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S.C. Supreme Court

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Jasper County
The Honorable Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2011-205448

THE STATE,

Respondent,

v.

ANTONIO SCOTT,

Appellant.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S STATEMENT OF QUESTION PRESENTED

Whether the trial court reversibly erred by failing to instruct the jury with 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 the night of March 20, 2011, in Ridgeland, S.C., petitioner Antonio Scott stabbed Cynthia Nelson with a knife. (R. 28, 29, 193-97). Nelson died the following day as a result of the knife wound. (R. 44-59, 110-25). Petitioner was arrested on March 21, 2011 for Nelson's murder. (R. 98-104). Petitioner was subsequently indicted on April 11, 2011 by the Jasper County grand jury for murder (2011-GS-27-216). (R. 1, 28, 29, 33, 34). Petitioner was represented by Robert Hughes, Esquire. (R. 1). Petitioner proceeded to trial December 5-7, 2011 before the Honorable Carmen T. Mullen and a jury. (R. 1, 193-200). At the conclusion of the trial, the jury found petitioner guilty of murder. (R. 193-97). Judge Mullen sentenced petitioner to thirty (30) years imprisonment for Nelson's murder. (R. 197-200).

Petitioner appealed his conviction and sentence to the South Carolina Court of Appeals. (BOA). Respondent filed a responsive brief. (BOR). On February 19, 2014, the Court of Appeals affirmed petitioner's conviction and sentence for murder. State v. Antonio Scott, Opinion No. 5199 (Ct. App. 2014). On March 6, 2014, petitioner filed a petition for rehearing, which was denied on May 2, 2014. Petitioner then filed in this Court a Petition for Writ of Certiorari to the Court of Appeals. As a result, Respondent files this Return to the Petition for Writ of Certiorari.

RESPONDENT'S STATEMENT OF FACTS

On the night of March 19, 2011, the victim Cynthia Nelson ("Cynthia") called police in reference to petitioner, Antonio Scott, her daughter's boyfriend and the father of Cynthia's grandchild, being outside the front door of her apartment trying to break in. (R. 71-72). Cynthia was outside her home in her car when she witnessed petitioner at the front door of her apartment and called police using her cell phone. (R. 17-23, 71-73). Ridgeland City Police Officers Kevin Smith and Rob Nelson responded to the scene; however, by the time the officers arrived petitioner was gone. (R. 71-72). When petitioner realized the victim had called police, he threw away the knife he was carrying and hid in a nearby garbage dumpster. (R. 72, 75-85). At Cynthia's request, Officer Smith searched her home to make sure petitioner was not in her home and it was safe for Cynthia to enter. (R. 72-73). Officer Smith eventually talked to petitioner on the phone, and petitioner admitted only that he had called Cynthia. (R. 72).

The following day, March 20, 2011, Ms. Monique Chester, a resident of Baytree Apartments, was attending a wake at a residence located behind Baytree Apartments. The wake was for petitioner's cousin who had recently died. While there, Ms. Chester overheard petitioner talking about what had occurred the previous evening. Petitioner told a fellow family member that he had tried to kill Cynthia the night before, but she had called the police. Petitioner stated he had hid in a dumpster to avoid being arrested by police, and he had thrown the knife somewhere. Petitioner also stated that the next time he saw Cynthia he was going to stab her. (R. 75-85).

On the same date, March 20, 2011, the victim's daughter, Akera Nelson ("Akera") and Cynthia drove to petitioner's sister's [Shareema Behlin's] apartment because petitioner had

requested that the victim's daughter [Akera] bring their son to him at his sister Shareema's apartment. Shareema also lived in Baytree Apartments. (R. 86-98, 105, 108, 115-25, 154-58, 160-61).

Akera and the child entered Shareema's apartment. Cynthia remained in the vehicle. Cynthia's daughter, Akera, saw a knife in petitioner's hand when she entered Shareema's apartment and petitioner got up of the couch. Petitioner knew Cynthia was outside in the vehicle and stated to Akera with the knife in his hand: "Is this how you wanna do things?" "You gonna let your mom come between us?" Akera told petitioner: "Its not that serious. Chill out." Akera continued to try and calm petitioner down and while doing so put her son down on a chair. About one (1) minute later, Cynthia got out of the car and entered the apartment where her daughter and grandson were, and Cynthia told petitioner she was not going to put up with him beating her daughter any more.[1] (R. 86-98, 105, 108, 115-25, 154-58, 160-61).

