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S.C. Supreme Court

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Lexington County
Honorable Knox R. McMahon, Circuit Court Judge
Appellate Case No. 2013-001169

THE STATE,

Respondent,

vs.

ANDREW E. TORRENCE, JR.,

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Procedural History

In August 2010, a Lexington County Grand Jury indicted Petitioner for murder. In May 2012, a Lexington County Grand Jury indicted Petitioner for carrying a firearm onto the premises of a building selling alcoholic liquors and possession of a weapon during a violent crime.

On May 31, 2011, Petitioner proceeded to trial. On June 3, 2011, the jury found Petitioner guilty of voluntary manslaughter and the two firearms charges. (R. pp. 617-618.) Thereafter, the Honorable Knox R. McMahon sentenced Petitioner to twenty-five years of imprisonment for the voluntary manslaughter conviction and five years for each firearm charge. (R. p. 642.) Petitioner filed a timely notice of appeal.

On March 5, 2013, the Court of Appeals heard arguments on the matter. On April 10, 2013, the Court of Appeals issued an unpublished opinion in which it affirmed Petitioner's conviction and sentence. State v. Torrence, 2013-UP-152 (filed April 10, 2013). On April 23, 2013, Petitioner filed a petition for rehearing, and the Court of Appeals denied the petition for rehearing on May 8, 2013. On June 12, 2013, Petitioner served a petition for writ of certiorari. This return follows.

Factual History

In the early morning hours of September 28, 2008, Petitioner shot Zach Chaplin two times. Approximately six weeks later, Chaplin died as a result of the gunshot wounds. (R. p. 49; R. pp. 60-63.)

Tonya Mozenko's Testimony

At trial, Tonya Mozenko, Petitioner's former employer, testified for the State. Mozenko hired Petitioner as a part-time security guard. (R. pp. 82-83.) Petitioner wanted

to be an armed guard; however, Mozenko's company did not have any armed positions available. (R. p. 88.) On several occasions, Petitioner told Mozenko that he wanted to be a police officer. (R. p. 89.) Eventually, Mozenko had to fire Petitioner because he could not do the job. (R. p. 84.)

A few hours before Petitioner shot Chaplin, Petitioner had a conversation with Mozenko and her friend, Stephen Smith, at Shaggy's Bar. Petitioner told Mozenko and Smith that he tried to buy Donna Muszynski a drink earlier that night, and he was upset Muszynski gave all of her attention to Chaplin. (R. p. 94; R. pp. 128-129.) Petitioner called Chaplin a "wolverine" and a "faggot." (R. p. 263; R. p. 97; R. p. 128.) But, according to Mozenko, Chaplin did not respond. (R. p. 95.)[1] Petitioner repeatedly said, "I should go to my truck and get my gun and shoot him." (R. p. 97-98; R p. 129.) Sick and tired of Petitioner's comments, Mozenko and Smith left the bar and went home. (R. p. 98.)

Lee Buchanan's Testimony

At trial, Lee Buchanan testified for the State. On the night of the shooting, Petitioner called Buchanan "gay" numerous times. (R. pp. 264-265.) Buchanan asked Petitioner to leave him alone. (R. p. 177.) Petitioner asked Buchanan if he wanted Petitioner "to kiss his ass." (R. p. 177.) Throughout the night, Petitioner continued making offensive comments to Buchanan about Buchanan's sexuality. (R. p. 178.)

Eventually, Petitioner and Chaplin got into a physical altercation. (R. p. 180.) Buchanan tried to stop the fight. (R. pp. 180-181; R. pp. 199-200; R. p. 226; R. p. 252; R. p. 376.) After the fight was over, Buchanan helped Petitioner find his glasses. Thereafter, Buchanan told Petitioner, "Let's all go home. It's over and done with." (R. p. 181.)

[1] According to Petitioner, Chaplin did respond to Petitioner's comments. (R. p. 478.)

Buchanan escorted Petitioner out of the bar. (R. p. 182; R. p. 213.) After Petitioner left, everything was calm. (R. p. 226.)

