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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Saluda County

Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

STEVEN OTTS,

APPELLANT

APPELLATE CASE NO. 2014-000274

FINAL BRIEF OF APPELLANT

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II. Did the trial judge err in failing to tailor the self-defense instruction to the evidence presented, including evaluating the deceased's intoxication and size to determine the existence of a threat, the reasonableness of the belief of the threat posed, and the amount of force necessary to repel the threat?

III. Did the trial judge err in instructing the jury on the law of defense of others where the instruction served only to confuse the jury because Appellant was not asserting defense of others as a defense to the charged offense and the instruction concerned the conduct of the deceased?

IV. Did the trial judge err in failing to provide the specific and clarifying instruction to the jury that an unintentional killing resulting from an unlawful assault and battery not of a character of itself to cause death is involuntary manslaughter?

STATEMENT OF THE CASE

On May 4, 2011, a Saluda County grand jury indicted Appellant for murder (2011-GS-41-288). R. 429 - 430. The state, represented by Ervin J. Maye and H. Franklin Young, called the case for trial on July 22, 2013 before the Honorable Thomas A. Russo and a jury. Tristan M. Shaffer and Catherine T. Johnson represented Appellant. R. 1. The jury found Appellant guilty as charged. R. 409, lines 9-12. Judge Russo sentenced Appellant to thirty years' imprisonment. R. 411, lines 19-25; R. 431. Appellant filed a written motion for new trial on August 3, 2013. R. 421. By an order filed on January 30, 2014, Judge Russo denied the motion for new trial. R. 428.

Appellant filed a timely notice of appeal. This brief follows.

STATEMENT OF FACTS

On January 27, 2011, Lakeisha Stallworth, Antonio Valentine, Saca Jawea Coleman, and Appellant were together in Ridge Springs, South Carolina. R. 23, line 21 – R. 26, line 6. Although there was some dispute concerning how long the foursome had been together and their activities, the evidence indicated at least some of them had been drinking alcohol. R. 29, line 24 – R. 30, line 4; R. 40, lines 2-24; R. 201, lines 2-17; R. 203, lines 4-8; R. 174, lines 1-10. Traveling in Valentine's truck, the four went to Orchard Park Apartments, where Appellant resided.[1] R. 27, lines 12-22; R. 174, line 25 – R. 175, line 9; R. 202, lines 16-22. Upon their arrival, Appellant and his girlfriend, Coleman, began arguing because Appellant wanted Coleman to go home with him, but Coleman wanted to continue partying. R. 30, lines 15-22; R. 38, lines 6-7: R. 175, lines 17-21; R. 184, lines 18-25; R. 190, lines 5-21; R. 191, lines 7-16; R. 192, lines 2-16; R. 203, lines 11-21.

Stallworth claimed Appellant was "kind of aggressive" with Coleman while the foursome remained in the truck. R. 30, line 24. Stallworth further claimed that Appellant was "pulling" on Coleman to get her out of the truck. R. 31, lines 8-23. According to Stallworth, Appellant pulled Coleman's coat over her head, leaving her only in a bra because she was not wearing a shirt under her coat. R. 32, lines 2-11; R. 42, lines 12-19.[2] Appellant then got out of the truck and walked to Coleman's side, but Coleman had locked the door. R. 32, lines 15-24. Stallworth claimed Valentine then instructed Coleman and Stallworth to get out of his truck and they did; however, Stallworth was forced to admit that

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[1] Appellant resided with Jane Burno and Charles Rayford, who were the aunt and uncle of Hydrick Burno, the deceased. R. 199, lines 15-18.