Petitioner started arguing with Cynthia. At this point, Akera could no longer see the knife in petitioner's hand. Akera then witnessed petitioner strike Cynthia one (1) time in the face/neck area with his fist. Petitioner's sister, Shareema, testified at trial that petitioner struck the victim in the face/neck area with the open part of his hand. Neither Akera nor Shareema saw petitioner and Cynthia wrestling or tussling before petitioner struck Cynthia. They were just arguing. After petitioner struck Cynthia, Cynthia then staggered forward and collapsed on the couch in the living room unable to speak. Blood was pouring from Cynthia's neck. It was subsequently discovered that petitioner had not just struck Cynthia with his fist but had actually stabbed her with the knife. The knife wound penetrated Cynthia's neck approximately two (2)

[1]Petitioner was on probation at the time of trial for CDV 2nd Offense. Akera was the victim in that offense.

and one half (½) inches and was stopped by a bone in her neck. The wound was downward and toward the spinal column. The knife wound severed an artery in Cynthia's neck resulting in a severe loss of blood, cardiac arrest, and eventual death.[2] (R. 86-98, 105, 108, 115-25, 58-62, 64-65).

Cynthia's daughter, Akera, then went in the kitchen, obtained a mop handle and swung it at petitioner because he had attacked her mother. When Akera stopped swinging at petitioner with the handle, petitioner took off his shirt and used it to try to stop the bleeding from Cynthia's neck. Petitioner then fled the scene going behind Baytree Apartments in the direction of where the wake had been. Akera followed petitioner briefly but did not leave the scene. (R. 86-98).

Petitioner's sister, Shareema, called 911. (State's Ex. 1, 1st call, R. 38-44). On the 911 tape, petitioner's sister can be heard telling someone in her apartment to the effect: "you better get out of here." (State's Ex. 1, 1st call). Petitioner's sister was asked by the 911 operator what happened to the victim, and Sharema stated ***someone stabbed her in the neck***. (State's Ex. 1, 1st call). When petitioner's sister was specifically asked who stabbed the victim, Shareema did not answer. She then stated she needed to walk outside her home. Sharema then became belligerent with the 911 operator. (State's Ex. 1, 1st call).[3]

The victim's daughter, Akema, then called 911. (State's Ex. 1, 2nd call, R. 38-44). She

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[2]The victim, Cyntia, was first taken by E.M.S. to a local hospital and then, because of her condition, she was transported to a hospital in Savannah, Georgia. She died there on March 21, 2011 as a result of the stab wound to her neck just below the ear at the jaw line. (R. 44-59, 110-25).

[3]When police responded one (1) of the officers was wearing a body camera that showed the jury exactly what occurred when police arrived at the scene. (State's Ex. 2, Video). Police attempted to interview petitioner's sister Shareema but she was not cooperative in the initial investigation. The victim's daughter, Akera, was present at the scene and was cooperative and related to police how petitioner had attacked her mother. (R. 67, 74, 91-92, 110).

informed the 911 operator her boyfriend, petitioner Antonio Scott, had struck her mother with his fist but she did not know what he had in his hand at the time. She informed the 911 operator that her mother was bleeding profusely. She also gave police a description of petitioner and where he had run to. (State's Ex. 1, 2nd call). (R. 86-98, 105, 108, 115-25, 154-58, 160-61)

When police arrived at the scene, Petitioner had already fled behind the apartment. Officer Rob Nelson went behind the apartment looking for petitioner. When he approached a group of people behind the apartment complex [petitioner's family] asking if they had seen petitioner and where he had fled, the individuals told Officer Nelson to leave. The murder weapon, the knife, was never found.[4] (R. 86-98, 105, 108, 115-25, 154-58, 160-61).[5]

Petitioner was subsequently arrested on March 21, 2011 and charged with attempted murder.[6] He was interviewed by police. Petitioner claimed the victim, Cynthia, came to the apartment with a knife and attempted to stab him, whereupon he used, for lack of a better word, a martial arts move to block the attempted stab, which resulted in the victim stabbing herself in the face / neck with the knife. Petitioner asserted that as the victim came at him with her knife, he side-stepped her and pushed her elbow up and she stabbed herself with the knife still in her hand. (R. 95-104). Investigator Daniel Litchfield testified that petitioner stated as follows:

> He [petitioner] told us he was there. He had an altercation, a verbal argument with Cynthia Nelson. During this argument, he stated that Cynthia Nelson pulled something shiny and silver out of her pocket, went towards him, and he stepped to the side and did a - - for lack of a better term, a martial arts move, pushing her elbow up, causing her to stab herself in the throat.

