

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Jasper County

Carmen T. Mullen, Circuit Court Judge

STATE OF SOUTH CAROLINA,

RESPONDENT,

V.

ANTONIO SCOTT,

APPELLANT

APPELLATE CASE NO. 2011-205448

FINAL BRIEF OF APPELLANT

BENJAMIN J. TRIPP

Appellate Defender

South Carolina Commission on Indigent Defense

Division of Appellate Defense

PO Box 11589

Columbia, SC 29211-1589

(803) 734-1343

ATTORNEY FOR APPELLANT

RECEIVED

JUN 13 2013

SC Court of Appeals

TABLE OF CONTENTS

TABLE OF CONTENTS	1
TABLE OF AUTHORITIES.....	2
STATEMENT OF ISSUE ON APPEAL.....	3
STATEMENT OF THE CASE	4
STATEMENT OF THE FACTS.....	5
ARGUMENT	
The trial court reversibly erred by failing to instruct the jury with involuntary manslaughter where there was evidence in the record indicating the knife wound to the deceased's neck was unintentionally caused by Appellant's defensive martial arts maneuver while he was acting in self-defense.....	8
CONCLUSION.....	13

TABLE OF AUTHORITIES

Cases

<u>Casey v. State</u> , 305 S.C. 445, 409 S.E.2d 391 (1991).....	9, 11
<u>State v. Brayboy</u> , 387 S.C. 174, 691 S.E.2d 482 (Ct. App. 2010).....	9
<u>State v. Burriss</u> , 334 S.C. 256, 513 S.E.2d 104 (1999).....	9
<u>State v. Cole</u> , 338 S.C. 97, 525 S.E.2d 511 (2000).....	9
<u>State v. Crosby</u> , 355 S.C. 47, 584 S.E.2d 110 (2003)	9
<u>State v. Hill</u> , 315 S.C. 260, 433 S.E.2d 848 (1993).....	8, 12
<u>State v. Jackson</u> , 227 S.C. 271, 87 S.E.2d 681 (1955)	11
<u>State v. Knoten</u> , 347 S.C. 296, 555 S.E.2d 391 (2001).....	8
<u>State v. Light</u> , 378 S.C. 641, 664 S.E.2d 465 (2008).....	9, 10, 11,12
<u>State v. Nichols</u> , 325 S.C. 111, 481 S.E.2d 118 (1997).....	11
<u>State v. Rash</u> , 182 S.C. 42, 188 S.E.2d 435 (1936).....	11
<u>Tisdale v. State</u> , 378 S.C. 122, 662 S.E.2d 410 (2008).....	9, 11

STATEMENT OF ISSUE ON APPEAL

Whether the trial court reversibly erred by failing to instruct the jury with involuntary manslaughter where there was evidence in the record indicating the knife wound to the deceased's neck was unintentionally caused by Appellant's defensive martial arts maneuver while he was acting in self-defense?

STATEMENT OF THE CASE

Appellant Antonio Scott was indicted on April 19, 2011 by the Jasper County grand jury for murder. R. 28, lines 2-9; R. 202 (Indictment). His case proceeded to trial before the Honorable Carmen T. Mullen and a jury from December 5th through 7th, 2011. R. 1. Robert Hughes (Counsel) represented Appellant, while Robert Ferguson represented the State. R. 1.

The jury found Appellant guilty as charged. R. 193, lines 15-23. The trial court imposed a sentence of thirty years. R. 200, lines 16-19; R. 204 (Sentence sheet).

STATEMENT OF THE FACTS

Appellant Antonio Scott was at the apartment of his sister, Shareema Behlin (Behlin), on the evening of March 20, 2011. Specifically, he was waiting for his son's mother, Akera Nelson (Akera), to drop his son off with him. R. 86, line 10—R. 87, line 13. Unknown to Appellant or Behlin, Akera's mother, Cynthia Nelson (Nelson), accompanied Akera in her vehicle. Shortly after Akera arrived, Nelson's mother entered Behlin's apartment uninvited, and began cursing Appellant. Specifically, Nelson told Appellant, "mother fucker, I'm tired of you beating on my daughter." R. 87, line 20—R. 88, line 19; R. 92, lines 15-21; R. 93, lines 10-13. The two argued in the apartment while Akera, Behlin, and Child stood by. R. 108, lines 1-24.