[2] Coleman contradicted Stallworth by explaining that she was wearing a shirt, was not wearing a jacket, and Appellant did not pull off her clothing. R. 175, line 22 – R. 176, line 8.

she had not been truthful with the jury regarding this testimony. In fact, Stallworth had informed the police that she had remained in Valentine's truck until after Appellant struck Burno. Stallworth had lied to the jury because Valentine did not want to be involved. R. 33, lines 2-10; R. 49, line 14 – R. 52, line 11. Coleman and Appellant continued to argue outside the truck. R. 33, lines 21-25. Hydrick Burno, a mutual friend and resident at the apartment complex, intervened. Burno was highly intoxicated. R. 33, lines 18-20; R. 34, lines 3-13; R. 133, lines 7-18.[3]

Angela Creech, another resident at the apartment complex, heard noise and yelling outside of her apartment. R. 59, lines 4-8; R. 68, lines 19-21. At the instigation of others, Creech, who had "a couple of beers or something," walked outside her apartment and upstairs to observe. R. 59, lines 11-24; R. 69, lines 8; R. 72, lines 8-10. Creech claimed she could see Appellant and Coleman "arguing and tussling inside the vehicle." R. 61, lines 3-7. She further claimed that from the second story balcony, she could hear "licks" inside the moving car. R. 61, line 23 – R. 62, line 4; R. 68, lines 22-25; R. 69, lines 6-18. According to Creech, Appellant was pulling on Coleman to get her out of the vehicle and the two were "tussling and fighting." R. 62, lines 20-24.

Coleman testified that when the foursome arrived at Orchard Apartments, Appellant wanted her to get out of the truck, but she was not ready to go because she had not "finished partying yet." R. 175, lines 10-13. She admitted the two argued, but she emphatically denied that Appellant assaulted her in any way. R. 175, lines 17-21; R. 184, lines 18-25; R. 190, lines 5-21; R. 191, lines 7-16; R. 192, lines 2-16. Appellant also denied hitting

[3] When he was admitted to the hospital, his blood alcohol level was 0.274. At the time of the autopsy, Burno's blood alcohol level was 0.15. R. 133, lines 3-18.

Coleman, but he admitted the two argued. R. 203, line 13 – R. 204, line 2. When he grabbed Coleman's arm to escort her out of the truck, she jerked away and refused to exit. R. 204, lines 3-25.

Stallworth did not remember Burno putting his hands on Appellant. R. 34, lines 6-8; R. 34, lines 14-16; R. 35, lines 11-16; R. 37, lines 8-9; R, 43, lines 14-22. However, Creech testified that Burno put his hand around Appellant and held him in a "bear hug." Further, Creech claimed Appellant said to Burno, "When you let me go, I'm going to knock your punk ass out." R. 63, lines 4-11; R. 74, lines 6-8. Additionally, Coleman testified that Burno, who was significantly larger than Appellant, "kept grabbing" Appellant. R. 177, lines 3-13. She heard Appellant tell Burno that if Burno did not let him go, he was going to hit him, but she did not see Appellant hit Burno because of her location. R. 177, lines 14-24. Appellant also testified that Burno, who was obviously intoxicated, was grabbing him and pulling him. R. 207, line 5; R. 208, lines 12-22. Then, Burno grabbed Appellant in a "bear hug" and carried him away from the truck. R. 207, lines 8-23. Appellant admitted telling Burno he was going to hit him if he did not let him go. R. 209, lines 2-14. When Appellant wiggled from Burno's bear hug, he walked back to the truck. R. 209, line 17. Burno grabbed Appellant again, ripping his coat. Appellant turned and struck Burno once to get away from him. R. 210, line 6 – R. 211, line 2; R. 227, lines 13-25. Appellant never meant to hurt Burno. R. 211, lines 15-20; R. 228, lines 1-2.

Everyone, including Appellant, agreed that Appellant hit Burno and Burno fell to the ground unconscious. R. 34, lines 1-5; R. 63, lines 13-16. Everyone also agreed that Appellant was surprised that Burno was knocked out. In disbelief of Burno's actual injuries, Appellant instructed Burno to "get up" and "stop playing." R. 36, lines 5-9; R. 44, lines 5-

18; R. 64, lines 11-17; R. 181, lines 17-18; R. 212, line 5 – R. 213, line 8. Thereafter, Appellant left the area. R. 36, lines 12-19; R. 65, lines 20-24; R. 181, line 18; R. 215, lines 15-16.