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[4] Police did find a steak knife in the kitchen sink, and a steak knife handle in the garbage can; however, S.L.E.D. determined those two (2) items to be of no evidentiary value. (R. 95-98).

[5] Police interviewed the victim's daughter, Akera, at the scene, and she gave police a statement regarding what had occurred. Petitioner's sister, Shareema, would not give police a statement. (R. 67, 74, 91-92, 110).

[6] The victim died later that day and the charge was upgraded to murder. (R. 95-104, 110-25).

Q: Now, did he physically show you how this occurred?

A: Yes, sir.

OFFICER LITCHFIELD: Be okay, Judge?

THE COURT: Sure.

A: Now, mind you, he was handcuffed, but he said he was standing there. She reached into her pocket, and when she went towards him, he said he did this and this. In other words, her arm went by him and he pushed the arm and she stabbed herself in the neck. That was his statement.

(R. 99, ln. 22 - p. 100, ln. 15). Investigator Litchfield further testified petitioner admitted he and the victim exchanged words before she was killed. (R. 100). And, petitioner was confronted with what Ms. Chester had related he had said at the wake before Cynthia's murder. Investigator Litchfield related petitioner denied he had ever threatened the victim before, but admitted that he and the victim had argued before and they did not like each other. (R. 101). Investigator Litchfield further testified that police interviewed others regarding Cynthia's death, but they were unable to find anyone to corroborate petitioner's claim that Cynthia was the aggressor in the incident. (R. 101).[7]

At the close of the trial, based on the evidence, Judge Mullen charged the jury on the crimes of murder and the lesser included offense of voluntary manslaughter. The trial judge also charged the jury on the complete defense of self-defense. Judge Mullen also instructed the jury that they could return a verdict of not guilty if the State failed to meet their burden of proof. The trial judge did not charge the jury on the *offense of* involuntary manslaughter or the *defense of*

[7]Petitioner did not testify at trial. After the State rested, petitioner presented no evidence. (R. 138). Akera also testified that, prior to trial, petitioner attempted to persuade her to give false testimony that he was trying to stab her, Akera, and Akera's mother jumped between them and was accidentally stabbed. Akera refused to testify falsely for petitioner. (R. 91-92).

accident finding they were not applicable under either the factual scenario testified to by the State or petitioner's version of events. (R. 134-36, 138-54).[8] On appeal, petitioner challenges the trial judge's declining to instruct the jury on involuntary manslaughter.

ARGUMENT

Judge Mullen did not err in declining to charge involuntary manslaughter, where taking the evidence in the light most favorable to petitioner, petitioner was not entitled to such an instruction; furthermore, the lack of such an instruction was harmless on this record.

At trial, given the evidence in the record, Judge Mullen appropriately charged the jury on the defense of self-defense. Petitioner asserts on appeal that Judge Mullen erred in refusing to charge the jury on *involuntary* manslaughter. Petitioner is wrong. Judge Mullen did not err in refusing to instruct the jury on involuntary manslaughter.

What Occurred Below

The charge conference took place over the last two (2) days of trial. (R. 134-36, 138-54). Petitioner requested a charge of involuntary manslaughter arguing the jury could find he acted recklessly or negligently while acting in self-defense.[9] Petitioner's counsel eventually **admitted his request for an involuntary manslaughter instruction was based on the fact that the trial judge was going to instruct the jury on murder, voluntary manslaughter, and not guilty**

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[8]Petitioner admitted below the defense of accident was not applicable to the facts of this case and withdrew his request for a charge on the defense of accident. (R. 145, ll. 9-25).

[9]Petitioner's counsel argued, although he did not know, there might have been a different defensive move his client could have used rather than the one described by petitioner to police; therefore, he was recklessly acting in self-defense and was entitled to an involuntary manslaughter charge. (R. 150, ll. 1-8). However, there was no testimony at trial that there was some alternative defensive move or maneuver petitioner could have used. (R. 134-200). Further, there was no testimony petitioner had any formal training or was an expert in martial arts. In fact, the only testimony was petitioner's father, who was a black belt, had taught him some martial arts moves.

