STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Jasper County

Carmen T. Mullen, Circuit Court Judge

Opinion No. 5199 (S.C. Ct. App. filed 2/19/2014)

11-GS-27-192

THE STATE,

RESPONDENT,

V.

ANTONIO SCOTT,

PETITIONER

APPELLATE CASE NO. 2011-205448

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on May 2, 2014.

QUESTION PRESENTED

Whether the trial court reversibly erred by failing to instruct the jury on involuntary manslaughter where Petitioner defended himself from an attack by an older, heavyset, and sickly woman; where Petitioner told police he deflected her knife thrust towards him by manipulating her arm using a martial arts maneuver; where the woman died from a single, pocket-knife sized puncture wound to the side of her neck; and where eyewitness testimony showed he was surprised by the woman's wound and quickly attempted to treat it?

STATEMENT OF THE CASE

On April 19, 2011, the Jasper County Grand Jury indicted Petitioner Antonio Scott for murder. R. 202. On December 5, 2011, Petitioner proceeded to trial before The Honorable Carmen T. Mullen and a jury. Robert Hughes represented Petitioner and Robert Ferguson represented the State. R. 1. On December 7, 2011, the jury found Petitioner guilty as charged. R. 193, lines 15-23. The trial judge sentenced Petitioner to thirty years imprisonment. R. 200, lines 16-19.

Petitioner appealed his conviction on grounds that the trial judge erred in failing to instruct the jury on involuntary manslaughter. Final Brief of Appellant. On February 19, 2014, the South Carolina Court of Appeals issued a published opinion affirming the conviction. Judge Pieper dissented. App. 1. Petitioner timely filed a Petition for Rehearing. App. 7. On May 2, 2014, the Court of Appeals denied the Petition for Rehearing. Judge Pieper adhered to his dissent. App. 17.

ARGUMENT

THE TRIAL COURT REVERSIBLY ERRED BY FAILING TO INSTRUCT THE JURY WITH INVOLUNTARY MANSLAUGHTER BECAUSE AMPLE EVIDENCE SUPPORTED THE FINDING THAT ALTHOUGH PETITIONER WAS RECKLESS TOWARDS NELSON IN DEFENDING HIMSELF, HE DID NOT INTENTIONALLY CAUSE HER DEATH.

STATEMENT OF FACTS

On the evening of March 20, 2011, Petitioner was at the apartment of his sister, Shareema Behlin, waiting for his son's mother, Akera Nelson, to drop their son off with him. R. 86, line 10—R. 87, line 13. Unbeknownst to Petitioner or Behlin, Akera's mother, Cynthia Nelson, was accompanying Akera on the trip. Shortly after Akera entered the apartment, Nelson's mother also entered uninvited and began cursing Petitioner: "[M]other 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, Belin, and the child stood by. R. 108, lines 1-24.

The altercation turned physical. Cynthia Nelson was forty-eight years old, heavyset, and sickly. R. 47, ll. 17-20; R. 51, ll. 2-4; R. 109, ll. 3-6. According to testimony from Investigator Daniel Litchfield of the Ridgeland Police Department, Petitioner, young enough to be a peer of Nelson's daughter,[1] had some training in martial arts from his father, a black belt. R. 86, ll. 12-24; R. 102, line 23—R. 103, line 1.

Investigator Litchfield further testified that Petitioner's account of the incident was that Nelson pulled something shiny and silver from her pocket and came towards him. R. 99, line 12—R. 100, line 1. Petitioner stated he stepped to the side and performed a martial arts move to neutralize the attack, pushing Nelson's elbow up, which resulted in a puncture wound to her neck:

[1] Petitioner was present in the courtroom at the trial. R. 65, ll. 18-22. According to SCDC records, Petitioner is 35 years old, stands 5'10", and weighs 135 pounds.

"[H]er arm went by him and he pushed the arm and she stabbed herself in the neck." Litchfield demonstrated such a maneuver for the jury. R. 100, lines 4-21. R. 100, lines 1-3.

Akera Nelson testified that she observed Petitioner strike her mother on the right side but did not see a knife in his hands.[2] R. 88, line 17—R. 89, line 23. Behlin testified that Petitioner hit Cynthia Nelson with the inside of his hand and never saw him with a knife. R. 106, lines 4-5; R. 107, lines 9-12; R. 107, line 21; R. 108, lines 15-16.

After suffering the wound, Nelson fell to the couch. R. 108, lines 17-21. Petitioner was initially not aware that the knife had penetrated Nelson's neck:

> [Petitioner] came from the kitchen . . . because Akera stated, "Oh, it's sticking out of her neck." And when he came, he was like, "Nothing is sticking out of her neck." And then he pulled her jacket down and he jumped back and jumped up on the chair and grabbed his shirt and he was holding her neck. . . . He was applying pressure to her neck.

