THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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S.C. SUPREME COURT

Certiorari to Charleston County
Edgar W. Dickson, Circuit Court Judge

Appellate Case No. 20212-000969

Timothy James Wright. . . . . . Petitioner,

v.

State of South Carolina, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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COUNTER- STATEMENT OF ISSUES

1. Whether the post-conviction relief judge correctly found that trial counsel was not ineffective when he did not request on the record a jury instruction on the defense of accident or object to its omission from the charge given although he had earlier made that request of the judge on the record.[1]

2. Whether trial counsel was not ineffective, and Petitioner was not prejudiced as to the above jury charge because the record contains no evidence of due care to support a defense of accident.

3. Whether trial counsel was not ineffective as to the above jury charge and Petitioner was not prejudiced in that no reasonable probability exists that the result of Petitioner's proceeding would have been different had the jury been instructed on the defense of accident because the jury rejected the lesser-included charge of involuntary manslaughter and instead convicted him of murder.

STATEMENT OF THE CASE

The State concurs in the history of the proceedings set forth beginning on page 4 of the Petition and continuing through the paragraph at the top of page 5. As to the Judge's Order, the State notes that the Judge denied and dismissed all claims in Petitioner's Application for Post-Conviction Relief except for the sentence for possession of a weapon during the commission

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1 The issue as framed by post-conviction relief counsel in the post-conviction hearing judge's order was not objecting to the charge as omitting the defense of accident (A. V. II, p. 701). Petitioner's counsel at the hearing and in the Petition frame the issue as including not placing the charge on the record. (App. p. 673). As noted, *infra,* counsel requested the charge in an off-the record conference, and the Court denied the request.

of a violent crime. App. V. II, pp. 705 and 706. As to the other issues including the one presented by this Petition, he found that counsel was not deficient in any manner. *Id.* The Court found that counsel had requested the jury charge but was told by the trial judge that he was not going to charge the defense. App. V. II, p. 701. The Judge further found that failing to object to the jury charge did not prejudice Petitioner, because the jury was able to hear his alleged testimony about the incident surrounding the shooting, and there was also conflicting information about whether the shooting was indeed an accident. *Id.* The Court also noted that trial counsel had testified that he was pleased with the jury charge for involuntary manslaughter and that he did not believe that the jury would find him guilty by reason of accident alone.

Statement Of Facts

The following facts come directly from the Order of Judge Dickson [A. V. II, pp. 684 – 694] with citations to the current appendix in brackets in lieu of the citations in the Judge's order. Elipses and asterisks mark where facts believed to be unnecessary for this petition are omitted.

On February 16, 2013, Appellant Timothy Wright shot his soon to be ex-girlfriend, Melinda Ford, with a shotgun. The shot was fired within three to four feet of Ford. [App. p. 386]. . . . .Ford died as a result of right lung and liver maceration due to a close-range shotgun wound to the back. [App. pp. 401-402].

Background

Wright and Ford had been dating for approximately seven to eight months before the shooting. [App. p. 415]. Wright had been living with Ford and her three children for approximately five months. [App. p. 140]. Ford had three children. Chrisson Hayward, Ford's oldest daughter, was nineteen at the time of the shooting; Kadasha J., Ford's youngest daughter, was fifteen; and

Davon M., Ford's son, was six. [App. pp. 137[2] & 188]. Ford's mother, Kate Ford ["Kate"], also lived nearby. [App. p. 196].

Wright was a hunter. [App. pp. 140 and 420]. He testified that he kept a 12-gauge Remington pump gun in a cabinet in Ford's bedroom. [App. p. 420]. . . .

While Kadasha was in the kitchen [on the day of the shooting], she heard Wright screaming in Ford's bedroom, but she did not hear Ford's voice. [App. p. 149]. She later saw him open up the bedroom door, and he came out to the kitchen. [App. p. 149]. Kadasha noted that she heard Wright say he was done; he got some black trash bags from a cabinet and started packing up his belongings that were in Ford's bedroom. [App. pp. 149-150]. Ford was inside the bedroom at that time. [App. p. 151].