(based on self-defense) and counsel believed the jury would compromise on voluntary manslaughter if they were not given a 4th option of involuntary manslaughter as well. (R. 147, ll. 5-12, R. 150, ll. 16-22). The Solicitor pointed out to the Court that jury instructions must be based on the evidence in the record and not on defense counsel's strategic concerns about what the jury might or might not do with only three (3) choices. (R. 152, ln. 20 - 153, ln. 3). Judge Mullen even recessed overnight so she could study the matter further and so counsel could provide her with any authority supporting a charge on involuntary manslaughter. The following day, after receiving authority, reviewing the same, conducting further research, and hearing further argument on the issue, Judge Mullen determined charging involuntary manslaughter on this record would not be appropriate. (R. 148-54). Judge Mullen thereafter instructed the jury on murder, voluntary manslaughter, self-defense, and not guilty. As previously stated, the jury convicted petitioner of murder.

The Lack of Merit of this Issue

Standard of Review

The conduct of a criminal trial is left largely to the discretion of the trial judge, and this Court will not interfere unless the rights of the petitioner were prejudiced. State v. Bridges, 278 S.C. 447, 448, 298 S.E.2d 212, 212 (1982). Therefore, this Court reviews errors of law only and is bound by the trial court's factual determinations unless they are clearly erroneous. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). In criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied. State v. Rye, 375 S.C. 119, 123, 651 S.E.2d 321, 323

(2007). If the instructions given to the jury afford the proper test for determining the issues, the failure to give one side's requested instructions is not prejudicial. State v. Hughey, 339 S. C. 439, 452, 529 S.E.2, 721, 728 (2000).

Jury Charges

"The law to be charged must be determined from the evidence presented at trial." State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 512 (2000). In determining whether the evidence requires a charge of manslaughter, the Court views the facts in the light most favorable to the defendant. State v. Byrd, 323 S.C. 319, 321, 474 S.E.2d 430, 431 (1996). For a court to refuse to charge a jury on manslaughter, there must be no evidence in the record tending to reduce the crime from murder to manslaughter. State v. Dickey, 380 S.C. 384, 669 S.E.2d 917 (Ct. App. 2008). However, "[a]n instruction should not be given unless it is justified by the evidence." State v. Moultrie, 273 S.C. 532, 534, 257 S.E.2d 730, 731 (1979). "Only the law applicable to the case should be charged to the jury." State v. Blurton, 352 S.C. 203, 208, 573 S.E.2d 802, 804 (2002). "If a jury instruction is provided that does not fit the facts of the case, it may confuse the jury." Id. Furthermore, a trial judge must be cautious in charging a lesser included offense. If a trial judge improperly charges the jury on a lesser included offense that is not supported by the facts, and the jury returns a verdict of guilty on the lesser included offense, then upon reversal of the conviction of the lesser included offense, the Double Jeopardy clause prevents retrial of the defendant on the greater offense. *See* Price v. Georgia, 398 U.S. 323 (1970); Gill v. State, 346 S.C. 209, 552 S.E.2d 26 (2001)(discussing fact that prosecution on retrial of greater offense than that for which defendant was convicted would constitute a violation of the Double Jeopardy Clause); Bozeman v. State, 307 S.C. 172, 414 S.E.2d 144 (1992)(finding trial counsel ineffective

for falsely informing defendant he could be convicted of murder on retrial if he appealed and succeeded in vacating his manslaughter conviction). This Court will not reverse the trial court's ruling regarding jury instructions unless the trial court abused its discretion. State v. Williams, 367 S.C. 192, 195, 624 S.E.2d 443, 445 (Ct. App. 2005). When the record contains no evidence to support a lesser included offense, a charge on the lesser included offense should not be given. *See* State v. Smith, 363 S.C. 111, 609 S.E.2d 528 (Ct. App. 2005), *referencing* State v. Cooley, 342 S.C. 63, 67-68, 536 S.E.2d 666, 668-69 (2000).

Analysis

At trial, there were two (2) versions of what occurred between the petitioner and the victim. The State's version was petitioner had threatened the victim the night before, had stalked her, and on the date in question, petitioner stabbed her one (1) time in the face/neck area with the knife he had in his possession when the victim and her daughter arrived at his sister's residence. Petitioner's version was that *the victim* brought the knife to his sister's apartment, tried to stab him with it, and he used a defensive move and blocked or pushed away the knife thrust resulting in the victim stabbing herself with the knife she always possessed. In the State's version of how the crime occurred, petitioner always had the knife and stabbed the victim intentionally with it. In petitioner's version of what occurred, the victim always had the knife, and he blocked it or pushed it away while acting in self-defense, and she stabbed herself. As a result, petitioner was not entitled to a charge of involuntary manslaughter.

While self-defense and involuntary manslaughter are not mutually exclusive, as Judge Mullen correctly found, the facts of this case did not entitle petitioner to an instruction on involuntary manslaughter. According to the State's evidence, petitioner was guilty of murder.