But a few minutes later, Petitioner knocked on the bar door and asked to come inside. Petitioner reentered the bar with a gun in his hand. Petitioner told Buchanan, "this has nothing to do with you, this doesn't involve you . . . ." (R. p. 183.) Buchanan could not escape. (R. p. 184.) At that point, Chaplin threw a barstool at Petitioner. (R. p. 189.) Buchanan heard two gun shots, which according to him, sounded like "bam (pause) bam." (R. p. 184.) Another witness testified that the gun shots were approximately twenty seconds apart. (R. p. 214.)

Petitioner's Testimony

In his defense, Petitioner testified at trial. Petitioner admitted making comments referencing Buchanan's sexual orientation. (R. p. 373; R. p. 477; R. p. 530.)[2] But Petitioner claimed that he was assaulted by Chaplin when he went to apologize to Buchanan. (R. p. 376.) After the fight was over, Petitioner continued to make comments. (R. p. 377.)

Thereafter, Petitioner went to his truck and grabbed his gun. (R. pp. 377-380.) According to Petitioner, he went back into the bar in order to detain Chaplin and Buchanan for the earlier assault. (R. p. 378-379.) Petitioner ordered Buchanan to put his hands on the bar. (R. p. 381.) While Petitioner searched Buchanan for weapons, Chaplin threw a barstool at Petitioner. (R. pp. 381-382.) Petitioner went into a defensive position. According to Petitioner, when Chaplin came towards him, he got scared and shot Chaplin twice. (R. pp. 382-386.) One bullet struck Chaplin in the right arm, and the other bullet struck Chaplin behind the right ear. Petitioner admitted that he intentionally fired the gun

[2] Petitioner denied asking Buchanan if he wanted Petitioner to "kiss his ass." (R. p. 528.)

two times at Chaplin in order to stop Chaplin. (R. p. 393.) But Petitioner claimed that he "had to make a fast decision, and [he] went with instinct." (R. p. 382.)

Dr. Janice Edwards Ross' Testimony

According to Dr. Janice Edwards Ross, Chaplin was either in a bent over position or on the ground when Petitioner fired the second shot. (R. p. 59.). The bullet that struck Chaplin behind his right ear injured his spinal cord and paralyzed him from the chest down. (R. p. 60.) On November 12, 2008, Chaplin died from complications of his paralysis. (R. p. 49; R. pp. 60-63.)

Jury Charge Conference

Before closing arguments, the trial judge held a charge conference. (R. p. 511.) When the State brought up Petitioner's request to charge accident, the following discussion occurred:

> THE COURT: All right. I will deny that request. I do not intend to charge accident or involuntary manslaughter.
>
> I do not think he was acting lawfully in unlawfully arming himself in that regard.
>
> Yes, sir, Solicitor?
>
> SOLICITOR: You are not giving a charge on involuntary manslaughter?
>
> THE COURT: I am not.

(R. p. 513.)

At that time, Petitioner's trial counsel did not comment. After discussing numerous charges, Petitioner's trial counsel asked the trial judge to charge involuntary manslaughter. (R. p. 526.) The following discussion occurred:

> THE COURT: I deny that. I thought I denied that earlier.

MR. FLOYD: I'm sorry. I may be in error but I did want to make sure I put it on the record.

THE COURT: I do not think you can reach the elements of involuntary manslaughter, in regard to the circumstances of this case.

Anything further?

MR. FLOYD: Nothing further, Your Honor.

(R. p. 526.)

After the jury began deliberations, the jury sent a note to the trial judge asking whether or not they could consider the crime of involuntary manslaughter. (R. p. 650; R. p. 620.) Petitioner's trial counsel argued that the jury's request indicated that there was no proximate cause between the incident and the victim's death. (R. p. 621.) The judge told the jury that they could not consider involuntary manslaughter. (R. p. 650; R. p. 622.)

ARGUMENT

I.

Petitioner's argument on appeal is not preserved because his argument at trial in support of his request to charge involuntary manslaughter was based on proximate cause, which is not the argument he advances on appeal. Regardless of preservation, the Court of Appeals properly affirmed the trial judge's denial of Petitioner's request to charge involuntary manslaughter because Petitioner admitted he intentionally shot the victim two times.

