

[35] **Criminal Law**
Instruction as to evidence

Homicide
Presumptions and inferences

Jury instruction that malice could be inferred from the use of a deadly weapon in prosecution for attempted murder prejudiced defendant, and thus was reversible error, despite the number of times defendant stabbed wife with a barbecue fork and the nature of the attack, where if the jury did not believe defendant had the specific intent to kill his wife, he would have been guilty of the lesser-included offense of assault and battery of a high and aggravated nature instead, and a jury could have found defendant only had a general intent to kill instead of the higher mens rea of specific intent to kill.

Cases that cite this headnote

[36] **Criminal Law**
Statements as to Facts, Comments, and Arguments

Improper comments do not automatically require reversal for a violation of procedural due process if they are not prejudicial to the defendant. U.S. Const. Amend. 14.

Cases that cite this headnote

[37] **Criminal Law**
Conduct of trial in general

A defendant challenging improper argument based on a violations of procedural due process has the burden of proving he did not receive a fair trial because of the alleged improper argument. U.S. Const. Amend. 14.

Cases that cite this headnote

[38] **Constitutional Law**
Prosecutor

The relevant question regarding an improper comment is whether the State's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. U.S. Const. Amend. 14.

Cases that cite this headnote

[39] **Criminal Law**
Summing up

State's reply closing comments regarding a kidnapping charge not discussed during its initial closing argument did not prejudice defendant, where defendant was aware of State's theory of the charge, State explained what facts it believed supported the charge in response to defendant's directed verdict motion, State indicated the charge was appropriate because defendant grabbed wife to pull her back into the house and would not let her leave, State indicated in its initial closing argument that the kidnapping charge was not of the traditional kind, State explained the kidnapping charge, defendant was aware of State's theory and knew from the initial closing argument that State was focusing on a brief confinement to support kidnapping charge, State's comments were arguably in reply to defendant's closing argument comment that he did not know how State would explain kidnapping.

Cases that cite this headnote

[40] **Kidnapping**
Elements

A kidnapping commences when a victim is lawfully deprived of his or her freedom and

continues until freedom is restored. S.C. Code Ann. § 16-3-910.

Cases that cite this headnote

[41] Kidnapping

Kidnapping

Kidnapping

Confinement, restraint, or detention

The crime of kidnapping is broad in scope and encompasses restraint regardless of duration. S.C. Code Ann. § 16-3-910.

Cases that cite this headnote

[42] Kidnapping

Weight and sufficiency

Evidence supported finding that defendant restrained and confined his wife as required for a kidnapped prosecution, even though defendant testified that his attempts to stop wife from leaving the house were ultimately unsuccessful, where wife testified that she tried to leave the house, but defendant kept closing the garage door so she could not escape, and that defendant pulled her by the hair and tried to drag her into the house so she could not leave, and their sons both recalled during testimony defendant grabbing wife by the hair. S.C. Code Ann. § 16-3-910.

Cases that cite this headnote

****528** Appeal From Laurens County, Edward W. Miller, Circuit Court Judge

Attorneys and Law Firms

E. Charles Grose, Jr., of Grose Law Firm, of Greenwood, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Deputy Attorney General David A. Spencer, both of Columbia; and Solicitor David Matthew Stumbo, of Greenwood, all for Respondent.

Opinion

THOMAS, J.:

***115** Preston Shands, Jr., appeals his convictions for first-degree burglary, kidnapping, attempted murder, first-degree assault and battery, and possession of a weapon during the commission of a violent crime. On appeal, Shands argues the trial court erred by (1) improperly applying the *Batson*[1] comparative juror analysis; (2) refusing to quash the ****529** indictments; (3) allowing the State to impeach him with a prior conviction; (4) refusing to charge the jury on involuntary intoxication; (5) denying his motion to strike the State's improper comments during closing argument; (6) instructing the jurors they could infer malice from the use of a deadly weapon; (7) failing to require the State to open fully on the law and facts during its initial closing argument; and (8) denying his motion for directed verdict on the kidnapping charge. We affirm in part and reverse in part.

1 *Batson v. Kentucky*, 476 U.S. 79, 96–98, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) (adopting a three-step inquiry for evaluating whether a party used a peremptory challenge to strike a juror in a manner that violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution).

FACTS AND PROCEDURAL HISTORY

In October 2014, a Laurens County grand jury indicted Shands for attempted murder, kidnapping, burglary, possession of a weapon during the commission of a violent crime, and two counts of assault and battery arising out of a domestic incident on July 20, 2014. On the day of the incident, Sharon Shands (Sharon) tried to leave the house after Shands began arguing with her. Shands prevented her from leaving by pulling her back into the house by her hair; he then stabbed her multiple times with a barbecue fork. Sharon was able to escape to the neighbor's house, but Shands followed her and broke into the neighbor's house. The assault ended when police arrived.

Shands testified in his defense and admitted he was responsible for what happened to Sharon. However, he claimed he did not have any memory of the incident because he drank homemade moonshine earlier in the day that must have been laced with a drug. Shands testified he bought the moonshine from someone at work and did not know who made the ***116** moonshine or what was in it. Shands believed there "was something more strong and powerful in there ...

other than alcohol" because it "had some effect on [him] that took [him] slap clean out of [his] mind." The jury found Shands guilty of attempted murder, possession of a weapon during the commission of a violent crime, assault and battery, burglary, and kidnapping. The trial court sentenced Shands to life imprisonment without the possibility of parole for first-degree burglary, kidnapping, and attempted murder; ten years' imprisonment for first-degree assault and battery; and five years' imprisonment for possession of a weapon during the commission of a violent crime. This appeal followed.

STANDARD OF REVIEW

In criminal cases, this court sits to review errors of law only, and is bound by the trial court's factual findings unless those findings are clearly erroneous. *State v. Edwards*, 384 S.C. 504, 508, 682 S.E.2d 820, 822 (2009). Thus, on review, this court is limited to determining whether the trial court abused its discretion. *Id.*

I. *BATSON* CHALLENGE

Shands argues the trial court did not properly apply the third step of the *Batson* comparative juror analysis. Shands asserts he proved the State impermissibly struck two jurors on the basis of gender by showing there was a similarly situated female juror on the panel. He contends the trial court "was confused because the initial motion was based on [the State] striking men, and ... Shands then pointed to ... a female[,]" and therefore, the trial court "operated under the mistaken belief [it] could not consider a similarly situated female juror." We affirm.

[1] **[2]** **[3]** **[4]** **[5]** **[6]** **[7]** **[8]** Generally, "[t]he trial court's findings regarding purposeful discrimination are accorded great deference and will be set aside on appeal only if clearly erroneous." *State v. Haigler*, 334 S.C. 623, 630, 515 S.E.2d 88, 91 (1999). However, "[w]he[n] the assignment of error is the failure to follow the *Batson* hearing procedure, [the appellate court] must answer a question of law. When a question of law is presented, [the] standard of review is plenary." *State v. Stewart*, 413 S.C. 308, 316, 775 S.E.2d 416, 420 (Ct. App. 2015) (quoting ***117** *State v. Cochran*, 369 S.C. 308, 312–13, 631 S.E.2d 294, 297 (Ct. App. 2006)).

> [T]he Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States prohibits the striking of a potential juror based on race or gender. When one party strikes a member of a cognizable racial group or gender, the trial court must hold a *Batson* hearing if the opposing party requests one.

Id. at 313–14, 775 S.E.2d at 419 (internal citation omitted). "The United States Supreme ****530** Court has set forth a three-step inquiry for evaluating whether a party executed a peremptory challenge in a manner which violated the Equal Protection Clause." *State v. Inman*, 409 S.C. 19, 25, 760 S.E.2d 105, 108 (2014).

> First, the opponent of the peremptory challenge must make a prima facie showing that the challenge was based on race [or gender]. If a sufficient showing is made, the trial court will move to the second step in the process, which requires the proponent of the challenge to provide a ... neutral explanation for the challenge. If the trial court finds that burden has been met, the process will proceed to the third step, at which point the trial court must determine whether the opponent of the challenge has proved purposeful discrimination.

State v. Giles, 407 S.C. 14, 18, 754 S.E.2d 261, 263 (2014) (internal citations omitted). In order to prove purposeful discrimination, "[t]he opponent of the strike must show the race or gender[ ]neutral explanation was mere pretext, which generally is established by showing the party did not strike a similarly[ ]situated member of another race or gender." *Stewart*, 413 S.C. at 314, 775 S.E.2d at 419. "The burden of persuading the court that a *Batson* violation has occurred remains at all times on the opponent of the strike." *State v. Evins*, 373 S.C. 404, 415, 645 S.E.2d 904, 909 (2007). "Whether a *Batson* violation has occurred must be determined by examining the totality of the facts and circumstances in the record." *State v. Shuler*, 344 S.C. 604, 615, 545 S.E.2d 805, 810 (2001).

[9] During jury selection, the State used four of its five peremptory strikes on three men and one woman. The

impaneled jury was composed of nine women and three men. Shands ***118** objected based on the State striking male jurors, and the court properly held a *Batson* hearing. In response to Shands's *Batson* motion, the State indicated it struck two of the potential jurors because they had convictions for criminal domestic violence (CDV) and the other potential juror because he had four convictions for violating the lottery law. The State's explanation for striking the three male potential jurors satisfied the second step of the *Batson* analysis because "a prior criminal conviction is a neutral reason to strike" a potential juror. *See State v. Casey*, 325 S.C. 447, 453 n.2, 481 S.E.2d 169, 172 n.2 (Ct. App. 1997). To meet the third step of the *Batson* analysis, Shands argued the State sat a similarly situated female juror who had a fraudulent check conviction, indicating the State's gender neutral reason for striking the male potential jurors was pretext. When Shands argued the third step of the *Batson* analysis, the trial court believed that Shands previously based his objection on male jurors being struck but altered his objection because the State sat a female juror. Shands's counsel reiterated his assertion that the female juror was similarly situated to the males who were struck, which met the third prong of *Batson*. However, the trial court denied the objection, finding the strikes were gender neutral.

[10] Based on the exchange between Shands and the trial court in the record, we find the trial court misapplied the third step of the *Batson* analysis by not properly considering whether the female juror was similarly situated to the potential male jurors. Therefore, this issue presents a question of law for this court because the trial court failed to follow the proper *Batson* hearing procedure. *See Stewart*, 413 S.C. at 316, 775 S.E.2d at 420 ("[When] the assignment of error is the failure to follow the *Batson* hearing procedure, [the appellate court] must answer a question of law. When a question of law is presented, [the] standard of review is plenary." (quoting *Cochran*, 369 S.C. at 312–13, 631 S.E.2d at 297)).

However, we find Shands did not meet his burden to show the State's strikes were based on purposeful discrimination. *See Evins*, 373 S.C. at 415, 645 S.E.2d at 909 ("The burden of persuading the court that a *Batson* violation has occurred remains at all times on the opponent of the strike."). The female juror was not similarly situated to the two potential male jurors who had convictions for CDV. It is understandable ***119** that the State would want to strike potential jurors who had convictions for CDV because Shands was being tried for attempting to kill his wife. Further, the female juror was not similarly situated ****531** to the third potential male juror who had convictions for violating the lottery law. We agree with the State that having multiple convictions is different than having only one conviction that is over a decade old. Considering the totality of facts in the record, we find Shands did not meet his burden of showing the State's use of its peremptory strikes was impermissible. *See Shuler*, 344 S.C. at 615, 545 S.E.2d at 810 ("Whether a *Batson* violation has occurred must be determined by examining the totality of the facts and circumstances in the record.").

II. GRAND JURY PROCESS

Shands argues the trial court erred in refusing to quash the indictments because the Laurens County grand jury process is unconstitutional. Shands contends the officer who testified at his grand jury hearing was not listed on his indictments and had no personal knowledge of his case, in violation of section 14-7-1550 of the South Carolina Code (2017). [2] Shands urges this court to correct "a fundamental inequality within the grand jury process in South Carolina: defendants indicted under the statewide grand jury system are afforded different procedures under the law than defendants who are indicted under the county grand jury system[,]" namely that "statewide grand jury proceedings must be recorded."

2 Section 14-7-1550 states: "The foreman of the grand jury ... may swear the witnesses whose names shall appear on the bill of indictment in the grand jury room. No witnesses shall be sworn except those who have been bound over or subpoenaed in the manner provided by law."

[11] **[12]** **[13]** **[14]** We affirm the trial court's denial of Shands's motion to quash because Shands did not present clear evidence that there was an abuse of the grand jury proceedings in his case. "When a defendant timely moves to quash an indictment ..., the [trial] court must determine whether the defendant[']s constitutional right to have the criminal allegations against him weighed by a properly constituted grand jury has been violated." *Evans v. State*, 363 S.C. 495, 510, 611 S.E.2d 510, 518 (2005). "Proceedings before the grand jury are ***120** presumed to be regular unless there is clear evidence to the contrary." *State v. Thompson*, 305 S.C. 496, 501, 409 S.E.2d 420, 424 (Ct. App. 1991). "Speculation about 'potential' abuse of grand jury proceedings cannot substitute for evidence of *actual* abuse as grounds for quashing an otherwise lawful indictment." *Id.* at 502, 409 S.E.2d at 424.