R. 106, 9-17. Petitioner used his own shirt to apply pressure to the wound on the left side of her neck at the jaw line. R. 91, lines 2-5; R. 106, lines 10-17; R. 108, lines 15—R. 109, line 22. Behlin called 9-1-1. R. 90, lines 6-20. When police arrived, Petitioner and Akera left out the back. R. 91, lines 6-9; R. 94, lines 3-9. Nelson was taken to the hospital where she was pronounced dead. R. 113, lines 16-18. Petitioner turned himself in to authorities the next day. R. 98, lines 5-10; R. 102, lines 8-12.

Dr. Lee Marie Tormos was the forensic pathologist who autopsied Nelson. R. 118, lines 2-7. She testified that Nelson died from blood loss due to the single puncture wound to the neck, which was around one-third of an inch wide, one-twentieth of an inch thick, and around two and

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[2] Akera said the apartment was well lit, and although she saw a knife in Petitioner's hand when she entered the apartment, she did not see one when Petitioner struck Nelson. R. 88, lines 3-21; R. 89, line 24—R. 90, line 3.

one-half inches deep. R. 120, ll. 5-6; R. 118, lines 12-13; R. 123, lines 20-22; R. 125, lines 11-12. She also confirmed that Nelson did not receive any "defensive wounds," which would suggest that one has defended herself from advances with a knife. R. 126, lines 2-14. Counsel also acted out with Dr. Tormos a physical maneuver designed to neutralize a knife attack. R. 127, ll. 23-25. During the maneuver, counsel manipulated Dr. Tormos's forearm and wrist. R. 129, ln. 19—R. 130, ln. 23. Dr. Tormos testified that the maneuver could cause one to unintentionally stab oneself in the neck consistent with the wound that the decedent suffered and that the maneuver would result in no defensive wounds to the wrists or arms. R. 128, ll. 8-22; R. 127, line 2—R. 128, line 22. In other words, the wound was consistent with an accident:

> Q: Okay. So then a person who is attacking could actually stab themselves in the neck?
>
> A: Yes.
>
> . . .
>
> Q: And the wound that would have been generated to yourself, that would have been consistent to the wounds that [Nelson] had?
>
> A: It is very possible, yes.
>
> **Q: So this could have been an accident?**
>
> **A: Yes.**

R. 125, ln. 10—R. 126, ln. 14; R. 128, ll. 8-22 (emphasis added).

Counsel for Petitioner sought instructions on self-defense and involuntary manslaughter. R. 146, line 1—R. 147, line 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 Petitioner's defense to be that he performed a martial arts move to avoid being injured. R. 147, lines 13-15; R. 149, lines 9-14. The trial court concluded the defense precluded a finding of involuntary manslaughter:

> 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. The State joined in, asserting 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. The trial court ultimately charged self-defense and voluntary manslaughter and refused to give an instruction on involuntary manslaughter. R. 153, line 12—R. 154, line 13; R. 183, line 6—R. 188, line 4.

On appeal to the South Carolina Court of Appeals, Petitioner argued that the trial court reversibly erred by failing to instruct the jury with involuntary manslaughter because evidence in the record indicated the wound resulted unintentionally from Petitioner's defensive martial arts maneuver. In its affirming opinion, the Court of Appeals concluded that if the jury believed the decedent had a knife, the evidence could not support a finding that Appellant recklessly exceeded justifiable force in executing the fatal self-defense maneuver. The Court of Appeals also concluded that an involuntary manslaughter charge was not warranted because no factual issue existed as to whether Appellant acted unintentionally. In his dissent, Judge Pieper concluded the evidence in the record warranted an involuntary manslaughter charge. App. 6.

Petitioner timely filed a Petition for Rehearing. App. 7. On May 2, 2014, the Court of Appeals denied the Petition for Rehearing. Judge Pieper adhered to his dissent. App. 17.

DISCUSSION

The trial court erred by failing to charge involuntary manslaughter because ample evidence supported the finding that although Petitioner was reckless towards Nelson in defending himself, he did not intentionally cause her death. 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). The trial court commits reversible by failing 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). In determining whether the evidence supports a charge for involuntary manslaughter, the Court must view the facts in the light most favorable to the defendant. *State v. Coleman*, 342 S.C.172, 179-80, 536 S.E.2d 387, 391 (Ct. App. 2000) (citing *State v. Byrd*, 323 S.C. 319, 474 S.E.2d 430 (1996)). "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 includes 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). A charge on this form of involuntary manslaughter and "a self-defense charge . . . are not mutually exclusive, as long as there is any evidence to support both charges." *State v. Light*, 378 S.C. 641, 650, 664 S.E.2d 465, 470 (2008). The central inquiry

