THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI-COA
APPEAL FROM NEWBERRY COUNTY
Court of General Sessions
Honorable Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2024-001773

The State ..... Respondent,

v.

Xzavier Sharif Davis ..... Petitioner.

PETITIONER'S REPLY TO RESPONDENT'S RETURN

C. RAUCH WISE
Attorney at Law
305 Main Street
Greenwood, SC 29646
(864) 229-5010
S.C. Bar No. 6188

Attorney for Petitioner

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Question I

Did the trial court err in failing to charge involuntary manslaughter when the record contained evidence that X'Zavier Sharif Davis was intending to commit the misdemeanor crime of malicious injury to personal property when he fired the shot that killed his step-son?

When the Respondent argues that malicious injury to personal property could be a felony depending on the value, the Respondent appears to admit that it also could be a misdemeanor. As a misdemeanor, X'Zavier Sharif Davis was entitled to a jury charge on involuntary manslaughter. The question is not what this Court or the trial judge believes is the most probable result should the issue be submitted to the jury. As this issue involved a request to charge by the defendant, this court must determine if there is any evidence from which facts may be inferred to submit the issue to the jury. *State v. Sams*, 410 S.C. 303, 764 S.E.2d 511 (2014). As the court of appeals has said, "In determining whether the evidence requires a charge on a lesser included offense, the court views the facts in a light most favorable to the defendant." *State v. Brayboy*, 387 S.C. 174, 179, 691 S.E.2d 482, 485 (Ct. App. 2010). This court has also held, "[O]ur cases consistently hold that 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 v. State*, 305 S.C. 445, 447, 409 S.E.2d 391, 392 (1991). A jury under the facts presented here viewed in the light most favorable to Mr. Davis, could infer from the facts that Mr. Davis committed the misdemeanor of malicious injury to personal property. As such, a charge as to involuntary manslaughter is proper.

This court has held, "The charge of murder involves a charge of manslaughter, and therefore necessarily involves both voluntary and involuntary manslaughter. The latter includes homicide by the negligent handling of a loaded gun." *State v. Causer*, 87 S.C. 516, 70 S.E. 161, 161–62 (1911). "Involuntary manslaughter is a lesser included offense of murder only if there is evidence the killing was unintentional." *Tisdale v. State*, 378 S.C. 122, 125, 662 S.E.2d 410, 412 (2008). In the present case, as noted in the Petition, there is ample evidence the killing was unintentional.

The State has relied upon *Bozman v. State,* 307 S.C. 172, 44 S.E.2d 144 (1992) for the proposition that since Mr. Davis intentionally fired a weapon, he is not entitled to an involuntary manslaughter charge. In *Bozman*, the defendant admitted he shot the firearm and apparently admitted he shot the firearm in the direction of the deceased. His testimony was that he did not aim the pistol. Firing a pistol at a person without aiming is an unlawful act naturally tending to cause injury. This court in *Bozman* did not hold the mere firing of a weapon would never be considered involuntary manslaughter. To have sold held, would have required this court to overturn *State v. Quick*, 168 S.C. 76, 167 S.E. 19 (1932). The *Quick* case also involved a defendant discharging a firearm without the intent to aim or shoot at any person.

Question II

Did the trial court err in failing to give the jury a improper definition of malice as being a disregard for human and a confusing explanation of intent when the jury expressed confusion over the meaning of total disregard for human life and intent to inflict injury?

The Respondent appears to urge this court to look at the jury charge as originally charged and ignore the confusing instructions given in response to the issue with which the jury was

struggling. As stated in the Petition, Mr. Davis urges this court to accept the premise that the response to a specific question from the jury needs to be clearer than the original charge. Geogia appears to have adopted such a position. In reversing the conviction for child sexual abuse, the court said, "When the jury expressed its confusion by asking whether sexual conversations could constitute an immoral or indecent act, the trial court should have instructed the jury to limit its consideration to determining whether Smith was guilty of committing child molestation in the specific manner alleged in the indictment only. Instead, the trial court aggravated the confusion by simply referring the jury to the charge and the indictment, with no limiting or remedial instruction." *Smith v. State*, 310 Ga. App. 418, 422, 714 S.E.2d 51, 55 (2011). Here, when the jury asked the question the correct answer was "no." Instead the trial judge confused the issue by implying to the jury that an intent was not required as to the crime for which Mr. Davis was convicted. The respondent is incorrect is saying this court should rely upon the charge originally given to find any error was cured.