When making his motion to quash the indictments, Shands admitted he may "need to call some witnesses" if the State did not stipulate to the grand jury process because the testimony presented to the grand jury was not recorded. The State explained the Laurens County grand jury process:

> Essentially, Your Honor, since Solicitor Stumbo has come into office, each individual assistant will, as he is assigned cases, there is a template for the indictment that is electronically produced and put in our electronic record system. We will go in, we will tailor the indictment to the facts that we have and then those are presented out, each individual assistant or deputy will then sign the indictments. But, essentially, yes, the individual agencies are notified the [g]rand [j]ury is coming, they will send a representative and one representative from each department will present all indictments from that individual department. That has been pretty much standard since I started in 1982.

However, the State indicated it "could not tell" whether either of the two officers listed on Shands's indictments testified in front of the grand jury because it did not have a record of who testified. We are unable to say there was a violation in Shands's case from the record presented. Without any clear evidence, Shands's argument that there was a grand jury abuse in his case is pure speculation. Furthermore, we disagree with Shands's argument regarding the nature of the county grand jury system because of "the view long held uniformly by courts nationwide that secrecy of grand jury proceedings is desirable and necessary." *See* Evans, 363 S.C. at 505, 611 S.E.2d at 515; *see also* State v. Moses, 390 S.C. 502, 521, 702 S.E.2d 395, 405 (Ct. App. 2010) (affirming the trial court's denial of the defendant's motion to quash the indictments even though direct evidence "is difficult to provide due to the ****532** secretive nature of the grand jury proceedings").

***121** Therefore, we find the trial court did not abuse its discretion in refusing to quash Shands's indictments.

III. PRIOR CONVICTION

Shands argues the trial court erred in allowing the State to impeach him with his 1976 murder conviction. Shands contends the conviction had no probative value and was highly prejudicial because it was similar to his charge of attempted murder. Shands asserts allowing the State to refer to the conviction as a violent felony did not lessen the prejudice because he was on trial for several violent felonies. Shands also argues he was released from confinement more than ten years prior to trial so the conviction was not admissible. Shands contends he did not open the door to the evidence because his conviction was not contrary to the evidence "that he had never acted in this manner around his wife and the children."

[15] We agree that Shands's conviction was not admissible under Rule 609, SCRE. Rule 609(a)(1), SCRE, allows "evidence that an accused has been convicted of ... a crime [to] be admitted [for the purpose of attacking the credibility of the accused] if the [trial] court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused." Rule 609(b), SCRE, then limits the admissible convictions to those when no more than "a period of ... ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction." However, convictions that are over ten years old can be admitted "in the interests of justice" if the trial court determines "that the probative value of the conviction ... *substantially* outweighs its prejudicial effect." Rule 609(b) (emphasis added). The trial court should consider the following factors in determining whether the probative value of a prior conviction outweighs its prejudicial effect: (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness's subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue. *Green v. State*, 338 S.C. 428, 433–34, 527 S.E.2d 98, 101 (2000).

***122** This case presents the novel issue in South Carolina of whether parole following a prison term constitutes "confinement" for the purposes of the ten-year time limit under Rule 609(b). The trial court found Shands's prior conviction for murder could be used to impeach him because he was still on parole for the conviction when he committed the crimes charged. In *State v. Scott*, this court held a defendant's 1977 robbery conviction was not too remote to be used to impeach her because, although she received parole in 1980, her sentence was still in effect until 1986. 326 S.C.

448, 451–52, 484 S.E.2d 110, 112 (Ct. App. 1997). However, the trial in *Scott* was prior to the adoption of the South Carolina Rules of Evidence. Therefore, the *Scott* court relied on common law to find the defendant's conviction was not too remote and did not interpret the confinement language from Rule 609(b). *See id.* at 450, 484 S.E.2d at 111. Under the common law rule, "[t]here [wa]s no fixed time in [South Carolina] after which a conviction bec[ame] too remote." *State v. Sarvis*, 317 S.C. 102, 105, 450 S.E.2d 606, 608 (Ct. App. 1994). For those reasons, we disagree with the State and find *Scott* is not controlling in the instant case. We note the majority of jurisdictions [3] considering this issue have held that probation and parole do not count as confinement for the purposes of rules and statutes similar to our Rule 609(b). *See United States v. Rogers*, 542 F.3d 197, 198 (7th Cir. 2008) ("[P]robation does not constitute 'confinement' within the meaning of Rule 609(b)."); *Bizmark, Inc. v. Kroger Co.*, 994 F.Supp. 726, 728 (W.D. Va. 1998) (" '[R]elease from confinement,' for 609(b) purposes means release from actual imprisonment, and therefore, [ ] neither parole nor probation constitutes confinement under the rule."); *Allen v. State*, 286 Ga. 392, 687 S.E.2d 799, 803 (2010) ("The legislature's distinction of 'confinement' from release on parole ****533** and suspended and probated sentences, when coupled with the construction of identical statutory language by the federal courts and our sister states, leads us to conclude that probation does not qualify as confinement ...."); *Commonwealth v. Treadwell*, 911 A.2d 987, 991 (Pa. Super. Ct. 2006) ("After reviewing the relevant statutory language and the rationale ***123** relied upon in other jurisdictions, we agree with the federal courts and our sister states, and conclude that probation does not qualify as confinement ....").

3 Because Rule 609(b) "is identical to the federal rule, federal cases may be persuasive." *See State v. Colf*, 337 S.C. 622, 626, 525 S.E.2d 246, 248 (2000).

[16] **[17]** **[18]** We follow the majority of jurisdictions in holding that probation and parole do not constitute "confinement" for the purposes of Rule 609(b); confinement ends when a defendant is released from actual imprisonment. Although Rule 609(b) does not define the term confinement, Black's Law Dictionary defines the term as "[t]he act of imprisoning or restraining someone; the quality, state, or condition of being imprisoned or restrained." *Confinement,* BLACK'S LAW DICTIONARY (10th ed. 2014). Conversely, "[t]he term parole means a conditional release from imprisonment." *State v. Ellis*, 397 S.C. 576, 579–80, 726 S.E.2d 5, 7 (2012). Although Shands was not technically a "free citizen" while he was on parole, we find he was no longer confined because he was not actually imprisoned. *See id.* at 581, 726 S.E.2d at 7 (recognizing a defendant on parole "was not a free citizen" and had "[a]ll the consequences of the judgement [still] upon him, except that he had leave of absence from prison" (quoting *Crooks v. Sanders, Superintendent of State Penitentiary*, 123 S.C. 28, 36–37, 115 S.E. 760, 763 (1922))). Therefore, Shands's confinement for his 1976 conviction ended in 2003 when he was released on parole, making his conviction over ten years old and presumptively inadmissible under Rule 609(b). *See Colf*, 337 S.C. at 626, 525 S.E.2d at 248 ("Rule 609(b) establishes a presumption against admissibility of remote convictions ....").

[19] Furthermore, the State did not present sufficient evidence to show the probative value of Shands's conviction *substantially* outweighed its prejudicial effect. *See id.* at 626–27, 525 S.E.2d at 248 ("[T]he State bears the burden of establishing facts and circumstances sufficient to substantially overcome that presumption."); Rule 609(b) (explaining a stale conviction is not admissible unless "in the interests of justice" the trial court determines "the probative value of the conviction[,] supported by specific facts and circumstances[,] substantially outweighs its prejudicial effect"). Because Shands was convicted over forty years ago and was released from prison over ten years ago, we believe his conviction had little probative value. *See* ***124** *State v. Black*, 400 S.C. 10, 26, 732 S.E.2d 880, 889 (2012) ("The genesis of the rule's ten-year provision was the belief that after ten years, the probative value of the conviction with respect to a person's credibility has diminished to the point where it should no longer be admissible."). Moreover, the prejudicial effect was high because of the nature of his charges. Thus, the trial court erred by finding the prior conviction admissible under Rule 609(b).

[20] **[21]** **[22]** However, we find the trial court did not err in admitting Shands's prior conviction because Shands opened the door to such evidence. "[O]therwise inadmissible evidence may be properly admitted when opposing counsel opens the door to that evidence." *State v. Page*, 378 S.C. 476, 482, 663 S.E.2d 357, 360 (Ct. App. 2008). "A party cannot complain of prejudice from evidence to which he opened the door." *State v. Culbreath*, 377 S.C. 326, 333, 659 S.E.2d 268, 272 (Ct. App. 2008). At trial, Shands elicited testimony during the cross-examination of numerous witnesses to show that he had never reacted violently before. For example, Shands's counsel asked Sharon if this was the first time "he ha[d] ever done something like this." Shands's counsel also elicited testimony from Shands's two sons about whether they

had ever seen Shands act in a similar manner. Furthermore, Shands's counsel asked the neighbor if Shands's behavior on the night of the incident was "entirely out of character." Because Shands opened the door about his past non-violent actions, the State was entitled to rebut his assertions with evidence of his prior conviction for a violent felony. *See State v. Taylor*, 333 S.C. 159, 175, 508 S.E.2d 870, 878 (1998) ("[B]ecause appellant 'opened the door' about his relationship with his wife, ****534** the solicitor was entitled to cross-examine him regarding the relationship, even if the responses brought out appellant's prior criminal domestic violence conviction."). Therefore, the trial court did not err in admitting Shands's prior conviction. *See State v. Robinson*, 305 S.C. 469, 474, 409 S.E.2d 404, 408 (1991) (explaining one who opens the door to evidence cannot complain of its admission).

IV. VOLUNTARY INTOXICATION

After resting his case, Shands requested that the trial court charge the jury on involuntary intoxication. The trial court denied Shands's request but granted the State's request to ***125** charge that voluntary intoxication was not a defense to a crime. On appeal, Shands argues the trial court erred in refusing to charge the jury on involuntary intoxication because his testimony indicated that the moonshine he drank was unknowingly "spiked with something other than alcohol." Shands contends the trial court improperly commented on the facts when it charged voluntary intoxication without also charging involuntary intoxication. We disagree.

[23] At trial, "[t]he law to be charged is determined from the facts presented." *State v. Lewis*, 328 S.C. 273, 278, 494 S.E.2d 115, 117 (1997).

> Involuntary intoxication may result from innocently consuming an intoxicant, through being tricked into it by another, or being forced to take it, or perhaps through unanticipated side effects of a prescription drug taken on orders of a physician. If [a jury] find[s] the defendant was given drugs or alcoholic beverages without his knowledge, and as a result, he lost his ability to exercise independent judgment and volition while committing the crimes alleged against him, then it would be [the jury's duty] to find the defendant not guilty.

RALPH KING ANDERSON, JR., SOUTH CAROLINA REQUESTS TO CHARGE—CRIMINAL § 6-4 (2012). However, "voluntary intoxication or use of drugs does not constitute a defense to a crime." *State v. Hartfield*, 300 S.C. 469, 473, 388 S.E.2d 802, 804 (1990).

[24] We find the trial court did not err in refusing to charge involuntary intoxication because Shands voluntarily consumed an illegal intoxicant. *See* S.C. Code Ann. § 61-6-4010(A) (2009) (making it illegal for a person to "manufacture, store, keep, receive, have in possession, transport, ship, buy, sell, barter, exchange, or deliver alcoholic liquors, except liquors acquired in a lawful manner" or "accept, receive, or have in possession alcoholic liquors for unlawful use"). Shands admitted he voluntarily drank the "homemade moonshine" and did not know who made it. He knew the moonshine was stronger than a typical alcoholic beverage because his coworkers told him the moonshine was "the grand[d]addy of all, the cremator of all whiskey" and he could not "say [he] drunk anything" until he "tasted the grand[d]addy." Moreover, ***126** Shands admitted he "had no idea what was in [the moonshine] and [he] had no idea how [he] was going to react to it," but he decided to drink it anyway.

We agree with the reasoning of the California Court of Appeals when it considered whether a defendant was entitled to an involuntary intoxication charge when he voluntarily smoked a marijuana cigarette given to him by others that was unknowingly laced with phencyclidine (PCP). *See People v. Velez*, 175 Cal.App.3d 785, 221 Cal.Rptr. 631, 632 (1985). The California Court of Appeals affirmed the trial court's denial of an involuntary intoxication charge, reasoning

> [The defendant's] defense depends on the validity of [the] defendant's assumptions that the cigarette did not contain PCP and would produce a predictable intoxicating effect. However, ... these assumptions are tested not by [the] defendant's subjective belief but rather by the standard of a reasonable person. In

> this regard, it is common knowledge that unlawful street drugs do not come with warranties of purity or quality associated with lawfully acquired drugs such as alcohol. Thus, ... unlawful street drugs are frequently not the substance they purport to be ....

Id. at 637. Similarly, in the instant case, Shands knowingly consumed an illegal, unregulated liquor and had no right to assume the moonshine would cause a predictable intoxicating effect. Further, because there was no evidence to support a charge for involuntary ****535** intoxication, the trial court did not err in charging voluntary intoxication without an accompanying charge on involuntary intoxication. *See Lewis*, 328 S.C. at 278, 494 S.E.2d at 117 ("The law to be charged is determined from the facts presented at trial."). Therefore, we find the trial court did not err.