When the police and emergency services arrived at the apartment complex, Burno was awake and sitting on the curb. He was swaying and "a little confused." Due to strong smell of alcohol on Burno, the medical personnel were unsure if the swaying and confusion were the result of the injury or intoxication. R. 81, lines 11-13; R. 82, lines 12-24; R. 155, lines 13-18; R. 162, lines 12-20. However, during the transport of Burno to Lexington Medical Center, Burno's behavior changed – he became combative and uncooperative. Burno also showed more persistent signs of confusion leading the medical personnel to believe he had suffered a more serious head injury than initially thought. R. 85, line 10 – R. 86, line 21.

Shortly after his admission to the hospital on January 27, 2011, Burno died. R. 101, lines 18-23. According to the pathologist, Burno died from brain herniation due to cerebral edema, which was caused by blunt-force trauma to the left side of Burno's head. R. 117, line 20 – R. 118, line 3. The pathologist was clear that Burno's death was the result of the blow to the left side of his head and not the injury he suffered when he fell to the ground. R. 129, lines 8-25. Appellant stipulated to the cause of death as well. R. 121, line 19 – R. 122, line 6. Further, the pathologist testified that Burno suffered only two blows to the head, one caused injury to the left side and one caused injury to the back when he fell to the ground. R. 130, line 10-13.

ARGUMENT

I. The trial judge erred in failing to direct a verdict of acquittal in Appellant's favor where the state failed to present substantial circumstantial evidence of malice, a necessary element of murder.

Relevant facts

At the conclusion of the prosecution's case, Appellant moved for a directed verdict based upon the prosecution's failure to present any direct or substantial circumstantial evidence of malice. R. 143, lines 5-7; R. 143, lines 16-20. The trial judge denied the motion: "And in this case there is evidence in the record, depending on how the jury will view that evidence, regarding comments allegedly made by the defendant while this process was going on and whether the jury believes those - - those statements or - - or what weight they give to those statements is certainly, I think, a jury issue." R. 143, lines 8-12; R. 143, line 21 – R. 144, line 9.

At the conclusion of the defense's case, Appellant renewed his motion for a directed verdict based on the lack of evidence of malice. R. 266, lines 23-25. The trial judge again denied the motion, finding "it's a question of fact for the jury to decide, based on the testimony regarding what - - what - - what may have been - - what allegedly had been said, whether they believe certain witnesses versus the other witnesses." R. 267, lines 1-8.

Discussion

A defendant is entitled to a directed verdict when the prosecution fails to provide evidence of the offense charged. State v. Brown, 103 S.C. 437, 88 S.E. 21 (1916); State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006); State v. McHoney, 344 S.C. 85, 97 544 S.E.2d 30, 36 (2001). Only "[i]f there is any direct evidence or any substantial

circumstantial evidence reasonably tending to prove the guilt of the accused," the trial judge may deny the motion for directed verdict. State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001); State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000); State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000).

When the prosecution relies exclusively on circumstantial evidence, the trial judge must direct a verdict in the defendant's favor unless there is any substantial circumstantial evidence which reasonably tends to prove the guilt of the defendant or from which his guilt may be fairly and logically deduced. State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011); State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000). Likewise, a directed verdict is appropriate when the evidence produced "merely raises a suspicion the accused is guilty." Lollis, 343 S.C. at 584, 541 S.E.2d at 256; State v. Arnold, 361 S.C. 386, 389-390, 605 S.E.2d 529, 531 (2004); State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 451-452 (1984); State v. Muhammed, 338 S.C. 22, 524 S.E.2d 637 (Ct. App. 1999). Our courts define suspicion as "a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." Lollis, 343 S.C. at 584, 541 S.E.2d at 256; State v. Hyder, 242 S.C. 372, 131 S.E.2d 96 (1963).

Murder is "the killing of any person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10. "Malice has been defined as the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong." State v. Johnson, 291 S.C. 127, 128, 352 S.E.2d 480, 481 (1987); see also Tate v. State, 351 S.C. 418, 426, 570 S.E.2d 522, 527 (2002). The Supreme Court of Pennsylvania held that death resulting from a single blow where the parties were approximately equal in size and had been drinking together for hours was insufficient to warrant the inference of legal malice.