Wright Shoots Ford

Kadasha went back to her bedroom. [App. p. 151]. Ford stopped by her room and told Kadasha that she was going to take Kate her Chinese food. [3] [App. p. 151]. The next thing Kadasha heard was Ford scream very loud. [App. p. 151]. She next heard a gunshot. [App. p. 152]. After hearing the gunshot, Kadasha ran to the door and saw Wright standing over Ford with a gun in his hands. [App. pp. 151-153, *see* A. p. 170]. . . .

Kadasha was able to identify the gun [Wright] was holding. [App. pp. 154-155]. She noted that Wright was standing in front of the porch around Ford, who was on the ground at that time. [App. pp. 154-155]. Kadasha testified Wright said he would shoot Kadasha. [App. p. 154].

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2 This page may have been miscited in the Judge's Order. The page number that was apparently intended is inserted here.

3 Kate Ford, Melinda's mother and Kadasha's grandmother, testified that Kadasha called to inform her that Melinda would be bringing her Chinese food. [App. pp. 196]

Kadasha noted that at some point, he said "huh, huh, huh" and pointed the gun at Ford.[4] [App. p. 155]. Kadasha attempted to find a phone at her house, and when she could not find one, she ran to the next door neighbor's house to call for help. [App. pp. 156, 171]. The neighbors were already on the phone with a 911 operator. [App. pp. 156-157].

Kadasha looked back towards her house and saw Wright on the ground next to Ford. [App. p. 157]. She heard a second gunshot. [App. p. 157]. After the second shot, she saw Wright lying on the ground next to Ford. [App. p. 171]. She assumed he shot himself. [App. p. 171]. She then ran back over to her house. [App. p. 157].

Wright then got up, ran to his truck, and drove off. [App. pp. 158 & 161]. Kadasha moved the gun he had been holding back from where they were. [R p. 158]. She ran over to Ford, found Ford's cell phone, and called 911. [App. p. 159]. Kadasha noted that her mother was not able to speak, and it appeared she had been shot in the chest. [App. p. 160]. The 911 dispatcher gave instructions on how to stop the bleeding. [App. p. 160]....

Leonard Maxwell, one of Ford's neighbors, testified he heard gunshots that afternoon. [App. pp. 174-175]. After he heard the first shot, he ran out to the porch and saw Ford lying on the ground. [App. p. 175]. He thought he saw Wright shoot the gun again. [App. p. 175]. Maxwell saw Wright standing over Ford, and then saw him lying next to her on the ground. [App. p. 175].

After the first shot, Maxwell looked out over the porch and saw Ford on the ground. [App. p. 176]. That's when he heard a second shot. [App. p. 176]. He saw Wright point the gun at himself. [App. p. 176]. Wright put the gun in his mouth and said he was going to kill himself. [App. p. 176].

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4. During cross-examination, Kadasha testified that at some point after the initial shooting, Wright attempted to give the gun to Kadasha and requested that she shoot him. (App. p. 172). She declined to do so. (A. pp. 172).

Maxwell told him no, but then Wright shot himself twice. [App. pp. 176 & 180]. After that, Wright got in his truck and drove away. [App. p. 177] . . . . Ford was dead when EMS arrived. [App. p. 215].

Wright Was Apprehended

Wright led law enforcement in a vehicle pursuit around John's Island. [*See* App. pp. 237-247, 256-259]. The chase ended after Wright drove his truck through a fence and onto a baseball diamond in a local park. [App. pp. 219, 247, 257-260]. Wright, however, eluded arrest at the scene. He instead hid in a local residence that was under construction. [App. 250-252, 303-306, 428-429]. After midnight the next morning, Wright surrendered to law enforcement, who had maintained a perimeter near the site of the truck crash. [App. pp. 264-266, 271-272]. He was treated at the scene by EMS and was transported to MUSC for treatment of his gunshot wounds. [App. 266, 272-279].

Wright Asserts the Shooting Was an Accident

Wright testified that on the day of the shooting, he purchased a cell phone for Kadasha. [App. p. 416]. He was at home when Kadasha and Ford came home from shopping. [App. p. 417]. He noted that Ford was frustrated about comments people had made to her regarding their relationship. [App. 417-418]. The two had a discussion in Ford's bedroom about that issue for three to four minutes. [App. p. 418]. Wright decided that based on that discussion, it was best that he leave the home. [App. p. 418]. He went to the kitchen, got some trash bags, and went back into the room to pack his clothing. [App. pp. 418-419].