V. COMMENTS DURING THE STATE'S CLOSING ARGUMENT

Shands argues the trial court erred by not striking the State's improper comments during closing argument and not instructing the jurors to disregard the comments. Shands asserts the State's comment: "This is a jealous, controlling husband who was not going to let his property leave that house," was "highly inflammatory and not based on the evidence." We disagree.

***127** In its reply closing argument, the State described its view of the case and evidence:

> And what happens, he is an almost 60-year-old man with a 38-year-old wife and she is beautiful and she is a good woman and she was taking care of him but it wasn't good enough for him. He starts getting controlling. [The neighbor] told y'all, [Shands] could be jealous if you tried to talk to [Sharon] in the neighborhood. He starts getting jealous and controlling. And it gets worse and it gets worse and he is arguing and he is fussing and he is drinking and Sharon said we were on pins and needles. So this, he may not have put his hands on her before but this is a relationship that is going downhill fast. And what happens on July 20, 2014, she finally says, you know what, I am leaving, I am going. Come on kids, get in the car. And that is when he snaps. He is not, his wife and his kids that he provides for and he works for that are his property, she is not leaving him, she is not taking those kids, no, no, no, no. Grabs her by the hair, grabs the first thing he can get his hands on and starts going at her. This isn't about he was drinking something that day, this is a jealous, controlling husband who was not going to let his property leave that house.

Shands objected and moved to strike, and the trial court instructed the State to continue.

[25] **[26]** We find the trial court did not abuse its discretion in denying Shands's motion to strike because the State's comments were not outside of the evidence. *See State v. Penland*, 275 S.C. 537, 539, 273 S.E.2d 765, 766 (1981) ("The control of argument is normally within the discretion of the trial [court], and we will not disturb [its] ruling whe[n] there is no abuse of discretion."). In its closing argument, the State "may argue [its] version of the testimony presented, and furthermore may comment on the weight to be accorded such testimony." *State v. New*, 338 S.C. 313, 319, 526 S.E.2d 237, 240 (Ct. App. 1999). In the instant case, Shands responded affirmatively when the State asked if he "got pretty jealous and kind of controlling" and if "things ... started falling apart." Sharon testified Shands was "controlling" in the months leading up to the incident, and she "walked on pins and needles every day [because she] didn't know what to expect" from him. The neighbor recalled Shands got "a little ***128** jealous at times" if someone tried to talk to Sharon, and Shands "would say something to ... get her attention." The evidence further showed Shands did not allow Sharon to leave the house when she tried to leave with the children, pulling her by the hair to get her to stay. Furthermore, Shands was not prejudiced by the comments in light of the overwhelming evidence of his guilt, including his testimony that he committed the acts in question and his lack of a viable defense. *See Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002) ("Improper comments do not

automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument."). Therefore, we find the trial court did not err in refusing to strike the State's comments during its closing argument.

VI. INFERRED MALICE JURY INSTRUCTION

Shands argues the trial court erred in instructing the jury that malice could be inferred from the use of a deadly weapon and giving the example of a knife as a deadly weapon. Shands contends the instruction was ****536** contrary to *State v. Belcher*[4] because the attempted murder charge could have been reduced or mitigated by the lesser-included offense of assault and battery of a high and aggravated nature (ABHAN) or Shands's defense that he lacked criminal intent. We agree that the trial court erred in instructing the jury that malice could be inferred from the use of a deadly weapon.

4 385 S.C. 597, 685 S.E.2d 802 (2009).

[27] **[28]** **[29]** "The implication of malice may arise from the use of a deadly weapon." *State v. Campbell*, 287 S.C. 377, 379, 339 S.E.2d 109, 109 (1985) (per curiam). However, "the 'use of a deadly weapon' implied malice instruction has no place in a murder (or assault and battery with intent to kill [5] [(ABWIK)]) prosecution whe[n] evidence is presented that would ***129** reduce, mitigate, excuse[,] or justify the killing (or the alleged [ABWIK])." *Belcher*, 385 S.C. at 610, 685 S.E.2d at 809 (footnote omitted). "A deadly weapon is generally defined as 'any article, instrument[,] or substance [that] is likely to produce death or great bodily harm.' " *Campbell*, 287 S.C. at 379, 339 S.E.2d at 109 (quoting *State v. Sturdivant*, 304 N.C. 293, 283 S.E.2d 719, 725 (1981)).

5 According to the Omnibus Crime Reduction and Sentencing Reform Act, the Legislature abolished the offense of ABWIK and replaced it with attempted murder. *See* Act No. 273, 2010 S.C. Acts 1949–50. ABWIK was "an unlawful act of violent nature to the person of another with malice aforethought, either express or implied." *State v. Hinson*, 253 S.C. 607, 611, 172 S.E.2d 548, 550 (1970).

"A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder." S.C. Code Ann. § 16-3-29 (2015). In *State v. King*, our supreme court considered the requisite *mens rea* required for attempted murder. *See State v. King*, 422 S.C. 47, 54, 810 S.E.2d 18, 22 (2017). The majority opinion, written by Chief Justice Beatty, held attempted murder requires the specific intent to commit murder, which is a higher level of *mens rea* than is required for murder.[6] *Id.* at 54–64, 810 S.E.2d at 22–27. The court discussed the fact that attempt crimes require the highest level of mens rea because "it is logically impossible to attempt an unintended result." *Id.* at 56, 810 S.E.2d at 23 (quoting 22 C.J.S. *Criminal Law: Substantive Principles* § 156, at 221–22 (2016)). The court explained attempted murder was not a mere codification of ABWIK, a general intent crime, because the General Assembly "purposefully add[ed] the language 'with intent to kill' to 'malice aforethought, either express or implied.' "[7] *King*, 422 S.C. at 61, 810 S.E.2d at 25. After ***130** considering the legislative history of the attempted murder statute, the court held a "specific intent to kill" is an element of attempted murder, and the trial court erred in instructing the jury that it was not. *Id.* at 61–64, 810 S.E.2d at 25–27. Although the majority opinion in *King* did not directly address the issue of whether an inferred malice charge was warranted in an attempted murder case, the court indicated its belief in a footnote that malice can never be implied in an attempted murder case. *See id.* at 64 n.5, 810 S.E.2d at 27 n.5. The court stated:

> While we find it unnecessary to address King's additional sustaining ground [that the trial court erred in instructing the jury that malice could be inferred from the use ****537** of a deadly weapon], we would respectfully suggest to the General Assembly to re-evaluate the language following "malice aforethought" as the inclusion of the word "implied" in section 16-3-29 is arguably inconsistent with a specific[ ]intent crime. *See* [*Keys v. State*, 104 Nev. 736, 766 P.2d 270, 273 (1988)] (stating, "[o]ne cannot *attempt* to kill another with implied malice because there is no such criminal offense as an attempt to achieve an unintended result" (citation and internal quotation marks omitted)). Moreover, if there is no evidence that one charged with attempted murder had express malice and a specific intent to kill, we believe the crime would involve a lower level of intent[, and] thus, would fall within the lesser degrees of the assault and battery offenses codified in section 16-3-600. *See* S.C. Code Ann. § 16-3-600 (2015 & Supp. 2016) (identifying levels and degrees of assault and battery offenses).

Id.

6 Acting Justices Benjamin and Hayes concurred in the majority opinion. Acting Justice Pleicones concurred in result only and did not write a separate opinion.

7 Justice Kittredge wrote a concurrence to express his belief that the General Assembly intended to codify ABWIK when it enacted the attempted murder statute. *King*, 422 S.C. at 71, 810 S.E.2d at 30 (Kittredge, J., concurring). Justice Kittredge noted the statutory offense of attempted murder had an ambiguity because the language "with intent to kill" was included with the "seemingly contradictory" language of "with malice aforethought, either expressed or implied." *Id.* at 73, 810 S.E.2d at 32 (Kittredge, J., concurring). However, Justice Kittredge believed a specific intent to kill was not required because ABWIK, a general intent crime, included "with intent to kill" in the name of the common law crime. *Id.* at 73–74, 810 S.E.2d at 32 (Kittredge, J., concurring). Justice Kittredge further pointed to "the legislature's use of the verbatim definition of ABWIK in the section 16-3-29 offense of attempted murder." *Id.* at 73, 810 S.E.2d at 32 (Kittredge, J., concurring). Therefore, Justice Kittredge would have affirmed the trial court's instruction that specific intent to kill was not an element of attempted murder. *Id.* at 73–74, 810 S.E.2d at 32 (Kittredge, J., concurring).

[30] **[31]** **[32]** **[33]** **[34]** "[S]pecific intent means that the defendant consciously intended the completion of acts comprising the [completed] offense." *State v. Nesbitt*, 346 S.C. 226, 231, 550 S.E.2d 864, 866 (Ct. App. 2001) (quoting *State v. Sutton*, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000)). "ABHAN is a lesser-included offense of attempted murder." *State v. Middleton*, 407 S.C. 312, 315, 755 S.E.2d 432, 434 (2014). "An ABHAN charge is ***131** appropriate when the evidence demonstrates the defendant lacked the requisite intent to kill." *State v. Dennis*, 402 S.C. 627, 638, 742 S.E.2d 21, 27 (Ct. App. 2013) (per curiam) (quoting *State v. Coleman*, 342 S.C. 172, 176, 536 S.E.2d 387, 389 (Ct. App. 2000)).

> [ABHAN] is the unlawful act of violent injury to another accompanied by circumstances of aggravation. Circumstances of aggravation include the infliction of serious bodily injury, great disparity in the ages or physical conditions of the parties, a difference in sexes, the purposeful infliction of shame and disgrace, taking indecent liberties or familiarities with a female, and resistance to lawful authority. [8]
>
> *State v. Green*, 327 S.C. 581, 585, 491 S.E.2d 263, 264–65 (Ct. App. 1997) (internal citations omitted).

8 The legislature codified ABHAN in section 16-3-600(B)(1) of the South Carolina Code (2015). However, the codified version's effective date was after the dates of the alleged offenses in this case. Thus, the pre-codified version of ABHAN applies to Shands's case. *See Pierce v. State*, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000) ("The application of a new or amended criminal statute may prompt a defendant to allege a violation of the Ex Post Facto Clause, arguing the court may not apply a statute enacted or amended after the date of an offense in his case.").

[35] In light of our supreme court's discussion in *King*, we find the State needed to prove Shands acted with express malice *and* the specific intent to kill in order to be found guilty of attempted murder. *See King*, 422 S.C. at 54–64, 810 S.E.2d at 22–27. Therefore, we question whether an implied malice instruction is proper in any attempted murder trial. However, even if an implied malice instruction was appropriate in an attempted murder case, we do not believe it was appropriate in Shands's case. As Shands and the State recognized at trial, if the jury did not believe Shands had the specific intent to kill, he would have been guilty of the lesser-included offense of ABHAN. Despite the number of times Shands stabbed Sharon and the nature of the attack, a jury could have found Shands only had a general intent to kill instead of the higher *mens rea* of specific intent to kill. *See State v. Kinard*, 373 S.C. 500, 504, 646 S.E.2d 168, 169 (Ct. App. 2007) (" 'General intent' is defined as 'the state of mind required for the commission of certain common law crimes not requiring specific intent' and it 'usually takes the form of recklessness ... or negligence.' " ***132** (quoting BLACK'S LAW DICTIONARY (7th ed. 1999))); *Nesbitt*, 346 S.C. at 231, 550 S.E.2d at 866 ("[S]pecific intent means that the defendant consciously intended the completion of acts comprising the [completed] offense." (quoting *Sutton*, 340 S.C. at 397, 532 S.E.2d at 285)). Therefore, because there was evidence to reduce Shands's charge, the trial court erred in instructing the jury that malice could be inferred from the use of a deadly weapon. *See Belcher*, 385 S.C. at 610, 685 S.E.2d at 809 (holding the use of a deadly weapon inferred malice instruction is not proper ****538** when there was evidence to reduce the crime).

This error requires reversal of Shands's conviction for attempted murder.[9] However, we find the trial court's error caused Shands no prejudice as to his convictions for first-degree burglary, kidnapping, first-degree assault and battery, and possession of a weapon during the commission of a violent crime, and we affirm those convictions.

9 Because Shands's argument regarding the propriety of the inferred malice instruction is dispositive, we do not consider Shands's argument that giving the example of a knife as a deadly weapon was a comment on the facts of the case. *See* State v. Henson, 407 S.C. 154, 167 n.4, 754 S.E.2d 508, 515 n.4 (2014) (declining to reach an additional argument where the resolution of the first issue was dispositive).

VII. CLOSING ARGUMENT PROCEDURE

Shands argues the trial court violated his due process rights[10] by refusing to require the State to open fully on the law and the facts in its initial closing argument so he would have the opportunity to respond to the State's entire argument in his closing argument. Shands argues the State "revealed to the jurors for the first time [its] theory about the kidnapping charge" in its reply closing argument. Shands also states he would have liked to respond to

> what [he] considered to be somewhat an emotional attack on [him] both in some of how it was delivered but in particular[ ] the language that was used. [He] would have responded about what [the State] said about kidnapping, [he] would have responded to what [it] said about placing the police on ***133** trial, that was not [his] purpose. And [he] would have responded to ... the argument made about Sharon leaving that day as well as a number of things that [he thought it] said that exceeded the bounds of what the evidence really was ....