According to petitioner's version of events, petitioner was entitled to an acquittal under the theory of self-defense. However, under neither version of events was petitioner entitled to an instruction on involuntary manslaughter.

These facts would not entitle petitioner to an instruction on involuntary manslaughter under South Carolina law and only supported murder, voluntary manslaughter, or self-defense. State v. Wharton, 381 S.C. 209, 672 S.E.2d 786 (2009); State v. Reese, 370 S.C. 31, 36, 633 S.E.2d 898, 900-01 (2006), *overruled on other grounds by* State v. Belcher, 385 S.C. 597, 685 S.E2d 802 (2009); State v. Cabrera-Pena, 361 S.C. 372, 381, 605 S.E.2d 522, 526-27 (2004)(finding defendant is not entitled to a charge on involuntary manslaughter where no evidence exists to support the charge). Under South Carolina law, involuntary manslaughter is the 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. State v. Smith, 391 S.C. 408, 706 S.E.2d 12 (2011); State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996). There is nothing in the record which would have entitled petitioner to an instruction on involuntary manslaughter because he does not fit in either of these two (2) categories.

Petitioner was not entitled to an involuntary manslaughter instruction under the State's case

First, under the State's version, petitioner intentionally stabbed the victim with a knife that he had in his possession when the victim and her daughter arrived at the apartment. State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007)(defendant not entitled to involuntary manslaughter instruction where after altercation with his grandfather he obtained shotgun, returned to his grandparents room and shot them, even though he claimed involuntary intoxication from Zoloft);

Cabrera-Pena, 361 S.C. at 381, 605 S.E.2d at 526 (involuntary manslaughter instruction not warranted where accused was "engaged in unlawful, felonious and harmful conduct" at the time of the incident);[10] State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994)(trial court did not err in refusing to instruct on involuntary manslaughter **where defendant wielded knife in an intentional manner, because the intentional use of a dangerous instrumentality does not support the allegation of mere criminal negligence**); Bozeman v. State, 307 S.C. 172, 177, 414 S.E.2d 144, 147 (1992)(no evidence of mere criminal negligence in use of a dangerous instrumentality because the defendant intentionally fired his weapon);[11] Gibson v. State, 390 S.C. 347, 701 S.E.2d 766 (Ct. App. 2010), *cert. granted* March 22, 2012 ("the essence of involuntary manslaughter is the involuntary nature of the killing" and because co-defendant admitted he voluntarily and intentionally fired his weapon, the trial court properly denied the instruction on involuntary manslaughter to accomplice defendant); State v. Pickens, 320 S.C. 528, 466 S.E.2d 364 (1996)(holding where defendant admitted he intentionally shot his gun, contending he was acting recklessly but lawfully in self-defense, involuntary manslaughter

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[10]*See also* State v. Cooney, 320 S.C. 107, 112, 463 S.E.2d 597, 600 (1995)("no error in refusal to charge involuntary manslaughter when the defendant admitted intentionally firing the gun, but claimed only he meant to shoot over the victim's head"); Harris v. State, 354 S.C. 382, 581 S.E.2d 154 (2003)(PCR Court erred in granting relief because defendant was not entitled to involuntary manslaughter instruction where he admitted he intentionally fired gun, but meant to only fire warning shots); State v. Craig, 267 S.C. 262, 269, 227 S.E.2d 306, 310 (1976) (involuntary manslaughter charge not warranted where defendant intentionally fired his shotgun but claimed he meant to shoot over the victim's head); Douglas v. State, 322 S.C. 67, 74, 504 S.E.2d 307, 310 (1998)(involuntary manslaughter charge not warranted where defendant admitted he intentionally fired gun into a crowd in self-defense despite testimony that defendant had been rushed by a group of people during a fight).

[11]Under South Carolina law, a deadly weapon is generally defined as any article, instrument, or substance which is likely to produce death or great bodily harm. State v. Davis, 374 S.C. 581, 649 S.E.2d 132 (Ct. App. 2007), *referencing* State v. Bennett, 328 S.C. 251, 262, 493 S.E.2d 845, 850-51 (1997). A knife is a deadly weapon or dangerous instrumentality. State v. Smith, 315 S.C. 647, 446 S.E.2d 411 (1994).