for the fact-finder in such a case is whether the accused acted with the intent to kill the deceased. *See id.* at 651, 664 S.E.2d at 470 ("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. . . . [T]he jury is entitled to resolve . . . how the shooting actually occurred."); *cf. Casey v. State* at 447, 409 S.E.2d at 391 ("Evidence of a struggle between a defendant and a [v]ictim over a weapon is sufficient for submission of an involuntary manslaughter instruction to the jury." (citing *State v. Patrick*, 289 S.C. 301, 345 S.E.2d 481 (1986) ("Appellant claimed that when he was putting the gun back into the car, the victim, apparently thinking that the appellant was going to shoot him, grabbed the end of the barrel causing the gun to fire. Appellant's testimony constituted a sufficient ground for submitting the possible verdict of involuntary manslaughter to the jury."))).[3]

Intent is defined as acting either with the purpose of reaching a result or with knowledge that the result is practically certain to follow. *See State v. Lee-Grigg*, 374 S.C. 388, 403-404, 649 S.E.2d 41, 49 (Ct. App. 2007) ("A person . . . act[s] purposefully if he consciously desires that result, whatever the likelihood of that result happening from his conduct. Concomitantly, a person act[s]

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[3] An accused's failure to meet the elements of the affirmative defense of self-defense is immaterial to whether he was "engaged in a lawful activity" for purposes of a finding of involuntary manslaughter. The question is not whether the accused acted lawfully in self-defense but whether he was in a lawful position when the prospect of self-defense arose:

> There is no merit to the State's argument that [the defendant] was not entitled to an involuntary manslaughter charge because he could not meet the necessary prongs of a self-defense charge. . . . [T]he question is not whether one is **acting** in self-defense at the time of the shooting, but whether the defendant is **lawfully armed** at the time of the shooting. Therefore, whether a defendant is entitled to a self-defense charge is of no consequence

Brayboy, 387 S.C. at 182, 691 S.E.2d at 486-87 (citing *Light*, 378 S.C. 641, 664 S.E.2d 465).

knowingly if he is aware the result is practically certain to follow . . . , whatever his desire may be as to that result." (internal quotations and citations omitted)). "Intent is a question of fact," *State v. Tuckness*, 257 S.C. 295, 299, 185 S.E.2d 607, 607 (1971), and "[b]ecause intent is seldom susceptible to proof by direct evidence, the circumstances surrounding the [act at issue] are relevant for establishing the requisite intent," *State v. Cherry*, 348 S.C. 281, 288, 559 S.E.2d 297, 300 (Ct. App. 2001), *aff'd* 361 S.C. 588, 606 S.E.2d 475 (2004).

In *State v. Crosby*, this Court held the defendant was entitled to an involuntary manslaughter charge because his statements shortly after the killing suggested he did not intentionally discharge the firearm. The defendant was attempting to break up a fight at an apartment when another individual who had recently been hostile to the defendant barked at him from behind. *Crosby*, 355 S.C. at 49-50, 584 S.E.2d at 111. Shortly after the ensuing shooting, the defendant made a statement to police describing what happened:

> "[The victim was] charging at me with his hand behind his back. I went in my pocket and pulled that gun out. I closed my eyes and pulled the trigger. I didn't even know I pulled the trigger. I was scared. I seen my life in danger. I didn't know how to react."

Id. The defendant also told eyewitness the shooting was an accident immediately after, and in his trial testimony, he stressed how quickly the victim "was already up on" him by the "time [he] turned around." *Id.* at 52-53, 584 S.E.2d at 112. The Court concluded the evidence was ample for the jury could have inferred the defendant did not intentionally discharge the weapon. *Id.*

In *State v. Chatman*, 336 S.C. 149, 519 S.E.2d 100 (1999), this Court held that the defendant was entitled to an involuntary manslaughter charge when the manner of the victim's death suggested it was unintentional. The defendant was hostile toward the victim and wrestled with him, claiming he engaged him in a chokehold with his shoulder pressed into the victim's neck. *Id.* at

151-53, 519 S.E.2d at 101-102. A medical examiner testified that the manner of death was consistent with the defendant's description. *Id.* The court reasoned that the defendant's pressing his shoulder into the victim's neck was not "the traditional strangulation type situation" in which a person strangles a victim with his hands around the neck. *Id.*

Viewing the facts most favorable to Petitioner in this case, Nelson had the knife when she attacked Petitioner. The record includes ample evidence to support a finding that Petitioner neither had the purpose of nor expected Nelson to suffer a fatal wound during the altercation. Petitioner's account as related by Litchfield was that Nelson came into the apartment unexpectedly and with hostility, cursing him and setting upon him with something "shiny and silver." Petitioner had some training in martial arts, but no evidence indicated he was proficient. When "her arm went by him[,] he pushed the arm and she stabbed herself in the neck." The clash ostensibly happened so quickly and suddenly that neither Akera nor Behlin could describe it in detail. Afterwards Petitioner was not even aware that the knife had contacted Nelson's neck. When he did see the wound, he was surprised, and he immediately attempted to treat it by applying pressure with his own shirt.