Shands contends even if some of the evidence fairly arose from the evidence at the trial, "there was [no] guarantee the [State] would make those same arguments during [its] closing argument" and it was "fundamentally unfair to require [him] to predict the prosecutor's closing argument."

10 Due process requires that no person shall be deprived of life, liberty, or property without due process of law. U.S. CONST. amend. XIV § 1; S.C. CONST. art. 1, § 3.

In *State v. Beaty*, our supreme court declined to create a rule specifying "the content and order of closing arguments in criminal cases in which a defendant introduces evidence," noting it did not have the authority "to promulgate a procedural rule for future cases by simply issuing an opinion." *State v. Beaty*, 423 S.C. 26, 36–37, 39, 46, 813 S.E.2d 502, 507, 509, 512 (2018). The supreme court extensively discussed the history of South Carolina's rules and practices surrounding the procedure of closing arguments in criminal cases. *Id.* at 36–43, 813 S.E.2d at 507–11. The court explained the existing procedure applicable to Shands's case as follows:

> [I]n cases in which a defendant introduces evidence of any kind, even through a prosecution witness, the State has the final closing argument. However, in cases in which the State is entitled to the reply argument, there is no common law or codified rule as to whether the State must open in full on the law, or the facts, or both, or neither, and there is no rule governing the content of the State's reply argument.

Id. at 42, 813 S.E.2d at 510–11. The court, instead, noted it "retain[ed] the authority to determine—on a case-by-case basis—whether a defendant's due process rights have been violated by procedural methods employed during a trial." *Id.* In *Beaty*, the supreme court found the State's closing arguments did not violate the defendant's procedural due process rights because the State's theories were (1) "arguably a proper response" to the defendant's closing argument, (2) "largely inconsequential to the question" of whether the defendant murdered the victim, (3) supported by evidence in the record, and (4) not prejudicial to the defendant. *Id.* at 43–47, 813 S.E.2d at 511–13.

***134** **[36]** **[37]** **[38]** Therefore, we must determine whether Shands's due process rights were violated in this instance. "[P]rocedural due process contemplates a fair trial."

**539 *Id.* at 43, 813 S.E.2d at 511. "A denial of due process occurs when a defendant in a criminal trial is denied the fundamental fairness essential to the concept of justice." *Id.* (quoting *State v. Hornsby*, 326 S.C. 121, 129, 484 S.E.2d 869, 873 (1997)). Our "case law focuses upon allegedly inflammatory or unsupported content of the State's closing argument, not upon whether the State must open in full on the facts and not upon reply arguments which have a basis in the record but to which a defendant is not allowed to respond." *Id.* "Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." *Humphries*, 351 S.C. at 373, 570 S.E.2d at 166. "The relevant question is whether the [State]'s comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.*

[39] Although Shands argues he did not get a chance to reply to the State's version of the facts, we find he was aware of the State's arguments and could have used his closing argument to respond to them. Shands was aware of the State's theory of the kidnapping charge because the State explained what facts it believed supported the charge in response to Shands's directed verdict motion. The State indicated the kidnapping charge was appropriate because Shands grabbed Sharon by the hair to pull her back into the house and would not let her leave through the garage. The State indicated in its initial closing argument that the kidnapping in Shands's case was not "the traditional kidnapping" a person usually thinks about when "there is [an] Amber alert and somebody's child is missing." The State explained: "Kidnapping is confining someone against their will and it doesn't have to be for a long time, there is no set amount of time that you have to confine somebody." Although the jury had not yet heard the State's full theory for kidnapping, Shands was aware of its theory and knew from the State's initial closing argument that the State was focusing on a brief confinement to support the kidnapping charge. Furthermore, the State's comments in its closing argument regarding kidnapping were arguably in reply to ***135** Shands's closing argument comment that he "had no idea how [the State] would explain kidnapping to [the jury] under this evidence."

Regarding Shands's argument that the State "emotional[ly] attack[ed]" him in its reply closing argument, we believe this matter was inconsequential to the issue of Shands's guilt, and as discussed in Section V, these comments were not prejudicial. Shands further argued he would have responded to the State's comments about him "placing the police on trial." We believe the State's comments during its reply closing argument were arguably in response to Shands's closing argument highlighting the fact that the police officers never asked him what his side of the story was and stating the lack of information in the case was "the fault of the police officers." Furthermore, these comments were insignificant to the issues before the jury.

Accordingly, while the State did "not restrict its reply argument to matters raised by" Shands and the trial court did not allow him to respond to the foregoing points, we hold Shands did not suffer prejudice as a result because he was not denied "the fundamental fairness essential to the concept of justice." *See Beaty*, 423 S.C. at 45, 813 S.E.2d at 512 (quoting *Hornsby*, 326 S.C. at 129, 484 S.E.2d at 873).

VIII. DIRECTED VERDICT

Shands argues the trial court erred in denying his motion for a directed verdict on the kidnapping charge because the evidence did not show that Shands "actually restrained" Sharon. Shands further argues the kidnapping statute is unconstitutionally vague and overbroad because the facts of his case did not put him on notice that his conduct could constitute kidnapping. We disagree.

"When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." *State v. Hernandez*, 382 S.C. 620, 624, 677 S.E.2d 603, 605 (2009). If the State fails to produce evidence of the charged offense, then the defendant is entitled to a directed verdict. *Id.* "In an appeal from the denial of a directed verdict motion, the appellate ****540** court must view the evidence in the light most favorable to the State." ***136** *State v. Cope*, 405 S.C. 317, 348, 748 S.E.2d 194, 210 (2013). "If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the [c]ourt must find the case was properly submitted to the jury." *Id.* (quoting *State v. Curtis*, 356 S.C. 622, 633–34, 591 S.E.2d 600, 605 (2004)).

[40] **[41]** Kidnapping occurs when one "unlawfully seize[s], confine[s], inveigle[s], decoy[s], kidnap[s], abduct[s,] or carr[ies] away" another person. S.C. Code Ann. § 16-3-910 (2015). "A kidnapping commences when [a victim] is [lawfully] deprived of his [or her] freedom and continues until freedom is restored." *State v. Kornahrens*, 290 S.C. 281, 287, 350 S.E.2d 180, 184 (1986). "[T]he crime of kidnapping in South Carolina is broad in scope" and "encompass[es] restraint regardless of duration." *Lozada v.*

S.C. Law Enf't Div., 395 S.C. 509, 513, 719 S.E.2d 258, 260 (2011).

[42] We find Shands's argument regarding the constitutionality of the kidnapping statute is without merit because our supreme court has already held the kidnapping statute is not unconstitutionally vague and overbroad. *See State v. Smith*, 275 S.C. 164, 166, 268 S.E.2d 276, 277 (1980) ("The terms of th[e] statute are clear and unambiguous. It proscribes the forceful seizure, confinement[,] or carrying away of another against his will without authority of law. We hold it is not unconstitutionally vague ...."). [11] Further, we hold the trial court did not err in denying Shands's motion for a directed verdict because, viewing the evidence in the light most favorable to the State, there was evidence to support the kidnapping charge. Sharon testified she tried to leave the house, but Shands kept closing the garage door so she could not escape. Sharon also testified Shands pulled her by the hair and tried to drag her into the house so she could not leave. The sons both recalled Shands grabbing Sharon by the hair as ***137** well. We find this evidence supported the kidnapping charge. Shands appears to argue that because his attempts to close the garage door and pull Sharon inside the house by her hair were not ultimately successful in preventing Sharon from leaving the house, his actions were only *attempts* to restrain, rather than actual restraints. We disagree. The kidnapping statute does not prescribe a duration, and therefore, by preventing Sharon from leaving the house, Shands restrained and confined her for the purposes of the statute. *See Lozada*, 395 S.C. at 513, 719 S.E.2d at 260 (stating that kidnapping "encompass[es] restraint regardless of duration"). Therefore, we affirm the trial court's denial of Shands's motion for a directed verdict on the kidnapping charge.

11 Other than an amendment to the maximum sentence, the kidnapping statute in 1980 was identical to the kidnapping statute in effect at the time of Shands's case. *See Smith*, 275 S.C. at 166, 268 S.E.2d at 277 ("Whoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever without authority of law, ..., shall be guilty of a felony and, upon conviction, shall suffer the punishment of life imprisonment ..." (quoting S.C. Code Ann. § 16-3-910 (Supp. 1979))).

CONCLUSION

For the foregoing reasons, we affirm Shands's convictions for first-degree burglary, kidnapping, first-degree assault and battery, and possession of a weapon during the commission of a violent crime, and we reverse his conviction for attempted murder.

AFFIRMED IN PART AND REVERSED IN PART.

WILLIAMS and MCDONALD, JJ., concur.

All Citations

424 S.C. 106, 817 S.E.2d 524

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LAURENS COUNTY
Court of General Sessions
Edward W. Miller, Circuit Court Judge

Court of Appeals Case No. 2015-001199

The State, ... Respondent

v.

Preston Shands, Jr., ... Appellant.

Petition for Rehearing

Pursuant to Rule 221, SCACR, Preston Shands, Jr. petitions for rehearing because this Court overlooked or misapprehended the following points.

I. Batson Challenge.

This Court agreed with Mr. Shands that the trial judge did not "properly apply the third step of the *Batson* comparative juror analysis." This Court, however, disagreed with Mr. Shands that the State violated *Batson.* In reaching this conclusion, this Court applied two lines of reasoning. First, this Court held, "It is understandable that the State would want to strike potential jurors who had convictions for CDV because Shands was being tried for attempting to kills his wife." Second, this Court held that the female juror with a fraudulent check conviction was not similarly situated the make juror with "convictions for violating the lottery law" because it "agree[d] with the State that having multiple convictions is different than having only one conviction that is over a decade old." Slip

Op. at 3-5. The opinion in this case conflicts with this Court's opinion in *State v. Stewart*, 413 S.C. 308, 314, 775 S.E.2d 416, 419 (Ct. App. 2015), which Mr. Shands relied upon in his Brief, at 5-9, and Reply Brief, at 1. Mr. Shands, in fact, argued:

> *Stewart* is instructive for two reasons. First, much like this case, *Stewart* reviewed the trial court's error by not correctly applying the third step of *Batson*. Second, *Stewart* involved a prosecutor attempting to justify preemptory strikes based on jurors' criminal history. In *Stewart,* the State struck African-American jurors with prior involvement with law enforcement while seating Caucasian jurors that also had prior involvement with law enforcement. The Court of Appeals held, "[E]ven though the State offered a racially-neutral explanation for striking the African American jurors, the State negated the reason by seating similarly-situated Caucasian jurors." *Stewart*, 413 S.C. at 317, 775 S.E.2d at 421. *See Miller–El v. Dretke,* 545 U.S. 231, 241 (2005) ("If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson* 's third step."); *State v. Oglesby,* 298 S.C. 279, 281, 379 S.E.2d 891, 892 (1989) (finding the solicitor negated his neutral reason when he seated a white female juror who was similarly situated). Just as it did in *Stewart*, the State in this case negated the gender-neutral reason for striking three men by seating a similarly situated female juror.

Final Brief of Appellant at 8-9. As Mr. Shands pointed out during the oral argument, the State's argument would have been more persuasive if the prosecutors had limited their strikes, purportedly based on criminal history, to the two male jurors with CDV convictions. The State "negated" the use of criminal history when it struck the male juror with lottery law convictions and sat the female juror with a fraudulent check conviction.

Additionally, this Court failed to examine the totality of the circumstances. Mr. Shands argued:

> [I]n addition to seating a similarly situated female juror, the totality of the circumstances militates in favor of ordering a new trial. *See State v. Scott*, 406 S.C. 108, 113, 749 S.E.2d 160, 163 (Ct. App. 2013) ("Whether a *Batson* violation has occurred must be determined by examining the totality of the facts and circumstances in the record.") (citing *State v. Shuler,* 344 S.C. 604, 615, 545 S.E.2d 805, 810 (2001)). During jury

> selection in this case, the Solicitor had twenty-seven decisions on whether to exercise one of her preemptory strikes. She struck three of the nine men (33%) presented to her. She struck just one of the eighteen women (about 5.5%) presented to her. The Solicitor, therefore, was six times more likely to strike men than women. As ... seen in Question V, ..., the Solicitor directed her closing argument towards the female jurors, including arguing that Mr. Shands considered his wife property.

Final Brief of Appellant at 9.

This Court should rehear this appeal and grant relief for the reasons set forth in Mr. Shand's brief, at 5-9, and reply brief, at 1.

II. Grand Jury Process.

This Court held that Mr. "Shands did not present clear and convincing evidence that there was an abuse of the grand jury proceedings in his case." Slip Op. at 5. This Court overlooked the Deputy Solicitor's admission that Laurens County has a pattern and practice that does not comply with S.C. Code Ann § 14-7-1550 and he standard instructions provided to the grand jurors at the beginning of every year. *See* Rule 406, SCRE. Mr. Shands, accordingly proved an abuse of the grand jury process in ***every*** case indicted in Laurens County.

This Court should rehear this appeal and grant relief for the reasons set forth in Mr. Shand's brief, at 9-19, and reply brief, at 1-2.