According to Akera, Appellant struck Nelson on the right side, and neither Akera nor Behlin saw a weapon in Appellant's hands at that time.¹ R. 88, line 17—R. 89, line 23; R. 106, lines 4-5; R. 107, lines 9-12; R. 107, line 21; R. 108, lines 15-16. According to testimony from Investigator Daniel Litchfield (Litchfield), of the Ridgeland Police Department, Appellant later confessed to him that Nelson pulled something shiny and silver from her pocket during the argument, and came towards Appellant.² R. 99, line 12—R. 100, line 1. Appellant stated he stepped to the side and performed a martial arts move, pushing Nelson's elbow up, which in turn caused Nelson to be stabbed in the throat.³ R. 100, lines

¹ Although Akera stated she saw a knife in Appellant's hand when she entered the apartment, she did not see a knife when Appellant struck Nelson. Behlin testified that Appellant hit Nelson with the inside of his hand. R. 88, lines 3-21; R. 108, lines 15-16. Akera also testified that the apartment was not dark, but well lit. R. 89, line 24—R. 90, line 3.

² Appellant turned himself in to authorities. R. 102, lines 8-12.

³ Litchfield demonstrated this maneuver before the jury. R. 100, lines 4-21.

1-3. Litchfield also testified on cross-examination that he knew Appellant's father, who had a black belt in martial arts, and that Appellant's father taught Appellant. R. 102, line 23—R. 103, line 1.

Nelson fell to the couch in Behlin's apartment, and Appellant used his own shirt to apply pressure to the cut on the left side of Nelson's neck at the jaw line. R. 91, lines 2-5; R. 106, lines 10-17; R. 108, lines 15—R. 109, line 22. When police arrived, Appellant left out the back, and Akera followed after. R. 91, lines 6-9; R. 94, lines 3-9. Nelson was taken to the hospital, and was declared brain dead at 10:05 pm on March 21, 2011. R. 113, lines 16-18.

Dr. Lee Marie Tormos (Dr. Tormos) was the forensic pathologist who autopsied Nelson on March 24, 2011: R. 118, lines 2-7. She confirmed that Nelson died from blood loss due to the single stab wound to the neck. R. 118, lines 12-13; R. 123, lines 20-22. Although Dr. Tormos categorized the death as a homicide, she agreed the wound was consistent with accident as well. R. 125, line 4-5; R. 132, lines 12-15. Furthermore, on cross-examination, Dr. Tormos confirmed that there were no defensive wounds on Nelson. R. 126, lines 2-14. Finally, after demonstrating the martial arts maneuver with Counsel, Dr. Tormos confirmed that the movement demonstrated could have accidentally inflicted the wound to Nelson, and that there would be no marks on Nelson's wrist or arm.⁴ R. 127, line 2—R. 128, line 22.

During discussions regarding jury instructions, Counsel sought, *inter alia*, instructions on self-defense and involuntary manslaughter. R. 146, line 1—R. 147, line 23;

⁴ Contrary to the State's assertion at trial, Dr. Tormos also indicated that Counsel did not move her wrist during the demonstration, but that the movement of her forearm by Counsel could have resulted the wound to Nelson. R. 130, lines 18-23.

R. 149, line 1—R. 151, line 25. The trial court ultimately charged self-defense and voluntary manslaughter, yet refused to give an instruction on involuntary manslaughter. R. 153, line 12—R. 154, line 13; R. 183, line 6—R. 188, line 4. Specifically, the court acknowledged that evidence of struggle over a weapon between the defendant and victim is sufficient for submission of an involuntary manslaughter jury instruction to the jury. R. 149, lines 1-8. The court interpreted the defense to be that Appellant performed a martial arts move to avoid being hit himself or hurt in some way. R. 147, lines 13-15; R. 149, lines 9-14. Thus, the trial court stated the following:

I don't see—if either what he did was self-defense or—and **you have to believe one way or the other, either he came with a knife or she came with a knife. I mean, that's the problem I have with that. I don't see how criminal negligence, what he did—I mean, I don't see how under any circumstances he could be criminally negligent.**

R. 149, lines 19-25 (emphasis added). The State then argued that it did not “see **how you could act in self-defense in a criminally negligent way, because it is an intentional act,**” to which the trial court agreed, “**Right.**” R. 151, lines 20-22 (emphasis added).

Counsel explained that Litchfield's testimony regarding Appellant's martial arts move, which was also demonstrated with Dr. Tormos, not only was possible, but also was what directly caused the death of Nelson. R. 150, lines 1-8. The trial court held “[t]hat would be purely self-defense.” R. 150, line 9.