charge was not warranted); State v. Morris, 307 S.C. 480, 483-84, 415 S.E.2d 819, 821-22 (Ct. App. 1991)(noting that under involuntary manslaughter, the act must be unintentional and defendant intentionally shot his gun though he claimed self-defense); State v. Light, 378 S.C. 641, 664 S.E.2d 465 (2008)(finding defendant had lawfully armed himself in self defense and was entitled to instruction on involuntary manslaughter where there was evidence the gun *unintentionally* discharged); State v. Brayboy, 387 S.C. at 181-82, 691 S.E.2d at 486 (holding although unlawful to point and present a firearm, when defendant lawfully armed himself in self defense his failure to immediately disarm himself when the threat subsided did not amount to unlawful pointing and presenting a firearm and evidence suggesting gun *accidentally* discharged was sufficient to warrant instruction on involuntary manslaughter). *See also* State v. Tyler, 348 S.C. 526, 560 S.E.2d 888 (2002)("An unintentional killing resulting from an unlawful assault and battery, **not of a character of itself to cause death**, is involuntary manslaughter...") *quoting* State v. Chatman, 336 S.C. 149, 152-53, 519 S.E.2d 100, 101 (1999), *citing* C.J.S. Homicide Section 40 (1991), *other citations omitted* (emphasis added).[12] State v. Davis, 374 S.C. 581, 649 S.E.2d 132 (Ct. App. 2007)(defendant was not entitled to a jury instruction on involuntary manslaughter where striking someone in the head with a five-pound sledgehammer would naturally tend to cause death or great bodily injury *and* there was no evidence defendant handled sledgehammer with reckless disregard for the safety of others but *intentionally struck the victim on the head* with the weapon). Under the State's version of what occurred, petitioner would not

[12]*See also* Smith v. Padula, 444 F.Supp. 531 (D.S.C. 2006)(habeas corpus petitioner failed to show S.C. Supreme Court unreasonably applied United States Supreme Court precedent in reversing PCR Court's grant of relief on ineffective assistance of counsel for failing to preserve trial judge's refusal to charge involuntary manslaughter where S.C. Supreme Court determined Petitioner was not entitled to involuntary manslaughter instruction under S.C. law).

be entitled to an instruction on involuntary manslaughter.

Petitioner was not entitled to an involuntary manslaughter instruction under his version

Nor was petitioner entitled to an involuntary manslaughter instruction under his version of events. Under petitioner's version of events, the victim brought the knife with her to the apartment; she removed the knife from her pocket; she attempted to stab him with the knife; he blocked or pushed away her stabbing thrust with his hand, and the victim accidentally stabbed herself in the neck with the knife that was still in her hand.[13] Under petitioner's version of events, he was not acting recklessly but in self-defense. If the jury believed petitioner's version of events, he was entitled to an acquittal but would not have been entitled to be convicted of the

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[13]Contrary to petitioner's assertion on appeal, the record reveals **there was no struggle over the knife**. According to petitioner's version of events, the victim always had the knife in her hand and in her complete possession. Petitioner simply sidestepped the victim and blocked her stabbing thrust by pushing her arm [or elbow] resulting in the victim stabbing herself. Petitioner never had his hands on the knife, and Petitioner never even had his hands on the victim's hand which held the knife. If petitioner's version is true, he should not be subject to three (3) years in prison for such lawful and non-reckless conduct. Further, those cases cited by petitioner on appeal are not apposite to the facts of this case. Both Tisdale v. State, 378 S.C.122, 125, 662 S.E.2d 410 (2008) and Casey v. State, 305 S.C. 445, 447, 409 S.E.2d 391 (1991) involve *the struggle over a firearm* that allegedly accidentally discharged. Further, a case not cited by petitioner, State v. Gorey, 235 S.C. 301, 111 S.E.2d 560 (1959), is not apposite or helpful to petitioner. In Gorey, the Court found involuntary manslaughter was warranted where the testimony showed the defendant was negligent in voluntarily engaging in a friendly tussle with a friend while he, *the defendant*, had an open pocket knife in his, *the defendant's*, hand which ultimately ended up causing the victim's death. Further, Gorey was under the old law in which one could be convicted of involuntary manslaughter based on simple negligence not recklessness. Additionally, State v. Chatman, 336 S.C. 149, 519 S.E.2d 100 (1999), which petitioner cites extensively, is not apposite, because in Chatman the defendant argued, and this Court agreed, he fit under the "unlawful activity" definition of involuntary manslaughter. In the present case, petitioner argues he falls under the "lawful activity" definition of involuntary manslaughter, not the unlawful activity definition. And, in State v. Light, the appellant had taken a gun away from his girlfriend, stumbled backwards with the firearm in his hand, and he claimed it accidentally discharged killing her. The Court found he could have recklessly handled the firearm. The facts of this case are simply not the same.

offense of involuntary manslaughter.[14] As a result, petitioner *was* entitled to an instruction on the absolute defense of self-defense, which he received, *but not* a jury instruction on involuntary manslaughter.