III. Prior Conviction.

This Court agreed with Mr. Shands that his prior conviction was not admissible under Rule 609, SCRE because (1) Mr. Shands had been released from confinement for more than ten years and (2) "the State did not present sufficient evidence to show the probative value of Shand's conviction *substantially* outweighed its prejudicial effect." Slip Op. at 8-9 (emphasis supplied by this Court). This Court, however, held, "[T]he trial

court did not err in admitting Shand's prior conviction because Shands opened the door to such evidence" by asking whether they had ever witnessed Mr. Shands commit an act of violence. Slip Op. at 9. This Court, however, never identified the court rule under which the evidence was admissible. It appears this Court conflated the analysis under Rule 609, SCRE with the analysis under Rule 404(a), SCRE or Rule 404(b), SCRE. The prosecution tacitly acknowledged Mr. Shand's conviction was not admissible under Rule 404, SCRE as its only theory at trial for admitting the conviction was under Rule 609, SCRE.

This Court, essentially, adopted a rule allowing the prosecution to introduce an otherwise inadmissible prior conviction to impeach an accused's cross-examination of witnesses that gave truthful answers about issues relevant in the case. In future trials, an accused will have to choose between cross-examining witnesses or testifying.

This Court should rehear this appeal and grant relief for the reasons set forth in Mr. Shand's brief, at 19-23, and reply brief, at 2-3.

IV. Voluntary Intoxication.

This Court held, "[T]he trial court did not err in refusing to charge involuntary intoxication because Shands voluntarily consumed an illegal intoxicant." Slip Op. at 10. This Court, however, overlooked the testimony that the drink was "spiked with something other than alcohol." In doing so, this Court encroaches on the role of the jurors as the fact finders.

This Court should rehear this appeal and grant relief for the reasons set forth in Mr. Shand's brief, at 23-25, and reply brief, at 4.

V. Comments During the State's Closing Argument.

This Court held, "[T]he trial court did not abuse its discretion in denying Shand's motions to strike because the State's comments were not outside the evidence." Slip Op. at 12. As pointed out in Mr. Shand's reply brief, at 4-5, the prosecutor's statement, "'[T]his is a jealous, controlling husband who was not going to let *his property* leave that house,' is highly inflammatory and not based on evidence." This Court never addressed this argument. Additionally, this Court overlooked the procedural posture of this issue. The trial judge very clearly sustained the objection and admonished the prosecutor to confine her arguments to the evidence. This Court, accordingly, was reviewing whether it was error not to provide a curative instruction and not whether the prosecutor's comments were improper.

This Court should rehear this appeal and grant relief for the reasons set forth in Mr. Shand's brief, at 25-26, and reply brief, at 4-5.

VI. Inferred Malice Jury Instruction.

Mr. Shands agrees with this section of this Court's opinion.

VII. Closing Argument Procedure.

Neither this Court's opinion in this case nor our Supreme Court's opinion in *State v. Beaty*, ___ S.C. ___ 813 S.E.2d 502 (2018) answers the question of whether due process requires the accused to have an opportunity to respond to the prosecution's best closing argument.[1] Mr. Shands believes it is fundamentally unfair to allow the State to withhold its theory of the case until after it hears the accused's closing argument. This

[1] Mr. Beaty's petition for rehearing raised this issue in our Supreme Court.

Court's focus on the argument in this particular case overlooks the larger due process issue.

Additionally, this Court cited *Beaty* for a four-part test to determine whether the state's closing argument violated the accused's due process rights. Our Supreme Court's opinion in *Beaty*, however, did not adopt a rigid four-part test. Rather, our Supreme Court wanted trial judges—and appellate courts—to exercise sound discretion in deciding whether a prosecutor's closing argument violated due process. Under the test adopted by this Court, an accused could never establish a violation. For example, if the prosecutor completely sandbags and reveals nothing about its theory in its initial closing argument, then anything the prosecutor argues in "reply" would be "'arguably a proper response' to the defendant's closing argument." Slip op. at 18.

This Court should rehear this appeal and grant relief for the reasons set forth in Mr. Shand's brief, at 29-35, and reply brief, at 6-7.

VIII. Directed Verdict & Unconstitutionality of the Kidnapping Statue.

This Court held, "We find Shand's argument regarding the constitutionality of the kidnapping statute is without merit because our supreme court has already held the kidnapping statute is not unconstitutionally vague." Slip Op. at 20. Mr. Shands takes this opportunity to remind this Court that he petitioned this Court to transfer his appeal to the Supreme Court because this Court lacked the authority to overrule precedent.

Additionally, the precise issue Mr. Shands appealed to this Court was:

> Did the trial judge err by denying Mr. Shands' motion for a directed verdict on the kidnapping charge because the kidnapping statute, as applied to Mr. Shands, is unconstitutionally vague and overbroad because it did not put him on notice of what conduct is prohibited?

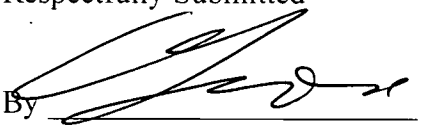
Final Brief of Appellant at 35. This Court never addressed the "as applied" challenge to the statute.

This Court should rehear this appeal and grant relief for the reasons set forth in Mr. Shand's brief, at 35-38, and reply brief, at 7-8.

Conclusion

For the foregoing reasons, and for the reasons set forth in Mr. Shands' Final Brief and Final Reply Brief, this Court should rehear this appeal and grant him a new trial.

Respectfully Submitted

By 

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LAURENS COUNTY
Court of General Sessions
Edward W. Miller, Circuit Court Judge

General Session Case No. 2014-GS-30-1477-82

The State, ... Respondent

v.

Preston Shands, Jr., ... Appellant.

PROOF OF SERVICE

I certify that I have served this pleading on the State, by placing a copy in the United States Mail, postage prepaid, on the date reflected below, addressed as follows:

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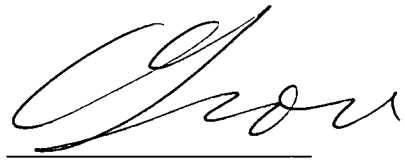

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The South Carolina Court of Appeals

The State, Respondent,

v.

Preston Shands Jr., Appellant.

Appellate Case No. 2015-001199

ORDER

After careful consideration of the petitions 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 petitions for rehearing are denied.

_____ J.

_____ J.

_____ J.

Columbia, South Carolina

cc: E. Charles Grose, Jr., Esquire
Alan McCrory Wilson, Esquire
David A. Spencer, Esquire
David Matthew Stumbo, Esquire

FILED
Aug. 16, 2018

RECEIVED
SEP 27 2018
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LAURENS COUNTY
Court of General Sessions
Edward W. Miller, Circuit Court Judge

Court of Appeals Case No. 2015-001199
State v. Shands, ___ S.C. ___ 817 S.E.2d 524 (Ct. App. 2018)

The State, ... Respondent-Petitioner,

v.

Preston Shands, Jr., ... Petitioner-Respondent.

PETITION FOR WRIT OF *CERTIORARI*

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CERTIFICATION

Pursuant to Rule 242(C)(1), SCACR, counsel for Preston Shands, Jr., certifies a petition for rehearing was made and finally ruled on by the Court of Appeals. A. 465-72, 482.[1]

QUESTIONS PRESENTED

I. Did the Court of Appeals err when it applied the third step of *Batson's* comparative juror analysis and concluded a female juror with a criminal conviction seated by the Solicitor was not similarly situated to three male jurors with criminal convictions struck by the Solicitor, when the Solicitor's sole basis for striking these jurors was criminal convictions?

II. Did the Court of Appeals err by affirming the trial court judge not quashing the indictments because the grand jury presentment process in Laurens County, including in Preston Shands, Jr's case, violates state law and Equal Protection?

III. Did the Court of Appeals err when it held Preston Shands, Jr. opened to the door to the Solicitor questioning him about his forty-year-old felony convictions that were inadmissible under Rule 609, SCRE, when he was on trial for multiple violent felony charges?

IV. Did the Court of Appeals err when it affirmed the trial judge not instructing the jurors about the law of involuntary intoxication when Preston Shands, Jr.'s testimony supported providing the instruction?

V. Did the Court of Appeals err when it held the Solicitor's improper closing argument was supported by the evidence, even though the trial judge had sustained Preston Shands, Jr.'s objection, instructed the Solicitor to "keep it to the facts," but refused to strike the argument form the record?

VI. Does Due Process confer a right for an accused to have a full and fair opportunity to respond to the prosecution's best closing argument, meaning the State must open in full on the facts and the law and restrict its reply argument to matters raised by the defense in closing?

---

[1] "R." refers to the Record on Appeal. "A." refers to the Appendix. The Record on Appeal is included in the Appendix. The page numbers for the Record on Appeal contained in the Appendix correspond to the page numbers in the original Record on Appeal. For example, R. 1 is also numbered A. 1.

VII. Did the trial judge err by denying Preston Shands Jr.'s motion for a directed verdict on the kidnapping charge because the kidnapping statute, as applied to Mr. Shands, is unconstitutionally vague and overbroad because it did not put him on notice of what conduct is prohibited?

STATEMENT OF THE CASE

On July 21, 2015, the State charged Preston Shands, Jr., with first-degree burglary, kidnapping, attempted murder, first-degree assault and battery, and possession of a knife during the commission of a violent crime. Record on Appeal (hereinafter "R.") 294-98. The Laurens County Grand Jury indicted Mr. Shands for these charges on October 3, 2014. R. 299-310. On September 4, 2014, the State served notice of intent to seek imprisonment for life without the possibility of parole, pursuant to S.C. Code § 17-25-45(A) regarding the charges of first-degree burglary, kidnapping, and attempted murder. R. 311.

The State tried Mr. Shands before the Honorable Edward W. Miller and a jury on May 26-27, 2015. Elizabeth White and Warren Mowry, both of the Eighth Circuit Solicitor's Office, represented the State. Charles Grose represented Mr. Shands. The jurors convicted Mr. Shands as charged. Judge Miller sentenced Mr. Shands to life imprisonment without the possibility of parole for first-degree burglary, kidnapping, and attempted murder. Judge Miller also imposed sentences of ten years for first-degree assault and battery and five years for possession of a knife during the commission of a violent crime. R. 267, ll. 6-14.

Mr. Shands appealed to the Court of Appeals. Charles Grose represented Mr. Shands. David A. Spencer, of the Attorney General's Office, represented the State. Mr. Shands raised eight questions on appeal. Question VIII of his brief in the Court of Appeals asked:

> Did the trial judge err by denying Mr. Shands' motion for a directed verdict on the kidnapping charge because the kidnapping statute, as applied to Mr. Shands, is unconstitutionally vague and overbroad because it did not put him on notice of what conduct is prohibited?

On January 12, 2016, the day after he served his Initial Brief of Appellant, pursuant to Rule 204(a), SCACR, Mr. Shands petitioned the court below to "issue an order transferring this appeal from the Court of Appeals to the Supreme Court" because Question VIII in his brief in the court below "involve[d] a challenge to the constitutionality of a state statute" that must be heard by this Court pursuant to Rule 203(d)(1)(A)(ii), SCACR. A. 318-20. The State opposed this motion. A. 321-23. The Court of Appeals denied the motion. A. 324.

On November 8, 2017, the Court of Appeals convened an oral argument. On June 13, 2018, the Court of Appeals reversed Ms. Shands conviction for attempted murder because the trial judge instructed the jurors they could infer malice from the use of a deadly weapon, which is contrary to this Court's holding in *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009). The Court of Appeals affirmed Mr. Shands other convictions and sentences. *State v. Shands*, ___ U.S. ___, 817 S.E.2d 524 (S.C. Ct. App. 2018). A. 447-64. Both parties petitioned for rehearing., and the Court of Appeals denied those petitions on August 16, 2018. A. 456-82. This petition for a writ of *certiorari* follows.

STATEMENT OF FACTS

On Sunday, July 20, 2014, Sharron Copeland Shands had been married to Preston Shands, Jr. for ten years. Mr. Shands watched the couple's two minor children, T.C. and J.S.,[2] while his wife went to church. That evening, Mr. and Ms. Shands got into an

[2] T.C. is Ms. Shands son from a prior relationship. Mr. Shands helped Ms. Shands raise T.C. J.S. is Mr. and Ms. Shands son together. R. 67-68.

argument. Ms. Shands left the house through the garage. The garage door was half closed. Mr. Shands pulled Ms. Shands by the hair. She went next door to the home of Clarence ("Bill") and Martha Koon. Mr. Shands broke a sliding glass door, entered the Koons' home, and cut Ms. Shands. Ms. Shands was treated for her injuries at Greenville Memorial Hospital. R. 55-67; *see also* R. 71-78, 81-84, 86-94, 98-100 (testimony of T.C., J.S., Bill Koon, and Martha Koon). Bill Koon testified that Mr. Shands' was cut and covered in blood, but did not see how it occurred. R. 95-96. T.C. also got cut, which was the basis of the first-degree assault and battery charge. R. 77-78.