Wright testified that all of his clothes were on hangers. [App. p. 419]. After he packed some of his belongings, and while Ford was in the bathroom, Wright grabbed the shotgun he kept

in the room, along with two bags he had packed, and he headed outside to his truck. [App. pp. 421-422].

"I walked outside and. I went to go open the truck door. Because my — the way my vehicle was sitting I had the two bags in my hand, the shotgun in my hand. And I went to go use one hand and kick the handle open to release the door. And when I released the door I used the other hand to kind of swing the door open." [App. p. 422, Il 7-12]. The shotgun fired. [App. p. 422]. Wright claimed he did not know Ford was outside. [App. p. 422]. After the shotgun fired, Wright dropped the bags that were in his hands, and he started walking away back towards the step. [App. p. 423]. He then heard Ford call his name. [App. p. 423]. According to Wright, Ford then told him she had been shot. [App. p. 423]. Wright testified that he tried to pick her up off the ground, but she told him to stop because of the pain. [App. p. 423].

Wright asserted that he called for Kadasha, but she did not come outside immediately. [App. p. 423]. He also stated that he told Kadasha to go call for help. [App. p. 423]. She ran back into the house, but when she returned, he attempted to hand Kadasha the shotgun and asked her to shoot him. [App. p. 424]. Wright noted that Kadasha never touched the shotgun. [App. p. 424]. Instead, he went off to the side and shot himself with the shotgun. [App. p. 425]. Wright said that he heard Ford yell out, so he walked over to her and explained what he did to himself. [App. p. 425]. He then shot himself again. [App. p. 425]. Wright testified that he then went back over to Ford, held her leg, and talked to her. [App. p. 425].

Wright testified that he observed Kadasha and a neighbor calling for help on the phone. [App. p. 426]. At that point, Wright became concerned about his personal safety if members of Ford's family came to the scene. [App. p. 426]. He promptly got into his truck, left the scene, and

drove in the direction of his aunt's house. [App. pp. 426-427]. Wright acknowledged that he saw a police car pull behind him with lights on, and that he did not stop. [App. pp. 427-428]. He also admitted that he crashed his truck into a couple of fences, and that he got out of the truck and ran into a house under construction nearby. [App. p. 428]. From the house, Wright could see police officers in the softball field where he left his truck. [App. pp. 428-429]. Wright recalled that at some time after many of the officers left the scene, he walked out to the remaining officers. [App. p. 429]. He recalled being treated by EMS, and that he was transported to MUSC. [App. pp. 429-430].

Summary Of Facts Adduced At The Evidentiary Hearing [A. V. II, pp. 689-692]

Petitioner called trial counsel, William Smith. Counsel testified that he has been practicing law for seventeen years, and the entirety of that time has been spent specializing in criminal cases. Counsel further testified that he was appointed to Applicant's case as a public defender at the Ninth Circuit Public Defender's Office. When asked what the overall theory of defense was for Applicant's case, Counsel testified that this was a fact-driven case, and that there was little investigation to do because "they knew all the players." Counsel further testified that he . . . largely relied on Applicant's version of events.

Trial counsel testified that . . .after reviewing the facts he did not think this would be a case where a jury would find Applicant not guilty by accident alone. However, he still requested that Judge Nicholson charge accident, and Judge Nicholson chose not to do so. After he could not get the charge on accident, trial counsel hoped to turn the jury in favor of the lesser charge of involuntary manslaughter.

Furthermore, Counsel contended that his strategy for this case was based upon Mr. Wright's version of events wherein the gun firing was the result of a coat hanger catching the trigger and causing the gun to go off and that he was not intentionally attempting to shoot the victim. However, based upon the fact that the judge did not issue a charge on accident, that issue was not preserved for appellate review. In this matter the jury still convicted Applicant with murder over the lesser charge presented, a fact that trial counsel testified to as "quelling his fears" of a problematic charge being issued in this matter.

* * *

Furthermore, Applicant testified briefly on his behalf. He testified to his version of the events that occurred on the night of the shooting as an accidental event triggered by a clothes hanger catching the trigger of the gun causing a misfire which struck the victim.