The jury found Appellant guilty of murder, and the trial court imposed a sentence of thirty years. R. 193, lines 15-23; R. 200, lines 16-19; R. 204 (Sentence sheet).

This appeal follows.

ARGUMENT

The trial court reversibly erred by failing to instruct the jury with involuntary manslaughter where there was evidence in the record indicating the knife wound to the deceased's neck was unintentionally caused by Appellant's defensive martial arts maneuver while he was acting in self-defense.

The trial court erred by failing to charge involuntary manslaughter where evidence was present indicating Appellant unintentionally caused Nelson's death without malice while engaged in the lawful activity of self-defense with reckless disregard for the safety of others. Investigator Litchfield testified that Appellant was taught martial arts by his father, who was a black belt, and that Appellant demonstrated the maneuver in question for Litchfield when interviewed. Litchfield also demonstrated this move for the jury, as did Dr. Tormos with the assistance of Counsel. Even with the knife in Nelson's hand rather than Appellant's, the martial arts maneuver that Appellant executed on Nelson could have unintentionally caused the fatal wound to the left side of Nelson's neck, consistent with a verdict of involuntary manslaughter.

The law to be charged is determined from the evidence presented at trial. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). Reversible error is committed if the trial court 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). Moreover, when determining whether the evidence requires a charge on a lesser included offense, the court views the facts in the light most favorable to the defendant. See Knoten, 347 S.C. at 302, 555 S.E.2d at 394 (providing a court must view the facts in the light most favorable to a defendant when determining if evidence required a charge on the lesser included offense of involuntary manslaughter).

“Importantly, our courts have long emphasized that to warrant a court's eliminating the offense of manslaughter, it should very clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter.” State v. Brayboy, 387 S.C. 174, 180, 691 S.E.2d 482, 486 (Ct. App. 2010); see also State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000); State v. Burriss, 334 S.C. 256, 265, 513 S.E.2d 104, 109 (1999); Casey v. State, 305 S.C. 445, 447, 409 S.E.2d 391, 392 (1991). Thus, a request to charge a lesser-included offense is properly refused only when there is no evidence that the defendant committed the lesser rather than the greater offense. Casey, 305 S.C. at 447, 409 S.E.2d at 392.

Involuntary manslaughter is the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm; or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others. State v. Crosby, 355 S.C. 47, 51-2, 584 S.E.2d 110, 112 (2003); see also State v. Light, 378 S.C. 641, 648, 664 S.E.2d 465, 468 (2008); Burriss, 334 S.C. 256, 265, 513 S.E.2d 104, 109 (1999). Further, evidence of a struggle over a weapon between a defendant and victim supports submission of an involuntary manslaughter charge. Tisdale v. State, 378 S.C. 122, 125, 662 S.E.2d 410, 412 (2008) Casey, 305 S.C. at 447, 409 S.E.2d at 392.

Moreover, “a self-defense charge and an involuntary manslaughter charge are not mutually exclusive, as long as there is any evidence to support both charges.” Light, 378 S.C. at 650, 664 S.E.2d at 470. Thus, “when there is a factual issue as to whether the [killing] was committed intentionally in self-defense or was committed unintentionally, then

the defendant is entitled to both charges as there is ‘any evidence’ to support each charge.”
Id. 378 S.C. at 651, 664 S.E.2d at 470.

In the case at bar, evidence is present in the record which, when viewed in the light most favorable to Appellant, supports the charge of involuntary manslaughter. First, the testimony of Litchfield and Dr. Tormos readily indicate that Nelson’s death may have been unintentionally caused. Appellant’s statement to Litchfield indicated that Appellant reacted to a knife attack by Nelson. R. 99, line 12—R. 100, line 1; R. 100, lines 1-3. Litchfield also indicated that Appellant had martial arts training from his father, but was not certain regarding the level of Appellant’s skill. R. 102, line 23—R. 103, line 1.

Additionally, Dr. Tormos testified that the wound to Nelson’s neck could have been accidental. R. 125, line 4-5; R. 132, lines 12-15. More importantly, after going through the in-court demonstration of the martial arts maneuver with Counsel, Dr. Tormos indicated that it was indeed possible for the wound to Nelson’s neck to be inadvertently caused by such a move. R. 127, line 2—R. 128, line 22.