Question III

Did the trial court err in failing to quash the indictment as to attempted murder when the indictment contained the improper language of implied malice?

The respondent appears to place form over substance. While the defense counsel did not use the phrase "I move to quash," the substance of the discussion was to call the attention of the trial court to the fact that the indictment was not proper. The state conceded the indictment was not proper when they moved to amend the indictment. The concession informed the trial judge that the indictment was not proper. When defense counsel refused to agree to the amendment, and he was not required to agree, everyone knew the indictment was defective. As everyone knew the

indictment was improper, should a defendant be required to use the magic word "quash"? To do so, would put form over substance.

The requirement of *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005) is not that a defendant use any particular word to put a court on notice of a defective indictment. The requirement is that the defective indictment be brought to the attention of the trial judge before the jury is sworn. Before the jury was sworn, the state, the trial judge and defense counsel knew the indictment was defective. The state wanted to amend the indictment to make it correct. Defense counsel was correct in making the objection because eliminating implied malice changes the finding of the grand jury. Nothing in the record suggests that the grand jury would have indicted Mr. Davis for attempted murder had implied malice been eliminated.

The state further argues that this issue is moot as the jury convicted Mr. Davis of the lesser included offense of assault and battery of a high and aggravated nature. Our state constitution provides, "No person may be held to answer for any crime the jurisdiction over which is not within the magistrate's court, unless on a presentment or indictment of a grand jury of the county where the crime has been committed, ..." S.C. Const. art. I, § 11. *See, also*, S.C. Code § 17-19-10 ('No person shall be held to answer in any court for an alleged crime or offense, unless upon indictment by a grand jury, ..."). While a defect in an indictment can be waived when the defect is not noted before the jury is sworn, when the defect is brought to the attention of the trial judge, the indictment should be dismissed regardless of the language used to bring the defect to the attention of the trial judge. If the defect is such that the indictment should be dismissed, then the indictment becomes a nullity and any conviction under the indictment violates the Constitution of the State of South Carolina and the statutory provisions as to the requirement of an

indictment. The conviction of the defendant on a lesser charge does not cure the defect as the defective indictment prevents the defendant from being convicted of any crime. Thus, the issue of the defective indictment is not moot. The trial on the charge of assault and battery of a high and aggravated nature should not have occurred because the indictment was defective. The state has argued, "If the indictment was quashed, the State could have easily indicted the Petitioner for the offense ABHAN. Since ABHAN it [sic] is a general intent crime and the evidence revealed that the Petitioner did shoot Indigo in the leg, an act not in dispute." Br. Of Resp. at 15. The fact that the evidence as to a lesser crime is overwhelming does not operate to waive the requirement that a defendant be tried only under a valid indictment. Mr. Davis was not indicted for assault and battery of a high and aggravated nature. The State could have so indicted him, but they elected not to do so.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Petition for Writ of Certiorari, this court should grant the Petition, reverse the conviction of X'Zavier Sharif Davis and remand the case for a new trial.

January 6, 2025

C. Rauch Wise
305 Main Street
Greenwood, SC 29646
(864) 229-5010
rauchwise@gmail.com
S. C. Bar № 6188

Attorney for X'Zavier Sharif Davis

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CERTIFICATE OF SERVICE

I, Sandy Traynham, hereby Certify that I am the Secretary for C. Rauch Wise, Attorney for the Petitioner, in the above entitled case. That on January 6, 2025, I did send via e-mail a copy of the Petitioner's Reply to Respondent's Return to Alan Wilson and Tommy Evans, Jr., at tommyevansjr@scag.gov and agwilson@scag.gov.

January 6, 2025

/s/Sandy Traynham
Sandy Traynham
Secretary

C. RAUCH WISE
Attorney at Law
305 Main Street
Greenwood, SC 29646
(864) 229-5010
S.C. Bar No. 6188

Attorney for Petitioner