Petitioner's argument on appeal fails for three reasons: First, Petitioner's argument on appeal in support of his request to charge involuntary manslaughter (i.e. his alleged lack of intent to inflict serious injury) was never presented to the trial judge; therefore the issue is not preserved for review. Second, in South Carolina, a defendant who admits to intentionally firing a gun is not entitled to an involuntary manslaughter charge. Third, regardless of this per se rule, Petitioner's actions do not fall within South Carolina's definition of involuntary manslaughter.

Standard of Review

In deciding on the law to be charged, the trial judge looks at the evidence presented at trial. State v. Gibson, 390 S.C. 347, 355, 701 S.E.2d 766, 770 (Ct. App. 2010) (certiorari granted March 22, 2012). The trial judge commits reversible error if he or she refuses a request for a jury instruction on a lesser-included offense that is supported by the evidence. Id. at 355-56, 701 S.E.2d at 770. When determining whether to charge involuntary manslaughter as a lesser-included offense, courts must view the evidence in the light most favorable to the defendant. See id. at 356, 701 S.E.2d at 770. Simply put, if there is any evidence in the record that warrants a charge on involuntary manslaughter, then the trial judge must charge it. State v. Reese, 370 S.C. 31, 36, 633 S.E.2d 898, 900 (2006). But if the trial judge fails to give a requested charge that is

supported by the evidence, appellate courts will not reverse unless the error was prejudicial. Gibson, 390 S.C. at 356, 701 S.E.2d at 770-771.

A. Issue is Not Preserved

First, Petitioner's argument on appeal fails because he never argued to the trial judge that there was evidence of Petitioner's lack of intent to inflict serious injury or death. Rather, Petitioner's argument in support of his request to charge involuntary manslaughter was based on proximate cause. Thus, the issue is not preserved for appellate review.

In South Carolina, an argument not raised and ruled on by the trial court is not preserved for appellate review. State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997). Further, an issue must be raised in a sufficiently specific manner to call attention to the exact error to the trial court. State v. Johnson, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005); see State v. Prioleau, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) ("[A]n objection should be sufficiently specific to bring into focus the precise nature of the alleged error so it can be reasonably understood by the trial judge."). "Where an objection and the ground therefor is not stated in the record, there is no basis for appellate review." State v. Morris, 307 S.C. 480, 485, 415 S.E.2d 819, 823 (Ct. App. 1991).

"A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). A defendant cannot raise one argument in support of an issue at trial and then raise a different argument in support of that issue to the appellate court. State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989); see State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) ("[A] party cannot argue one theory at trial and a different theory on appeal."); State v.

Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003) ("[A] defendant may not argue one ground below and another on appeal."); see also State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial.").

Here, the record is clear: Petitioner never argued why involuntary manslaughter charge should have been charged to the jury until after the jury retired for deliberations. Even then, Petitioner based his involuntary manslaughter argument upon proximate cause. Petitioner never made the argument that he asserts on appeal to the trial judge. Thus, the argument Petitioner asserts on appeal is not preserved for review. See State v. Benton, 338 S.C. 151, 156-157, 526 S.E.2d 228, 231 (2000) (finding Benton's challenge to the trial judge's refusal to give a requested charge was not preserved for appellate review where Benton "argued one ground in support of a circumstantial evidence charge at trial (State only presented circumstantial evidence of intent) and argues another ground in support of the charge on appeal (palm print is circumstantial evidence).")

B. Intentional Use of a Firearm Precludes Involuntary Manslaughter Charge

Second, Petitioner's argument on appeal fails because he admitted he intentionally fired his gun and shot Chaplin two times. (R. p. 393.) Because there was no evidence that Petitioner acted unintentionally, the trial judge did not in refusing to charge involuntary manslaughter.

Under South Carolina law, involuntary manslaughter is defined as the following: "[T]he killing of another without malice and **unintentionally** while engaged in either: (1) an unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm; or (2) a lawful act with reckless disregard for the safety of others." Reese, 370 S.C. at 36, 633 S.E.2d at 900 (emphasis added).