Second, the record contains evidence that Appellant was engaged in the lawful activity of self-defense at the time Nelson was unintentionally killed. See, e.g., Light, 378 S.C. at 649, 664 S.E.2d at 469 (explaining the elements of self-defense). As Akera stated, Appellant did not know Nelson was coming with her to drop off Appellant’s son. Also, Nelson unexpectedly entered Behlin’s apartment and began cursing and arguing with Appellant. R. 87, line 20—R. 88, line 19; R. 92, lines 15-21; R. 93, lines 10-13. As Litchfield indicated, Appellant stated he saw Nelson take out a shiny silver object from her pocket and come at him with it. R. 99, line 12—R. 100, line 1. Therefore, under these circumstances, Appellant was without difficulty bringing on the difficulty, and had the

right to act on the appearances that he was being attacked by Nelson with a knife. See, e.g., State v. Nichols, 325 S.C. 111, 117, 481 S.E.2d 118, 121 (1997) (citing State v. Jackson, 227 S.C. 271, 87 S.E.2d 681 (1955), and State v. Rash, 182 S.C. 42, 188 S.E.2d 435 (1936)). In response, Appellant performed a martial arts maneuver, apparently not only intended to get out of the way of an attack, but also to counter attack. R. 100, lines 1-3. Accordingly, Appellant was engaged in the lawful activity of self-defense at the time he caused Nelson to be stabbed in the neck.

Third, evidence is present in the record indicating Appellant's martial arts move was conducted with reckless disregard for the safety of others. Specifically, Dr. Tormos confirmed that the movement demonstrated could have inflicted the wound to Nelson, and that the wound could have been accidental. R. 127, line 2—R. 128, line 22. Additionally, pursuant to Appellant's statement to Litchfield, the maneuver performed was in response to a knife attack and specifically would have handled the forearm of Nelson's knife-wielding arm. R. 99, line 12—R. 100, line 1; R. 100, lines 1-3. As a result, such testimony is evidence of a physical struggle between Appellant and Nelson with the knife. Accordingly, Appellant was entitled to a jury instruction on the lesser-included offense of involuntary manslaughter, and the trial court reversibly erred by failing to do so. See, e.g., Tisdale, 378 S.C. at 125, 662 S.E.2d at 412; Casey, 305 S.C. at 447, 409 S.E.2d at 392.

Furthermore, the trial court's concern that it could not charge both self-defense and involuntary manslaughter under the circumstances of this case was also erroneous. The South Carolina Supreme Court has already held that "a self-defense charge and an involuntary manslaughter charge are not mutually exclusive, as long as there is any evidence to support both charges." Light, 378 S.C. at 650, 664 S.E.2d at 470. As indicated

above, evidence was present in the record supporting both a self-defense charge—which the trial court gave—and an involuntary manslaughter charge—which the court did not give. Therefore Appellant was entitled to both charges of self-defense and involuntary manslaughter because there was a factual issue for the jury to determine as to whether the killing was committed intentionally in self-defense or was committed unintentionally.” Id. 378 S.C. at 651, 664 S.E.2d at 470.

Finally, Appellant was prejudiced by the trial court’s failure to give an involuntary manslaughter jury instruction. Appellant’s defense was not that his actions did not result in Nelson’s death; rather, Appellant’s defense was that he was either justified in killing her, or that his reckless actions unintentionally resulted in her death. However, Appellant was denied the opportunity to have the jury consider a lesser-included offense when deliberating his case. See, e.g., Hill, 315 S.C. at 262, 433 S.E.2d at 849 (stating reversible error is committed if the trial court fails to give a requested charge on an issue raised by the evidence). Thus, Appellant was prejudiced by the trial court’s refusal to charge involuntary manslaughter. As a result, Appellant seeks reversal of his conviction, and a new trial granted.

CONCLUSION

For the foregoing reasons, Appellant Antonio Scott respectfully requests reversal of his conviction, and remand for a new trial.

Respectfully submitted,

for Robert M. Faehk
Benjamin J. Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of June 2013.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

June 13, 2013

for Robt M. Paeltz
Benjamin J. Tripp
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

RECEIVED

JUN 13 2013

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Jasper County

Carmen T. Mullen, Circuit Court Judge

STATE OF SOUTH CAAROLINA,

RESPONDENT,

V.

ANTONIO SCOTT,

APPELLANT

Appellate Case No. 2011-205448

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 13th day of June, 2013.

for Rollin M. Falk

Benjamin J. Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 13th day of June, 2013.

Talal McKay (L.S.)

Notary Public for South Carolina
My Commission Expires: July 24, 2022.

RECEIVED

JUN 13 2013

SC Court of Appeals