Harmless Error

Further, even assuming *arguendo* petitioner was somehow entitled to an involuntary manslaughter instruction, the failure to do so was harmless under the particular facts of this case. State v. Middleton, 407 S.C. 312, 755 S.E.2d 432 (2014)(finding harmless error analysis is appropriate for the failure to charge a lesser included offense); State v. Battle, 408 S.C. 109, 757 S.E.2d 737 (Ct. App. 2014)(same). "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.'" Middleton, *supra*, *quoting* State v. Kerr, 330 S.C. 132, 144-45, 498 S.E.2d 212, 218 (Ct. App. 1998). "In making a harmless error analysis, our inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered." Id., *citation omitted.* "Thus, whether or not the error was harmless is a fact intensive inquiry." Id.

A fact intensive inquiry shows the trial court's not charging involuntary manslaughter did not contribute to the verdict. The evidence presented by the State showed Petitioner had stalked the victim the day preceding her murder and intended to kill her on that occasion but was

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[14]Another way to appropriately analyze this issue is to imagine the State had requested an involuntary manslaughter instruction, petitioner had objected, the jury was instructed on the same, the jury had returned a verdict of involuntary manslaughter, and petitioner had been sentenced to prison. On appeal, petitioner would have been entitled to vacation of his conviction of involuntary manslaughter because under his version of what occurred he was acting in complete self-defense and was not acting with recklessness by sidestepping and blocking a knife thrust by the victim resulting in her stabbing herself with her own knife. This appeal has no merit. The petition for writ of certiorari must be denied.

interrupted by the victim calling the police and the police arriving at the victim's apartment. On the night of March 19, 2011, the victim Cynthia Nelson ("Cynthia") called police in reference to petitioner being outside the front door of her apartment trying to break in. **(R. 71-72).** Cynthia was outside her home in her car when she witnessed petitioner at the front door of her apartment and called police using her cell phone. **(R. 17-23, 71-73).** Ridgeland City Police Officers Kevin Smith and Rob Nelson responded to the scene; however, by the time they arrived petitioner was gone. **(R. 71-72).** When petitioner realized the victim had called police, he threw away the knife he was carrying and hid in a nearby garbage dumpster. **(R. 72, 75-85).** At Cynthia's request, Officer Smith searched her home to make sure petitioner was not in her home and it was safe for Cynthia to enter. **(R. 72-73).** Officer Smith eventually talked to petitioner on the phone, and petitioner admitted only that he had called Cynthia. **(R. 72).**

However, the following day, March 20, 2011, Monique Chester, a resident of Baytree Apartments, was attending a wake at a residence located behind her apartment complex. The wake was for a relative of petitioner. While there, Ms. Chester overheard petitioner telling a fellow family member that he had tried to kill Cynthia the night before, but she had called the police. Petitioner also stated he had hid in a dumpster to avoid being arrested by police, and he had discarded the knife. And, petitioner stated that the next time he saw Cynthia *he was going to stab her.* **(R. 75-85).**

That evening, May 20th, petitioner asked the victim's daughter to bring their child to him at his sister's apartment. When the victim's daughter entered the apartment, she saw a knife in petitioner's hand as he got up off the couch. Petitioner then began to fuss at the victim's daughter for allowing the victim to come between them, i.e. between petitioner and the victim's

daughter. **(R. 86-98, 105, 108, 115-25, 154-58, 160-61).**

The victim then entered the apartment, and told petitioner she was not going to allow petitioner to beat her daughter anymore. Petitioner was on probation for criminally assaulting the victim's daughter [CDV 2nd offense]. Petitioner and the victim then began fussing. Petitioner then struck the victim just below the ear along the jaw line with a knife that penetrated the victim's neck severing an artery. The victim immediately collapsed on the couch unable to speak, with blood pouring from the stab wound. The victim's daughter then went into the kitchen, obtained a mop handle, and began hitting petitioner with the mop handle because petitioner had assaulted her mother. When she stopped, petitioner then, and only then, tried to stop the blood from pouring from the victim's neck. **(R. 86-98, 105, 106, 108, 115-25, 58-62, 64-65).**