The law in South Carolina is clear: If a defendant admits he or she intentionally fired a gun, he or she is not entitled to a jury charge on involuntary manslaughter. See Douglas v. State, 322 S.C. 67, 74-75, 504 S.E.2d 307, 310-11 (1998) (holding that the defendant was not entitled to a jury charge on involuntary manslaughter because at its core, involuntary manslaughter is an unintentional killing and the defendant admitted he intentionally fired his gun into a crowd); State v. Pickens, 320 S.C. 528, 532, 466 S.E.2d 364, 367 (1996) (holding that the trial judge properly refused to charge involuntary manslaughter because the defendant admitted he shot the gun); see e.g., State v. Smith, 315 S.C. 547, 550, 446 S.E.2d 411, 413 (1994) (holding that the trial judge properly refused to charge involuntary manslaughter because the defendant acted intentionally in wielding the knife); State v. Craig, 267 S.C. 262, 269, 227 S.E.2d 306, 310 (1976) (holding that the trial judge properly refused to charge involuntary manslaughter because the defendant admitted he intentionally fired his shotgun but claimed he only meant to shoot over the victim's head); Gibson, 390 S.C. at 358, 701 S.E.2d at 772 (holding that the trial judge properly refused to charge involuntary manslaughter because the defendant admitted he voluntarily and intentionally fired his weapon); State v. Morris, 307 S.C. 480, 484, 415 S.E.2d 819, 822 (Ct. App. 1991) (holding that the trial judge properly refused to charge involuntary manslaughter because the defendant admitted he intentionally shot the victim in self-defense).[3]

[3] The rule applied in South Carolina is consistent with the rule in other jurisdictions. See People v. Jackson, 874 N.E.2d 123, 130 (Ill. App. Ct. 2007) ("Illinois courts have consistently held that when the defendant intends to fire a gun, points it in the general direction of his or her intended victim, and shoots, such conduct is not merely reckless and does not warrant an involuntary-manslaughter instruction, regardless of the defendant's assertion that he or she did not intend to kill anyone."); People v. McMullan, 789 N.W.2d 857, 858 (Mich. 2010) (holding that the defendant was not entitled to an involuntary manslaughter charge because defendant's actions constituted "a malicious series of intentional acts . . . not a grossly negligent handling of a firearm that inadvertently caused death.").

In this case, there was no evidence that Petitioner unintentionally fired his gun at Chaplin. In fact, Petitioner freely and candidly admitted that he intentionally fired his gun and shot Chaplin. But Petitioner claimed he only shot Chaplin because he was afraid Chaplin was going to get the gun from him and shoot him. (R. p. 391.) Notably, the Court of Appeals in Morris instructed: "Whether the shooting was excusable in the circumstances (self defense) or was committed in the heat of passion upon sufficient provocation (voluntary manslaughter) was for the jury to determine, and the judge so charged them." Morris, 307 S.C. at 484, 415 S.E.2d at 822. Thus, at the most, Petitioner was entitled to a voluntary manslaughter charge, not involuntary manslaughter. [4]

Further, the fact that Petitioner claimed he did not intend to harm Chaplin when Petitioner reentered the bar is irrelevant. See Smith, 315 S.C. at 550, 446 S.E.2d at 413 (holding whether the defendant intended to harm the victim was irrelevant because the defendant intentionally stabbed the victim with a knife, i.e., a dangerous instrumentality).

Contrary to Petitioner's assertions, the current rule applied in South Carolina does not contradict the holding in State v. Quick, 168 S.C. 76, 167 S.E.2d 19 (1932). In Quick, the issue on appeal was not whether the trial judge should have charged involuntary manslaughter. Id. Rather, the issue on appeal related to the ***content*** of the involuntary manslaughter charge. Id. This Court pointed out in Quick that "a person who causes another's death by the *negligent* use of a *deadly weapon* is guilty of involuntary manslaughter[.]" Id. (emphasis in original). Thus, the rule set forth in Craig, Morris, and Pickens (i.e. one cannot obtain an involuntary manslaughter charge if he or she admits to intentionally firing a gun) is supported by the holding Quick.

[4] See Douglas, 322 S.C. at 75, 504 S.E.2d at 311 ("A claim of imperfect self-defense would also be unavailing because it has no application to involuntary manslaughter.").

Also, the rule prohibiting an involuntary manslaughter charge when a defendant admits to intentionally firing a gun makes sense. As this Court pointed out in Douglas, "involuntary manslaughter is at its core an unintentional killing." Douglas, 322 S.C. at 74, 504 S.E.2d at 310. When a defendant admits that he or she intentionally fired a gun in the direction of another, there is absolutely no basis for a jury to conclude that the killing was unintentional because death is a natural consequence of that intentional act. Because the rule applied in South Carolina makes sense, there is no need for this Court to abandon our rule and adopt North Carolina's interpretation of its involuntary manslaughter doctrine.