Ms. Shands and T.C. agreed that, while Mr. and Ms. Shands had argued before, this evening was the first time that Mr. Shands had ever violently assaulted Ms. Shands. R. 70-80. J.S. testified that Mr. Shands' conduct was "out of the ordinary" and he had "never seen [Mr. Shands] in that kind of state of mind before." R. 85, ll. 16-25. Bill Koon testified Mr. Shands is a "real nice guy," a "good neighbor," and that their children played together. He too had never seen Mr. Shands act this way before. R. 96-97. Martha Koon testified Mr. Shands was a "good neighbor," "very friendly, very polite," and "seemed like a good guy."

Mr. Shands testified he does not have a memory of the incident but, after reviewing the evidence, realized his conduct was responsible for his wife's injuries. He testified about the events, which he could remember, leading up to the incident. After Mr. Shands cooked breakfast for the family, Ms. Shands went to church. Mr. Shands took care of the two boys. They cleaned house. Mr. Shands helped T.C., who has a learners permit, practice driving. Mr. Shands had one Bud Light. Mr. Shands had bought some "homemade moonshine" at work. He started drinking it. It was too strong to drink

straight, so he mixed it with Coca Cola. Normally, Mr. Shands goes to sleep when he drinks alcohol, but this time he had a different reaction. "This had some effect that took me slap clean out of my mind." R. 188-96. Travis McBeth testified that Ms. Shands acknowledged to him the possibility that Mr. Shands had been poisoned. R. 210-11. Mr. Shands contended at trial that he lacked criminal intent, and he requested a juror instruction on involuntary intoxication. R. 213-15, 293.

ARGUMENTS

I. Did the Court of Appeals err when it applied the third step of *Batson's* comparative juror analysis and concluded a female juror with a criminal conviction seated by the Solicitor was not similarly situated to three male jurors with criminal convictions struck by the Solicitor, when the Solicitor's sole basis for striking these jurors was criminal convictions?

The trial court judge conducted *voir dire*. Only two potential jurors—numbers 118 and 122—responded to any of the trial judge's questions. R. 13-14. All potential jurors affirmed they could be fair to both the prosecution and Mr. Shands. R. 11-15. During jury selection, the prosecutor exercised four of the State's possible five preemptory challenges to remove jurors 126 (a female), 125 (a male), 115 (a male) and 156 (a male). The resulting jury consisted of nine women and three men.[3] R. 16-22.

Pursuant to *Batson v. Kentucky,* 476 U.S. 79 (1986), Mr. Shands challenged the prosecutor striking jurors 125, 115, and 156 (all men) based on gender. R. 22, l. 2 – 23, l. 4. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (held that intentional discrimination on the basis of gender by state actors in use of peremptory strikes in jury selection violates equal protection clause). The Solicitor explained the State's strikes. Jurors 125 and 156 had convictions for criminal domestic violence. The State argued,

[3] The alternate was also a woman. R. 21-22.

"[T]his is a case involving domestic violence." Juror 115 had "convictions for lottery law violations." The Solicitor, however, acknowledged seating juror 54 (a female), who has a fraudulent check conviction. The Solicitor had a strike available to her when she sat juror 54. R. 23. Mr. Shands argued, "[T]here is really no way to separate juror number 54 which is the sixth juror [sat] who is a black female who does have a conviction for [a] fraudulent check. . . . If you are going to use criminal record as a reason to strike somebody then you have got to be consistent otherwise." R. 23-24. The trial judge was confused because the initial motion was based on the prosecutor striking men, and Mr. Shands then pointed to juror number 54, a female. The trial judge operated under the mistaken belief that the trial court could not consider a similarly situated female juror because Mr. Shands challenged the Solicitor striking male jurors. Counsel tried to explain that the State seating a similarly situated female juror pertained to the third step of the *Batson* analysis. The trial court denied Mr. Shands' *Batson* motion. R. 24-26. Mr. Shands renewed his objection prior to the trial court swearing the jurors. R. 32.

On appeal, Mr. Shands argued the trial judge did not properly apply the third step of *Batson's* "three-step process for evaluating claims that peremptory challenges have been exercised in a manner violative of the Equal Protection Clause." *State v. Giles*, 407 S.C. 14, 18, 754 S.E.2d 261, 263 (2014) (internal citations omitted). "In the third step, the opponent of the strike must show that the race-neutral explanation given was mere pretext." *Payton v. Kearse*, 329 S.C. 51, 55, 495 S.E.2d 205, 208 (1998). Pretext "generally is established by showing the party did not strike a similarly-situated member of another race or gender." *State v. Stewart*, 413 S.C. 308, 314, 775 S.E.2d 416, 419 (Ct. App. 2015). The Court of Appeals agreed "the trial court misapplied the third step of

the *Batson* analysis by not properly considering whether the female juror was similarly situated to the potential male jurors." *Shands*, ___, S.C. at ___, 817 S.E.2d at 530. The court below, however, held:

> The female juror was not similarly situated to the two potential male jurors who had convictions for CDV. It is understandable that the State would want to strike potential jurors who had convictions for CDV because Shands was being tried for attempting to kill his wife. Further, the female juror was not similarly situated to the third potential male juror who had convictions for violating the lottery law. We agree with the State that having multiple convictions is different than having only one conviction that is over a decade old. Considering the totality of facts in the record, we find Shands did not meet his burden of showing the State's use of its peremptory strikes was impermissible.

Id. ___ S.C. at ___, at 530–31 (S.C. Ct. App. 2018).

During the oral argument at the Court of Appeals and during his Petition for Rehearing, A. 466, Mr. Shands contended the State's argument would have been more persuasive if the prosecution had limited its strikes, based on criminal history, to the two male jurors with domestic violence convictions. The State, however, "negated" the use of criminal history when it struck the male juror with lottery law convictions and sat the female juror with a fraudulent check conviction. The totality of the circumstances supports ordering a new trial. *See State v. Scott*, 406 S.C. 108, 113, 749 S.E.2d 160, 163 (Ct. App. 2013) ("Whether a *Batson* violation has occurred must be determined by examining the totality of the facts and circumstances in the record.") (citing *State v. Shuler,* 344 S.C. 604, 615, 545 S.E.2d 805, 810 (2001)). During jury selection in this case, the Solicitor had twenty-seven decisions on whether to exercise one of the State's preemptory strikes. The State struck three of the nine men (33%) presented. The State struck just one of the eighteen women (about 5.5%) presented. The Solicitor, therefore, was six times more likely to strike men than women. As will be seen in Question V,

infra, the Solicitor directed the State's closing argument towards the female jurors, including arguing that Mr. Shands considered his wife to be his property.

This Court should grant to writ, consider the issue, and provide guidance for when the State selectively uses criminal history to strike similarly situated jurors, particularly in situations where our state's limited *voir dire* procedure yields limited information for parties to consider when exercising preemptory strikes. As Mr. Shands argued in the court below:

> *Stewart* involved a prosecutor attempting to justify preemptory strikes based on jurors' criminal history. In *Stewart,* the State struck African-American jurors with prior involvement with law enforcement while seating Caucasian jurors that also had prior involvement with law enforcement. The Court of Appeals held, "[E]ven though the State offered a racially-neutral explanation for striking the African American jurors, the State negated the reason by seating similarly-situated Caucasian jurors." *Stewart*, 413 S.C. at 317, 775 S.E.2d at 421. *See Miller–El v. Dretke,* 545 U.S. 231, 241 (2005) ("If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson* 's third step."); *State v. Oglesby,* 298 S.C. 279, 281, 379 S.E.2d 891, 892 (1989) (finding the solicitor negated his neutral reason when he seated a white female juror who was similarly situated). Just as it did in *Stewart*, the State in this case negated the gender-neutral reason for striking three men by seating a similarly situated female juror.

Brief of Appellant, A. 333-34, 466.

II. Did the Court of Appeals err by affirming the trial court judge not quashing the indictments because the grand jury presentment process in Laurens County, including in Preston Shands Jr.'s case, violates state law and Equal Protection?

The trial court convened a hearing on Mr. Shands written motion to quash the indictment, during which the Solicitor's Office confirmed the essential facts. In Laurens County, an Administrative Assistant in the Solicitor's Office prepares indictments. The Administrative Assistant lists the law enforcement officer that was the affiant on the

warrant as the sole witness to be called before the Grand Jury. The indictments are then reviewed and signed by an Assistant Solicitor. When the Grand Jury meets, a police officer from the arresting agency obtains copies of the indictments from the Solicitor's Office and presents them to the grand jurors. The testifying police officer, who is not the same law enforcement officer listed on the indictment, does not have any personal knowledge of the case. The Solicitor's Office ***does not*** keep a record of the identity of the person ***actually*** testifying before the Laurens County Grand Jury.[4] The State followed this procedure in Mr. Shands' case.[5] R. 26-29, 269-85; *see also* warrants and indictments, R. 294-310.

In the trial court and his Brief of Appellant, Mr. Shands argued the procedure used to obtain indictments violates state law, including S.C. Code §14-7-1550, the pattern instruction trial judges provide new grand jurors, and Equal Protection. A. 269-85, 334-44. The Court of Appeals acknowledged the prosecution "'could not tell' whether either of the two officers listed on Shands's indictments testified in front of the grand jury because it did not have a record of who testified." *Shands*, ___ S.C. at ___, 817 S.E.2d at 531. The court below was unable "to say there was a violation in Shands's case from the record presented," reasoning "[w]ithout any clear

[4] Mr. Shands renewed his objection prior to the trial court swearing the jurors. R. 32, ll. 9-12.

[5] The grand jury process followed in Mr. Shands case is the norm in the Eighth Judicial Circuit. *See* Brief of Appellant Respondent-Appellant Edward Dean, at 10-19, *State v. Dean*, Court of Appeals Appellate Case No. 2015-001436; *State v. Carrier,* S.C.S.Ct. Memorandum Opinion No. 2014-MO-043 (filed October 22, 2014) (Oral argument found at http://media.sccourts.org/videos/2012-212777.mp4 (last viewed September 22, 2018)).

evidence, Shands's argument that there was a grand jury abuse in his case is pure speculation." *Id.*

Because of the Solicitor's custom and practice of not keeping records of witnesses testifying before the grand jury, no one accused of a crime in the Eighth Judicial Circuit will ever be able to meet the unreasonable burden required by the court below. This Court, however, long ago warned grand juries are not "a prosecutor's plaything and the awesome power of the State should not be abused but should be used deliberately, not in haste." *State v. Capps*, 276 S.C. 59, 61, 275 S.E.2d 872, 873 (1981) (Lewis, C.J., Dissenting); *see also State v. Davis*, 420 S.C. 50, 61, 800 S.E.2d 138, 143 (Ct. App. 2017) (same). This Court should grant the writ, consider the issue, and provide guidance to the bench and bar about the proper procedures for a grand jury presentment.[6]

III. Did the Court of Appeals err when it held Preston Shands, Jr. opened to the door to the Solicitor questioning him about his forty-year-old felony convictions that were inadmissible under Rule 609, SCRE, when he was on trial for multiple violent felony charges?

Pursuant to Rule 609, SCRE,[7] Mr. Shands moved to exclude his prior conviction in Florida for murder, occurring over forty years ago, when he was a juvenile. R. 286-88. Mr. Shands pointed out he had been released from confinement on parole in 2003,

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[6] Abusive grand jury practices occur in other judicial circuits. The Honorable Daniel D. Hall quashed 904 indictments, involving 400 people, when lawyers showed the grand jurors spent an average of 39 seconds considering each indictment. "York County judge throws out 'unreasonable' 904 indictments from June grand jury," *The Herald*, Aug. 17, 2018 (found at https://www.heraldonline.com/news/local/article216878215.html (last viewed Sept. 15, 2018)).

[7] Rule 609(a)(1), SCRE provides, "For the purpose of attacking the credibility of a witness, . . . evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused." Rule 609(b) sets a ten-year time limit on the admissibility of the conviction from "the date of the conviction or of the release of the witness from the confinement imposed for that conviction."

arguing that this took the conviction outside the parameters of Rule 609(b), SCRE. Counsel argued Rule 609(a), SCRE, requires weighing the probative value of admitting evidence against the prejudicial effect to Mr. Shands. Counsel contended a conviction "that far in the past would have little if any relevance, no probative value in our opinion and the prejudicial impact would be extraordinarily high if he were to take the stand and be asked about that." R. 135-40. The trial court ruled, under Rule 609(b), "the end of confinement refers to termination of parole or probation." The trial judge ruled the prosecution could ask Mr. Shands if he had been convicted of any violent felonies. The judge also ruled Mr. Shands would not have to object when the prosecutor asked the question. R. 173-76. During the State's cross-examination, the Solicitor asked, "Mr. Shands, you have been convicted before of a violent felony, right?" Mr. Shands responded, "Yes, ma'am." R. 204, l. 24 – 205, l. 1. In addition to not knowing the nature of the charge, the jurors did not know that it occurred forty (40) years ago when Mr. Shands was a juvenile.[8]

The Court of Appeals observed, "This case presents the novel issue in South Carolina of whether parole following a prison term constitutes "confinement" for the purposes of the ten-year time limit under Rule 609(b). *Shands*, ___ S.C. at ___, 817 S.E.2d at 532. The court below decided to "follow the majority of jurisdictions in holding that probation and parole do not constitute 'confinement' for the purposes of Rule 609(b); confinement ends when a defendant is released from actual imprisonment." *Id.* ___ S.C. at ___, 817 S.E.2d at 533. The Court observed "the State did not present

[8] Counsel reminded the trial judge, "[W]hen I did not object during cross-examination of Mr. Shands about the prior record, that was based on discussion that we had earlier." The trial judge agreed counsel "didn't have to" object again. R. 217.

sufficient evidence to show the probative value of Shands's conviction *substantially* outweighed its prejudicial effect" and held, "Because Shands was convicted over forty years ago and was released from prison over ten years ago, we believe his conviction had little probative value." *Id.*

The Court of Appeals, however, ultimately held, "[T]he trial court did not err in admitting Shands's prior conviction because Shands opened the door to such evidence" because Mr. Shands "elicited testimony during the cross-examination of numerous witnesses to show that he had never reacted violently before." *Id.* Mr. Shands merely asked his wife, children, and neighbors whether they had ever seen him act in this manner to support his involuntary intoxication defense. None had. The court below thus adopted a rule allowing the prosecution to introduce an otherwise inadmissible prior conviction to impeach an accused's cross-examination of witnesses that gave truthful answers about issues relevant in the case. In future trials, an accused will have to choose between cross-examining witnesses or testifying.