STANDARD OF REVIEW

When reviewing the rulings of a post-conviction relief court, the standard of review the reviewing appellate court employs depends on the specific issues before the court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). On appellate review, reviewing courts defer to a post-conviction relief court's finding of fact and will uphold them if there is any evidence in the record to support them. *Smalls*, 810 S.E.2d at 839-40 (citing *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); *Jordan v. State*, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). Particularly, the reviewing court must give great deference to a post-conviction relief court's finding where matters of credibility are involved since the reviewing court lacks the opportunity to directly observe the witnesses. *Drayton v. Evatt*, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993) (citing *S.C. Dept. of Social Services v. Forrester*, 282 S.C. 512, 320 S.E.2d 39

(Ct.App.1984)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. *Id*. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

Petitioner alleges that trial counsel was ineffective for failing to place on the record a jury charge request on the defense of accident or to object to the charge as given. The post-conviction relief found that Petitioner was not prejudiced and had failed to prove that counsel was constitutionally ineffective. His decision is well-supported as discussed, *infra.*

Standards Applicable To Ineffective Assistance Of Counsel Claims

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984); *Lomax v. State*, 379 S.C. 93, 665 S.E.2d 164 (2008).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*, 466 U.S. 668. First, the applicant must prove that

counsel's performance was deficient. *Id.*; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing *Strickland*, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

A

The Post-Conviction Relief Judge Correctly Found That Trial Counsel Was Not Ineffective And Petitioner Was Not Prejudiced When Counsel Did Not Place on the Record His Request For A Jury Charge For The Defense Of Accident And Did Not Object to the Charge As Given

As noted above in the Statement of the Case, the Court found that counsel was not ineffective on multiple grounds for not objecting to the charge for omitting the defense of accident. The trial judge had denied an off-the-record request to charge on that ground (App., V. II, pp. 649 & 701) The post-conviction relief Judge found that Petitioner was not prejudiced by his counsel's not objecting on the record to the omission of the charge for reasons which included that the jury heard Petitioner's testimony about the incident (App. V. II, p. 701; *see*

App. V. I, pp 418 – 422) and conflicting evidence existed as to whether it was an accident (App. V. II, p. 701; *see* App. V. I, pp. 151-155). The Judge did not think that a jury would find him not guilty by reason of accident. App., V. II, p. 649. As trial counsel testified, the trial judge charged involuntary manslaughter, but the jury rejected that charge and found murder instead. A., V. II, pp. 649 and 650.

1

Petitioner's counsel was not ineffective and Petitioner was not prejudiced because the record contains no evidence of due care to support a charge on a defense of accident

Petitioner's argument fails at the start because he was not entitled to a jury charge on accident. Although he requested the charge, and the judge declined, his failure to object on the record to the judge's failure to give the charge was not error because Petitioner was not entitled to the charge.

"For a homicide to be excusable on the ground of accident, it must be shown the killing was unintentional, the defendant was acting lawfully, and due care was exercised in the handling of the weapon. *State v. Burriss*, 334 S.C. 256, 259, 513 S.E.2d 104, 106 (1999)." *State v. Smith*, 391 S.C. 408, 415, 706 S.E.2d 12, 16 (2011). Petitioner's testimony showed that he was not exercising due care in the handling of the weapon. He testified that he was carrying two bags of clothes on hangers and his shotgun with the safety off, and that the gun fired when a hanger snagged the trigger as he was swinging the car door open. A. pp 419, 420, 422, and 444. By no measure would such careless conduct with a loaded weapon be due care, and without due care, he was not entitled to a jury charge on accident.

> "In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." *State v. Adkins*, 353 S.C. 312, 318,

> 577 S.E.2d 460, 463 (Ct.App.2003). “A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law.” Id. at 318, 577 S.E.2d at 464; *State v. Jackson*, 297 S.C. 523, 377 S.E.2d 570 (1989) (recognizing that jury instructions must be considered as a whole and if as a whole, they are free from error, any isolated portions that might be misleading do not constitute reversible error). A jury charge that is substantially correct and covers the law does not require reversal. *State v. Foust*, 325 S.C. 12, 479 S.E.2d 50 (1996).

State v. Mattison, 388 S.C. 469, 478, 697 S.E.2d 578, 583 (2010). In this instance, for the reasons set forth above, the charge was correct as the evidence did not support a charge on accident. Therefore, counsel was not ineffective in not putting his objection to the omission of the accident charge on the record.