In summary, because Petitioner admitted he intentionally fired his gun and shot the victim, the trial judge did not err in refusing to charge involuntary manslaughter.

C. Not Entitled to Involuntary Manslaughter Charge Under South Carolina's Definition

Finally, Petitioner's argument on appeal fails because his actions did not fall within South Carolina's definition of involuntary manslaughter. Regardless of South Carolina's per se rule prohibiting an involuntary manslaughter charge when a defendant admits to intentionally firing a gun, Petitioner's argument fails because firing a gun is an activity that naturally tends to cause death or great bodily harm, and Petitioner was neither acting lawfully when he brandished his gun in the bar nor merely recklessly when he intentionally fired his gun at the victim.

As mentioned above, involuntary manslaughter is defined as "the killing of another without malice and unintentionally while engaged in either: (1) an unlawful act not amounting a felony and not naturally tending to cause death or great bodily harm; or

(2) a lawful act with reckless disregard for the safety of others." Reese, 370 S.C. at 36, 633 S.E.2d at 900.

Here, Petitioner's actions do not fall within the first category of the involuntary manslaughter definition because Petitioner fired a gun, which naturally tends to cause death or bodily harm. See Bozeman v. State, 307 S.C. 172, 177, 414 S.E.2d 144, 147 (1992) (holding that firing a gun naturally tends to cause or bodily harm).

Further, Petitioner's actions do not fall within the second category of the involuntary manslaughter definition because he was not engaged in a lawful act when he brought his gun into the bar and presented it to the patrons of the bar.[5] Further, Petitioner was not acting lawfully when he entered the bar with the gun and seized/confined, which is kidnapping,[6] Buchanan and the rest of the patrons. In addition, Petitioner's actions do not fall within the second category of the involuntary manslaughter definition because there was no evidence that Petitioner acted merely recklessly. Although Petitioner claims on appeal that he acted recklessly when he brought his gun into the bar, he admitted at trial that he intentionally brought the gun into the bar so that he could get command of the room and scare the patrons. Further, Petitioner admitted he acted intentionally when he fired his gun twice at the victim. This is not a situation where a defendant negligently handled a loaded gun. See State v. Brayboy, 387 S.C. 174, 180, 691 S.E.2d 482, 485 (Ct. App. 2010) (noting that the negligent handling of a loaded gun can support a charge of

[5] See S.C. Code Ann. § 16-23-410 (presenting or pointing a loaded or unloaded firearm at another person); see also In re Spencer R., 387 S.C. 517, 692 S.E.2d 569 (Ct. App. 2010) (holding the phrase "to present" under § 16-23-410 means to offer to view in a threatening manner, or to show in a threatening manner); see also S.C. Code Ann. § 16-23-465 (carrying a firearm onto the premises of a building selling alcoholic liquors).

[6] South Carolina's kidnapping statute provides the following: "Whoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever without authority of law, except when a minor is seized or taken by his parent, is guilty of a felony . . . ." S.C. Code Ann. § 16-3-910.

involuntary manslaughter). Thus, Petitioner's intentional use of a deadly weapon does not support his allegation of mere criminal negligence. See Smith, 315 S.C. at 550, 446 S.E.2d at 413.

In other words, shooting someone is not a lawful act, and the intentional use of gun does not support the allegation of mere criminal negligence. See Id. at 550, 446 S.E.2d at 413 (noting that stabbing someone is not a lawful act, and the intentional use of a dangerous instrumentality does not support an allegation of mere criminal negligence).

Because Petitioner's actions were outside the definition of involuntary manslaughter, the trial court did not err in refusing to instruct the jury on the law of involuntary manslaughter.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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June 11, 2013

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THE STATE,

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Petitioner.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Return to Petition for Writ of Certiorari on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Blake A. Hewitt, Esquire
BLUESTEIN, NICHOLS,
THOMPSON & DELGADO, LLC
P.O. Box 7965
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I further certify that all parties required by Rule to be served have been served. This 11th day of June, 2013.

Ellen R. DuBois

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