Additionally, as pointed out in the petition for rehearing, the court below never identified the court rule under which the evidence was admissible. A. 467-68. It appears the Court of Appeals conflated the analysis under Rule 609, SCRE with the analysis under Rule 404(a) or (b), SCRE. The prosecution tacitly acknowledged Mr. Shand's conviction was not admissible under Rule 404, as its only theory at trial for admitting the conviction was under Rule 609. Like Rule 609, Rule 404 generally does not support the admission of remote convictions. *See, e.g., State v. King*, 334 S.C. 504, 513, 514 S.E.2d 578, 583 (1999) ("The temporal connection between these petty thefts and the charged

crimes is too attenuated for admissibility under the *res gestae* theory or under" Rule 404(b)).

Allowing the prosecution to impeach Mr. Shands with evidence of the prior conviction of a "violent felony"—occurring almost forty (40) years ago—was extremely prejudicial and interfered with the jurors' evaluating Mr. Shands' testimony, the credibility of which was central to his defense. *See also State v. Black*, 400 S.C. 10, 732 S.E.2d 880 (2012) (witness's 20-year-old convictions for manslaughter were inadmissible to impeach witness's credibility).

The error is not harmless. Mr. Shands' credibility was essential to his defense. Our appellate courts consistently find error prejudicial when the defendant's credibility is at issue. *E.g. State v. Anderson*, 413 S.C. 212, 219, 776 S.E.2d 76, 79 (2015) (error in qualifying witness as an expert not harmless when the "case turned solely on the credibility of the minor and of Appellant"); *Gilchrist v. State*, 350 S.C. 221, 228, 565 S.E.2d 281, 285 (2002) (Solicitor's improper vouching for State's witness was prejudicial); *State v. Bryant,* 316 S.C. 216, 221, 447 S.E.2d 852, 855 (1994) (Bryant was unfairly prejudiced by the improper cross-examination" that pitted the officer's testimony against Bryant.).

This Court should grant the writ, consider the issue, and provide guidance to the bench and bar regarding the admissibility of remote convictions.

IV. Did the Court of Appeals err when it affirmed the trial judge not instructing the jurors about the law of involuntary intoxication when Preston Shands Jr.'s testimony supported providing the instruction?

Mr. Shands testified that the "homemade moonshine" "had some effect that took me slap clean out of my mind." All witnesses agree they had never seen Mr. Shands act

in this manner before. J.S. testified that Mr. Shands' conduct was "out of the ordinary" and he had "never seen [Mr. Shands] in that kind of state of mind before." This testimony indicated that, unbeknownst to Mr. Shands, the moonshine had been spiked with something other than alcohol. Based on all of this testimony, Mr. Shands' requested the trial court instruct the jurors about involuntary intoxication:

> There are two types of intoxication, voluntary and involuntary. Involuntary intoxication may result from innocently consuming an intoxicant, through being tricked into it by another, or being forced to take it, or perhaps through unanticipated side effects of a prescription drug taken on orders of a physician. If you find the defendant was given drugs or alcoholic beverages without his knowledge, and as a result, he lost his ability to exercise independent judgment and volition while committing the crimes alleged against him, then it would be your duty to find the defendant not guilty.

Request to Charge No. 4, R. 293 (citing Ralph King Anderson, Jr., *South Carolina Requests to Charge - Criminal*, 2007, § 6-4 Involuntary Intoxication. The Solicitor objected and requested the trial judge "charge voluntary intoxication." Mr. Shands objected to that request "without the charge on involuntary intoxication that goes with it." The trial judge declined to charge involuntary intoxication. R. 213-15. During closing, the State, "[V]oluntary intoxication is not a Defense." R. 234-35. The trial judge ultimately instructed, "[V]oluntary intoxication is not a Defense to a crime. A person who voluntarily becomes intoxicated is just as responsible for the acts committed while intoxicated as when a person is not intoxicated. R. 243.

After the trial judge instructed the jurors, Mr. Shands renewed the "request to charge number four on involuntary intoxication. He also renew[ed the] prior objection to charging voluntary intoxication without [the] corresponding involuntary intoxication charge." Counsel also pointed out that deleting the involuntary intoxication portion of

the charge while including the voluntary intoxication portion "rises to a comment on the facts in the case," which violates Art. V; Section 21 of the South Carolina Constitution. R. 253, ll. 18-25.

"The law to be charged to the jury is determined by the evidence presented at trial. . . . , [and] a trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence." *State v. Hill*, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). "The purpose of a jury instruction is to enlighten the jury and to aid it in arriving at a correct verdict." *State v. Blurton*, 352 S.C. 203, 207-08, 573 S.E.2d 802, 804 (2002). Here, an instruction on "involuntary intoxication" was necessary to aid the jurors in their deliberations. Instructing on "voluntary intoxication," while omitting an instruction on "involuntary intoxication," had the effect of the judge expressing an opinion on Mr. Shands' testimony and defense in violation of Art. V; Section 21 of the South Carolina Constitution.

This Court should grant the writ, consider the issue, and provide guidance for when the defense of involuntary intoxication is raised by the evidence.

V. Did the Court of Appeals err when it held the Solicitor's improper closing argument was supported by the evidence, even though the trial judge had sustained Preston Shands, Jr.'s objection, instructed the Solicitor to "keep it to the facts," but refused to strike the argument form the record?

During the State's final argument to the jurors, the prosecutor argued:

> But things started going downhill and he said he started drinking. And what happens, his is an almost 60-year-old-man with a 38-year-old wife and she is beautiful and his is a good woman and she was taking care of him but it wasn't good enough for him. He starts getting controlling. Bill Koon told y'all, he could be jealous if you tried to talk to her in the neighborhood. He starts getting jealous and controlling. And it gets worse and he is arguing and he is fussing and he is drinking and Sharon said we were on pins and needles. So this, he may not have put his hands on her before that but this is a relationship that is going downhill fast.

> And what happens on July 20th, 2014, she finally says, you know what, I am leaving, I am leaving, I am going. Come on kids, get in the car. And that is when he snaps. He is not, his wife and his kids that he provides for and he works for that are his property, she is not leaving him, she is not taking the kids, no, no, no, no. Grabs her by the hair, grabs the first thing he can get his hands on and starts going at her. This isn't about he was drinking something that day, this is a jealous, controlling husband who was not going to let his property leave that house.

Mr. Shands objected "to the characterization, outside of the evidence." The trial judge sustained the objection by instructing the Solicitor, "Let's keep it to the facts." Mr. Shands moved to strike. The trial judge denied this motion, R. 231-32, even though ordinarily:

> When an objecting party is sustained, the trial court has rendered a favorable ruling, and therefore, it becomes necessary that the sustained party move to cure, or move for a mistrial if such a cure is insufficient, in order to create an appealable issue. Moreover, as the law assumes a curative instruction will remedy an error, failure to accept such a charge when offered, or failure to object to the sufficiency of that charge, renders the issue waived and unpreserved for appellate review.

State v. Wilson, 389 S.C. 579, 583, 698 S.E.2d 862, 864 (Ct. App. 2010). The trial judge, accordingly, should have granted Mr. Shands' motion to strike and instructed the jurors to disregard the comment. A "trial judge's failure to give a curative instruction" can be reversible error. *State v. Pickens*, 320 S.C. 528, 531, 466 S.E.2d 364, 366 (1996). As seen, Mr. Shands' credibility was essential to his defense. *See Anderson, Gilchrist* and *Bryant, supra.*

The court below, however, held, "[T]he trial court did not abuse its discretion in denying Shand's motions to strike because the State's comments were not outside the evidence." *Shands*, ___ S.C. ___, 817 S.E.2d at 535. The Court of Appeals overlooked the procedural posture of this issue. The trial judge very clearly sustained the objection and admonished the prosecutor to confine her arguments to the evidence. The court

below, accordingly, was reviewing whether it was error not to provide a curative instruction and not whether the prosecutor's comments were improper. As pointed out in Mr. Shand's reply brief and Petition for Rearing, the prosecutor's statement, "'[T]his is a jealous, controlling husband who was not going to let *his property* leave that house,' is highly inflammatory and not based on evidence." A. 441-42, 469.

This Court should grant the writ, consider the issue, and provide the bench and bar guidance about limiting the closing argument to the evidence in the case and not seeking a conviction based on considerations other than evidence in the case.

VI. Does Due Process confer a right for an accused to have a full and fair opportunity to respond to the prosecution's best closing argument, meaning the State must open in full on the facts and the law and restrict its reply argument to matters raised by the defense in closing?

In its opening statement, the prosecution told the jurors:

> [A] lot of time you hear kidnapping. What do you think of, kidnapping for ransom, kidnapping something [sic], holding a child for ransom. Again, that is not what South Carolina requires. But you hold or contain somebody or even move them a short distance against their will and this is kidnapping and you will hear facts in this case that we submit will justify a conviction on that crime.

R. 43-44. During the directed verdict motion, Mr. Shands noted that the kidnapping indictment did not contain any "factual allegation . . . to tell us what exactly was done in the course of these events for Mr. Shands to have to defend." R. 170-7. Prior to closing arguments, Mr. Shands called the trial judge's attention to his written motion "asking that the State be required to open in full on the law and the facts" and then reply only to new matters raised by the Mr. Shands in his closing argument. Counsel noted, "Due process requires that we have a full opportunity to respond to their entire argument. And then they would have a chance to respond to new matters that were raised in the response."

The trial judge ruled, "[M]aybe the Supreme Court will want to change [the procedure, but] I decline to do so." Counsel verified that the trial judge had reviewed the arguments in the written motion. R. 217-18, 289.

After the trial judge denied Mr. Shands' motion, the State opened on the law. The prosecution argued—as it had telegraphed in its opening statement—without any additional explanation, "[T]his isn't a traditional kidnapping." R. 220-23. Mr. Shands argued in full. R. 223-30. During Mr. Shands' argument, counsel noted:

> As it has kind of already been eluded to this is going to be my last opportunity to address you and I am at a little bit of a handicap because our rules and or procedures don't allow me to hear what they are going to say about the facts before they make their argument. So one point that I would like to make at the onset is, is I have no idea how they are going to explain kidnapping to you under this evidence. And the reason that I have no idea about that is because all they have told you in opening and just a minute ago in closing is that it is not something that you traditionally think of.

And, "I don't get a chance to respond to [] their theory under the facts." R. 224-25.

The prosecution made its reply argument. R. 230-38. During its final argument, the prosecution revealed to the jurors for the first time the State's theory about the kidnapping charge:

> Kidnapping, Mr. Grose brought up that he didn't know what our position was going to be on kidnapping. It is pretty obvious, she wanted to leave, he closed the garage door, she opened it, he closed it again until it was half-way open. She can't get out. He grabs her by the hair and pulls out a great big chunk of it and won't let her leave. Can she leave when he has got her by the hair. Can she leave when he has got this fork stabbing her with it. She can't get away, she has to be rescued by her own teenage son, she couldn't get away on her own. There is the kidnapping, ladies and gentlemen.

R. 234. As will be discussed in more detail in Question VIII, *infra*, the actual testimony of the witnesses did not support submitting the kidnapping charge to the jurors.

After closing arguments, trial counsel noted for the record what he "would have done if [he] had been able to respond" to the Solicitor's closing argument:

> I would have responded to what I considered to be somewhat of an emotional attack on Mr. Shands both in some of how it was delivered but in particular the language that was used. We would have particularly responded to comments about jealous, controlling, manipulative and viewing his family as property. We would have responded about what they said about kidnapping, we would have responded to what they said about placing the police on trial, that was not our purpose. And we would have responded to the evidence about, the argument made about Sharon leaving that day as well as a number of things that I think that they said that exceeded the bounds of what the evidence really was, Your Honor.