> To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant. *State v. Burkhart*, 350 S.C. 252, 261, 565 S.E.2d 298, 303 (2002). “Failure to give requested jury instructions is not prejudicial error where the instructions given afford the proper test for determining the issues.” *Id.* at 263, 565 S.E.2d at 304. An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion. *State v. Pittman*, 373 S.C. 527, 647 S.E.2d 144 (2007).

Mattison, *supra,* 388 S.C. at 479, 697 S.E.2d at 583–84. In this case, the charge given was neither erroneous nor, for the reasons found by the Post-Conviction Relief Judge, was it prejudicial. Petitioner was not entitled to the charge.

2

Trial counsel was not ineffective as to the jury charge, and Petitioner was not prejudiced in that no reasonable probability exists that the outcome of his trial would have been different had the jury been instructed on the defense of accident in that the jury rejected the lesser-included charge of involuntary manslaughter and instead convicted him of murder

As recognized by the post-conviction relief court, the jury heard Petitioner’s testimony about the incident. The jury had the opportunity to find him guilty of involuntary manslaughter in accordance with the jury charge on that ground but rejected that charge.

Counsel was not ineffective as to the jury charge and Petitioner was not prejudiced in that the jury found Petitioner guilty of murder rather than involuntary manslaughter which shows that the result of the trial would not have been different had accident been charged. *State v. Workman*, 437 S.C. 62, 78, 876 S.E.2d 151, 159 (Ct. App. 2022), reh'g denied (Aug. 12, 2022) examined a number of cases on analogous issues noting that "[m]any courts have recognized a distinction in finding harmless error that hinges on whether the jury is charged with an intermediate offense or not." The Court cited a Tennessee court's holding that an "error may be harmless when the jury 'necessarily rejected' all the lesser-included offenses by rejecting an intermediate offense." *State v. Allen*, 69 S.W.3d 181, 189- 190 (Tenn. 2002); *Workman* noted that "b]ecause the [South Carolina] Supreme Court [had] not opted to find the failure to give instructions for a lesser offense harmless when the jury convicted of the higher offense, [the Court of Appeals would] not find the error in failing to give a complete charge on the lesser offense harmless here." *Id.,* 437 S.C. at 81, 876 S.E. 2d at 161.

Workman addressed a situation that is different from the present case in that no complete charge was given in that case between the alternatives of guilt of the highest-level offense and innocence. The lesser charge was incomplete. In the instant case, the jury had the option of finding the Petitioner guilty of involuntary manslaughter between the alternatives of murder and not guilty but rejected that charge in favor of murder.

Courts in states in addition to Tennessee have found harmless error in failing to give a lesser charge when jurors rejected an intermediate charge. *People v. Zak*, 184 Mich. App. 1, 16, 457 N.W.2d 59, 66 (1990) ("Where the trial court instructs on a lesser included offense which is intermediate between the greater offense and a second lesser included offense, for which

instructions were requested by the defendant and refused by the trial court, and the jury convicts on the greater offense, the failure to instruct on that requested lesser included offense is harmless . . . ."); *Turner v. Commonwealth,* 23 Va. App. 270, 276, 476 S.E.2d 504, 507 (1996), aff'd, 255 Va. 1, 492 S.E.2d 447 (1997)("the jury in this case, by rejecting the lesser-included offense of second degree murder, necessarily rejected the factual basis upon which it might have rendered a verdict on the lesser-included offense of voluntary manslaughter. Accordingly, the court's error was harmless."[footnote omitted]).

In the instant case, even if, *arguendo*, the failure of the trial judge to charge accident was error, the error was harmless when the jury had the option of finding Petitioner guilty of involuntary manslaughter which was, in degree, between the murder charge and not guilty by reason of accident. When the jury opted for murder over involuntary manslaughter, it surely would not have found that the incident was an accident. Because any error in the charge was harmless beyond a reasonable doubt,[5] Petitioner was not deprived of the effective assistance of counsel and was not prejudiced.

5 "When considering whether an error with respect to a jury instruction was harmless, we must 'determine beyond a reasonable doubt that the error complained of did not contribute to the verdict.' " *Id.*

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, the State seeks permission to brief more fully the issues herein.

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