The evidence of involuntariness is tantamount to that assayed in *Crosby*. Nelson set upon Petitioner suddenly and violently. Petitioner was uncertain as to what harm Nelson intended or was capable of inflicting. Petitioner had to quickly decide how to protect himself. Petitioner explained these aspects of the incident to police shortly after. His behavior immediately after the attack in believing Nelson was unharmed and then attempting to treat her wound strongly suggest the injury was accidental. The evidence reasonably supports the inference that Petitioner reacted to Nelson's thrust by manipulating her arm to deflect its momentum away from himself without any goal or expectation of injuring her. The puncture simply resulted from an explosive situation outside of Petitioner's total control.

Consistent with this theory of the case, the State's forensic pathologist testified both that Nelson suffered no other defensive wounds and that the single puncture wound was consistent with that of a person accidently stabbing herself during a physical struggle involving a knife. Indeed, had Appellant had the purpose of killing Nelson, one would reasonably expect to see more trauma than an uncannily inflicted pocket knife-sized puncture wound in the midst of a melee with no other blows to speak of. Thus, the facts are analogous to those in *Chatman*. Nelson's death occurred during a hostile altercation involving a nontraditional stabbing. These circumstances, along with the medical examiner's corroborating testimony, constituted sufficient evidence that the killing was involuntary.

Taken as a whole, the record readily supports a finding that Petitioner acted recklessly and exceeded justifiable force in executing the fatal self-defense maneuver. "[A defendant] in defending his person has the right to use so much force as was apparently necessary to accomplish his deliverance and no more." *State v. Jackson*, 227 S.C. 271, 277, 681, 684, 87 S.E.2d 681, 684 (1955). A defendant may be found to have used excessive force in self-defense against a knife attack if the evidence shows the defendant could have physically engaged the victim and neutralized the attack without delivering a fatal strike. *State v. Harvey*, 110 S.C. 274, 96 S.E.2d 399 (1918) ("There was evidence from which the jury might have inferred that the appellant was near enough to catch the arm of the deceased, and thus prevent the killing . . . . The necessity is a matter for the jury."); *see also State v. Hendrix*, 270 S.C. 653, 661, 244 S.E.2d 503, 507 (1978) ("The rule is that ordinarily one is not justified in shooting or employing a deadly weapon after the adversary has been disarmed or disabled."). Relevant to whether a defendant was warranted in delivering a fatal strike is evidence of disparity in the physical capacities of the defendant and the victim. *Hendrix*, 270 S.C. at 660, 244 S.E.2d at 507

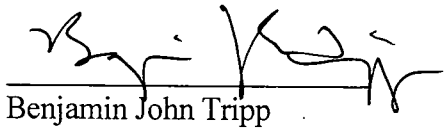
("[Defendant] was sixty-five years of age some fifteen to twenty years older than his adversary and hardly a physical match . . . . The deceased was under the influence of alcohol . . . . These circumstances, combined with the deadly weapon with which the deceased was armed, leave no doubt as to the imminent peril portending death . . . .").

Here, the record shows Petitioner had martial arts training, and he was younger and more agile. He was set upon by an older, sickly, heavyset woman with pocket-knife like weapon. Based on this evidence, a juror could reasonably find that Appellant could have confidently employed his superior reach, agility, and training to fend off or disable Nelson's attack without sending her arm swinging violently back towards a vital area or more generally without engaging Nelson's arm at all, which would have obviated the struggle over a weapon out of either person's total control. Based on the evidence presented, the jury had the right and duty to consider the possibility that although Petitioner did not intentionally kill Nelson, he was reckless and guilty of involuntary manslaughter. The trial court usurped that role by failing to charge involuntary manslaughter, and this Court should grant certiorari and reverse.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant the petition for certiorari to allow full briefing.

Respectfully submitted,



Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER.

This 20th day of May, 2014

STATE OF SOUTH CAROLINA
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Certiorari to Jasper County
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THE STATE,

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V.

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PETITIONER

APPELLATE CASE NO. 2011-205448

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on J. Anthony Mabry, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and the S.C. Court of Appeals, this 20th day of May, 2014.

Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 20th day
of May, 2014.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.