R. 255.

While Mr. Shands case was pending in the Court of Appeals, this Court decided *State v. Beaty* and acknowledged "there is no rule governing the content and order of closing arguments in criminal cases in which a defendant introduces evidence, except for the 'constitutional rule' that a defendant's right to due process cannot be violated at any stage of a trial." 423 S.C. 26, 46, 813 S.E.2d 502, 512-13 (2018). This Court further recognized, under precedent existing at the time of Mr. Shands trial, "In cases in which a defendant introduces evidence, trial judges clearly have the authority to require the State to open in full on the facts and the law and have the authority to restrict the State's reply argument to matters raised by the defense in closing." *Id.*

The opinion below illustrates five deficiencies in our state's closing argument procedure, even after *Beaty*. First, as pointed out in Mr. Shands' petition for rehearing, A. 469-70, neither the Court of Appeal's opinion in this case nor this Court's opinion in *Beaty* answers the question of whether due process requires the accused to have an

opportunity to respond to the prosecution's best closing argument.[9] Mr. Shands believes it is fundamentally unfair to allow the State to withhold its theory of the case until after it hears the accused's closing argument.

Second, the Court of Appeals looked to *Beaty* and observed, our state's "case law focuses upon allegedly inflammatory or unsupported content of the State's closing argument, not upon whether the State must open in full on the facts and not upon reply arguments which have a basis in the record but to which a defendant is not allowed to respond." *Shands*, ___ S.C. at ___, 817 S.E.2d at 539 (quoting *Beaty*, 423 S.C. at 43, 813 S.E.2d at 511). Our state lacks such law because, until the *Beaty* opinion, many in the bench and bar—like Mr. Shands' trial judge—did not understand trial courts have discretion, under existing precedent, to grant the relief requested by Mr. Shands.[10] This Court's guidance is needed for consistency in our state.

Third, the court below followed this Court's lead in *Beaty* when it stated, "[T]he State's comments during its reply closing argument were arguably in response to Shands's closing argument." *Shands*, ___ S.C. at ___, 817 S.E.2d at 539 (mirroring *Beaty*, 423 S.C. at 44, 813 S.E.2d at 512 (2018) ("We first note that the State's presentation of this theory during its reply was arguably a proper response to the theory Appellant advanced in his closing argument.")). The court below actually reasoned, "[T]he State's comments in its closing argument regarding kidnapping were arguably in reply to Shands's closing argument comment that he 'had no idea how [the State] would

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[9] Mr. Beaty raised this issue in his Petition for Rehearing in this Court.

[10] "A failure to exercise discretion amounts to an abuse of that discretion." *State v. Hawes*, 411 S.C. 188, 191, 767 S.E.2d 707, 708 (2015) (quoting *Samples v. Mitchell,* 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct.App.1997)).

explain kidnapping to [the jury] under this evidence.'" *Id.* An appellate court always will be able to make these types of observations when the trail court allows the prosecution to hear the accused's closing argument before requiring it to commit to its theory of the case. Neither the court below in this case nor this Court in *Beaty* explained how this scenario complies with due process.

Fourth, the procedure sanctioned by the Court of Appeals in this case requires defense counsel to anticipate the prosecutor's factual argument. The Court below acknowledged "the jury had not yet heard the State's full theory for kidnapping" when Mr. Shands made his closing argument, but reasoned Mr. "Shands was aware of the State's theory of the kidnapping charge because the State explained what facts it believed supported the charge in response to Shands's directed verdict motion." *Id.* As discussed in Section VII below, the State argued at the directed verdict stage that Mr. Shands' unsuccessful attempt to keep his wife from leaving their garage constituted the kidnapping. Even after the prosecution made this statement, how could Mr. Shands be assured the State wouldn't switch theories during its reply argument and argue the kidnapping occurred when Mr. Shands was on top of his wife inside the Koons' home?[11] *See, e.g.*, R. 92. Neither the court below in this case nor this Court in *Beaty* explained why requiring defense counsel to anticipate the Solicitor's real theory of the case complies with due process.

Finally, the court below conflated the due process violation with the harmless error rule when it stated, "[W]hile the State did not restrict its reply argument to matters

[11] As seen in Question VII below, Mr. Shands contends neither theory supports a kidnapping conviction as neither theory alleges conduct beyond the allegations of the assaults.

raised by Shands and the trial court did not allow him to respond to the foregoing points, we hold Shands did not suffer prejudice as a result because he was not denied the fundamental fairness essential to the concept of justice." *Shands*, ___ S.C. at ___, 817 S.E.2d at 539 (internal quotations omitted). This Statement seemingly finds a due process violation but then requires Mr. Shands to show prejudice contrary to *Chapman v. California,* 286 U.S. 18, 24 (1967) ("before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt").

This Court should grant the writ, consider the issue, and answer the question left unanswered in the *Beaty* opinion, to wit: Does Due Process confer a right for an accused to have a full and fair opportunity to respond to the prosecution's best closing argument, meaning the State must open in full on the facts and the law and restrict its reply argument to matters raised by the defense in closing?

VII. Did the trial judge err by denying Preston Shands Jr.'s motion for a directed verdict on the kidnapping charge because the kidnapping statute, as applied to Mr. Shands, is unconstitutionally vague and overbroad because it did not put him on notice of what conduct is prohibited?

As seen above, Mr. Shands moved the court below to transfer this constitutional issue to this Court. The State opposed, and the Court of Appeals denied the motion. A. 318-24. The Court of Appeals ultimately rejected Mr. Shands constitutional argument—as it was required to under our state's procedures—stating, "We find Shands's argument regarding the constitutionality of the kidnapping statute is without merit because our supreme court has already held the kidnapping statute is not unconstitutionally vague and overbroad." *Shands*, ___S.C. ___, 817 S.E.2d at 540 (citing *State v. Smith*, 275 S.C. 164, 268 S.E.2d 276 (1980) and *Lozada v. S.C. Law Enforcement Div.*, 395 S.C. 509, 719

S.E.2d 258 (2011)). Mr. Shands now requests this Court consider the constitutional argument.

At the end of the State's case, Mr. Shands moved for a directed verdict on the kidnapping charge based on the sufficiency of the evidence and additionally argued:

> [T]he kidnapping statute is unconstitutionally vague and overbroad because we have not really heard any evidence in this case that would put someone on notice that they had committed a kidnapping crime and come to defend the case at trial. And I would note that there is really no factual allegation in this indictment to tell us what exactly was done in the course of these events for Mr. Shands to have to defend. And we think the State's proof has failed on this issue and if this evidence is somehow construed that it has not then the statue is unconstitutionally vague and overbroad and based on the facts of this case Mr. Shands has standing to challenge that statute.

R. 170. The Solicitor contended:

> [S]everal people have testified that she was grabbed by the hair as she was attempting to leave, pulled back into the doorway of the house. There is testimony that she lifted the garage door and closed it and sort of ended up in kind of a halfway state where she would not have been able to get her car out and leave. That is confining for the purpose of the statute.

R. 171. The Solicitor did not point to any other facts in the case that supported submitting the charge to the jurors, even thought there was evidence Mr. Shands was on top of his wife inside the Koons' home. The trial judge denied Mr. Shands' motions for a directed verdict. R. 172. Mr. Shands renewed his motions at the close of all evidence. R. 213.

Ms. Shands and her two children were the only witnesses that could have observed Mr. Shands' conduct related to the garage door and pulling his wife's hair. Ms. Shands actual testified, "[W]e tried to get out of the garage. It was halfway so we couldn't get out." And, "I remember him pulling me by my hair to try to get me back in the backdoor." R. 58. At this point, she did not testify that Mr. Shands did anything to close an open garage door or actually restrain her by her hair. Later on, Ms. Shands

testified, I was trying to open it and he was trying to close it." R. 66-67. But, she still never testified that Mr. Shands restrained her. T.C. testified that Mr. Shands "tried to close the garage" door, but never testified that he actually did. R. 74-75. T.C. did not offer any testimony about Mr. Shands pulling his wife's hair. J.S. did not offer any testimony about the garage door. J.S. testified that his father "got my mom by the hair," R. 83, but never said his father actually restrained his mother.

This Court has explained:

> When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight. A defendant is entitled to a directed verdict when the state fails to produce evidence of the offense charged. When reviewing a denial of a directed verdict, this Court must view the evidence and all reasonable inferences in the light most favorable to the state. If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury.

State v. Cherry, 361 S.C. 588, 593-94, 606 S.E.2d 475, 477-78 (2004) (internal citations omitted). *And see* Rule 19(a), SCRCrimP.

S.C. Code Ann. § 16-3-910 provides, "Whoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever without authority of law . . . is guilty of" kidnapping. In this case, the testimony of the State's witnesses did not establish the elements of kidnapping, and the trial judge should have directed the verdict in favor of Mr. Shands. This testimony, additionally, did not establish that Mr. Shands "possessed the requisite intent to commit [a] kidnapping." *See State v. East*, 353 S.C. 634, 638, 578 S.E.2d 748, 751 (Ct. App. 2003).

If the testimony in this case is construed to constitute a kidnapping, then § 16-3-910 is not constitutional. As this Court has observed:

> The void-for-vagueness doctrine rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication. The constitutional standard for vagueness is whether the law gives fair notice to those persons to whom the law applies. A statute is not unconstitutionally vague if a person of ordinary intelligence seeking to obey the law will know, and is sufficiently warned of, the conduct the statute makes criminal. This concept has been explained as follows, [a] law is unconstitutionally vague if it forbids or requires the doing of an act in terms so vague that a person of common intelligence must necessarily guess as to its meaning and differ as to its application. One to whose conduct the law clearly applies does not have standing to challenge it for vagueness.

State v. Neuman, 384 S.C. 395, 402-03, 683 S.E.2d 268, 271-72 (2009) (internal quotations and citations omitted. This Court should grant the writ and consider the constitutional issue. The State did not present evidence of kidnapping beyond what was alleged in the assaults. If this Court allows Mr. Shands' kidnapping conviction to stand, then every assault offenses involving attempt to grab or hold the other person would also support a kidnapping conviction.

CONCLUSION

For the foregoing reasons, this Court should grant the writ and consider the issues.

Respectfully Submitted,

By _____

E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646

Attorney for Preston Shands, Jr.

September 24, 2018.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LAURENS COUNTY
Court of General Sessions
Edward W. Miller, Circuit Court Judge

Court of Appeals Case No. 2015-001199
State v. Shands, ___ S.C. ___ 817 S.E.2d 524 (Ct. App. 2018)

The State, ... : Respondent-Petitioner,

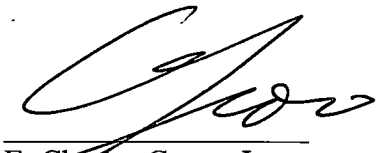
v.

Preston Shands, Jr., ... Petitioner-Respondent.

PROOF OF SERVICE

I certify that I have served Mr. Shands' Petition for Writ of *Certiorari* on the State of South Carolina, by placing a copy in the United States Mail, postage prepaid, on the date reflected below, addressed as follows:

David A. Spencer, Esquire
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211



E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466

September 24, 2018
Greenwood, South Carolina

The Supreme Court of South Carolina

The State, Respondent-Petitioner,

v.

Preston Shands, Jr., Petitioner-Respondent.

Appellate Case No. 2018-001673
Lower Case Nos. 2014-GS-30-01482, 2014-GS-30-01481, 2014-GS-30-01479, 2014-GS-30-01478, 2014-GS-30-01477

ORDER

Based on the vote of the Court, the cross-petitions for writs of certiorari filed by the State and Preston Shands, Jr. are denied.

FOR THE COURT

BY _____
CLERK

Columbia, South Carolina

May 9, 2019

cc:
E. Charles Grose, Jr., Esquire
Alan McCrory Wilson, Esquire
David A. Spencer, Esquire
David Matthew Stumbo, Esquire
The Honorable Lynn W. Lancaster
The Honorable Jenny Abbott Kitchings, Esquire

The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
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May 15, 2019

The Honorable Lynn W. Lancaster
PO Box 287
Laurens SC 29360-0287

REMITTITUR

Re: The State v. Preston Shands, Jr.
Lower Court Case No. 2014GS3001482, 2014GS3001481,
2014GS3001479, 2014GS3001478, 2014GS3001477
Appellate Case No. 2015-001199

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: E. Charles Grose, Jr., Esquire
Alan McCrory Wilson, Esquire
David A. Spencer, Esquire
David Matthew Stumbo, Esquire

ROA 309

WITNESSES

Tony Lynch
Laurens Police Department

WARRANT NUMBER

2014A3020400363

61

True Bill

Foreman of the Grand Jury

Date: 10/3/14

VERDICT

Guilty

Foreman

5/27/15

THE STATE OF SOUTH CAROLINA

COUNTY OF LAURENS

COURT OF GENERAL SESSIONS

October Term, 2014

Indictment # 14GS30- 1482

THE STATE

vs.

Preston Shands Jr

INDICTMENT FOR

Kidnapping

§16-03-0910

CDR: 0095

THE STATE OF SOUTH CAROLINA

COUNTY OF LAURENS

INDICTMENT FOR

Kidnapping
§16-03-0910

At a Court of General Sessions, convened on the 3rd day of October, 2014, the Grand Jurors of Laurens County present upon their oath:

That Preston Shands Jr did, on or about July 20, 2014, in Laurens County, willfully and unlawfully with criminal intent, seize, confine, inveigle, decoy, kidnap, abduct or carry away Sharon Shands without authority of law, in violation of Section 16-3-910 of the South Carolina Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such cases made and provided.

Assistant Solicitor