When petitioner's sister called 911, she admitted **someone had stabbed the victim**. (State's Ex. 1, 1st call). When asked by the 911 operator asked who stabbed the victim, petitioner's sister would not answer. Petitioner's sister could be heard in the 911 call (State's Ex. 1, 1st call) telling someone in her apartment that they needed to leave immediately. Petitioner fled from the apartment and behind the apartment complex where the wake had been held the previous day. Petitioner's sister told the 911 operator she needed to step outside of her apartment. When the 911 operator asked her who stabbed the victim, petitioner's sister became belligerent with the 911 operator. When police arrived, petitioner's sister would not give police a statement regarding what had occurred. **(State's Ex. 1, 1st call, R. 38-44, 110, State's Ex. 2, Video, R. 140).**

The victim's daughter, however, called 911 and informed the 911 operator that it was

petitioner who struck the victim before she collapsed. The victim's daughter admitted she could not see what was in petitioner's hand when he struck the victim, but her mother collapsed after petitioner struck her and her mother was bleeding. The victim's daughter testified consistent with her 911 call. She testified when she entered the residence petitioner had a knife in his hand, and became belligerent with her regarding her mother. When her mother entered the apartment, the victim's daughter could no longer see the knife, but she saw petitioner strike her mother along the face/neck area with his closed fist, and then her mother collapsed. She followed petitioner briefly when he fled from the apartment complex, and returned and fully cooperated with police, including giving a statement regarding what had occurred during the murder and related to police how petitioner had attacked her mother. The victim's daughter also testified that, prior to trial, petitioner attempted to persuade her to give false testimony that he was trying to stab her, Akera, and Akera's mother [the victim] jumped between them and was accidentally stabbed. Akera refused to testify falsely for petitioner. **(R. 86-98, State's Ex. 1, 2nd call, R. 38-44, 74, State's Ex. 2, Video, 69-71, 67, 91-92).**

Neither the victim's daughter nor petitioner's sister saw petitioner and Cynthia wrestling or tussling before petitioner struck Cynthia. They were just arguing. **(R. 86-98, 105-40).**

In his statement to police, petitioner admitted he and the victim exchanged words before the victim was killed. Petitioner also admitted he and the victim had had arguments in the past, and that he did not like the victim. **(R. 100, 101).**

The stab wound petitioner inflicted penetrated the victim's neck approximately two (2) and one half (½) inches and was stopped by a bone in her neck. The wound was downward,

toward the spinal column, and toward the back of her neck.[15] The knife wound severed the artery in Cynthia's neck which carries blood from the heart to the brain, resulting in a severe loss of blood, cardiac arrest, and eventual death. **(R. 44-59, 110-25).**

Petitioner's version, which was from his statement to police, was he acted in self-defense. Petitioner claimed the victim brought the knife to the apartment. She armed herself with it. She thrust it at him. He dodged or evaded the stab thrust while simultaneously pushing her elbow up or away as her arm passed. Petitioner claimed the victim stabbed herself. **(R. 95-104, specifically p. 99, ln. 22 - p. 100, ln. 15).** The jury obviously did not believe Petitioner's version of events as they were appropriately charged on self-defense; they heard his testimony, and they found petitioner guilty of murder beyond a reasonable doubt. **(R. 184-88, 193-97).**

Given the evidence *in this particular case*, it is clear the failure to charge involuntary manslaughter was harmless beyond a reasonable doubt. State v. Middleton, 407 S.C. 312, 755 S.E.2d 432 (2014)(finding failure to charge lesser included offense was harmless after a fact specific inquiry); *see* State v. Battle, 408 S.C. 109, 757 S.E.2d 737 (Ct. App. 2014)(finding failure to charge lesser included offense was not harmless after a fact specific inquiry in that particular case).

[15] Petitioner admits in his Petition that his trial counsel's attempt to "re-create" the incident [according to petitioner's version] with the pathologist acting as the victim included manipulating the pathologist's forearm *and* wrist in order to accomplish the injury that the victim suffered to her neck. (Petition for Writ of Certiorari, p. 7, ll. 3-8). Petitioner did not tell police he manipulated the victim's forearm and wrist. (R. 95-104). He simply acted in self-defense.

CONCLUSION

For the above stated reasons, petitioner's conviction and sentence for the murder of Cynthia Nelson must be affirmed. The petition for writ of certiorari should be denied.

Respectfully submitted,

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Anthony Mabry

July 31, 2014

CERTIFICATE OF SERVICE

I, Anthony Mabry, hereby certify that I have served the ***Return to Petition for Writ of Certiorari*** in the foregoing action by depositing copies in the Interagency Mail to Benjamin J. Tripp, Appellate Defender, Division of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, SC 29201 this 31st day of July, 2014.

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