Commonwealth v. Thomas, 594 A.2d 300, 303 (Pa. 1991); see also Commonwealth v. MacArthur, 629 A.2d 166, 169 (Pa. Super. Ct. 1993)(finding a single push following a verbal and physical confrontation insufficient to support a finding of malice); Pine v. People, 455 P.2d 868, 869 (Colo.1969)(explaining "[i]t is quite true that ordinarily a mere blow with the fist does not imply malice or an intent to kill").

The state was required to present direct or substantial circumstantial evidence that Appellant's act of punching Burno one time was done with the wrongful intent to injure Burno and with a wicked or depraved spirit intent on doing wrong. The state simply failed to present substantial circumstantial evidence of malice where Appellant struck the deceased only once with his bare fist. Appellant was not in a dispute with the Burno when Burno approached him and grabbed him. Rather, Appellant was arguing with his girlfriend, Coleman. Appellant bore no ill-will against the deceased; in fact, all of the evidence indicated the two were friends. Furthermore, Appellant was smaller than Burno. After the punch, Appellant went to the deceased in disbelief that the deceased could have suffered a serious injury resulting from the single punch. Appellant's conduct before, during, and after the single punch do not evidence a person acting with a wicked or depraved spirit intent on doing wrong.

In denying the directed verdict motion, the trial judge relied upon Creech's claim that Appellant told Burno that he was going to knock him out. However, the alleged statement failed to show Appellant acted with hatred toward Burno. At worst, the evidence demonstrated that Appellant wanted Burno to stop interfering and would strike Burno to defend himself. Quite simply, the state failed to present substantial circumstantial evidence of malice.

II. The trial judge erred in failing to tailor the self-defense instruction to the evidence presented, including evaluating the deceased's intoxication and size to determine the existence of a threat, the reasonableness of the belief of the threat posed, and the amount of force necessary to repel the threat.

Relevant facts

The undisputed evidence was that Burno was significantly larger than Appellant and Burno was highly intoxicated at the time of his death. According to the pathologist, Burno "was around 200 pounds and ... 69 inches." R. 135, lines 1-4. Coleman estimated that Burno weighed "two-something" and was approximately five-feet and eleven inches tall. R. 177, lines 9-13. Appellant testified that Burno was bigger and stronger than he. R. 207, lines 18-23.[4] The emergency medical personnel smelled alcohol on Burno when they arrived to administer aid to him. R. 81, lines 11-13; R. 82, lines 12-24; R. 155, lines 13-18; R. 162, lines 12-20. When Burno was admitted to the hospital, his blood alcohol level was 0.274. At the time of the autopsy, Burno's blood alcohol level was 0.15. R. 133, lines 3-18.

During the charge conference, Appellant requested a jury instruction on self-defense tailored to the facts and circumstances surrounding the incident and the individuals involved. R. 268, line 7 – R. 269, line 14; R. 416. Appellant asked the judge to instruct the jury that "the relative sizes, ages, and weights of the defendant and the victim may be considered in deciding the apparent or actual need for force in self-defense" and that "the

[4] The incident report described Appellant as five-feet and eight inches tall and weighing one hundred and seventy pounds. R. 413.

intoxication of the victim may be considered in deciding whether the defendant's fear of bodily injury was reasonable." R. 416.

The trial judge instructed the jury concerning self-defense; however, he failed to instruct the jury regarding Appellant's specific requests concerning consideration of the relative sizes, ages, and weights of the defendant and the victim and consideration of the victim's intoxication. After instructing the jury that "[s]elf-defense is a complete defense" and that "[t]he state has the burden of disproving self-defense by proof beyond a reasonable doubt," the judge went through the four elements of self-defense. He briefly addressed the first element that a defendant must be without fault in bringing on the difficulty. He then turned to the second and third elements regarding imminent danger and the reasonableness of believing one was in imminent danger. Concerning these elements, he instructed the jury that self-defense required the defendant to be in imminent danger of death or serious bodily injury or to believe such. R. 402, line 25 – R. 403, line 24.

He further instructed:

> If the defendant was actually in imminent danger, it must be shown that the circumstances would have warranted a person of ordinary firmness and courage to strike the fatal blow to prevent death or serious bodily injury. If the defendant believed he was in imminent danger of death or serious bodily injury, it must be shown that a reasonably prudent person of ordinary firmness and courage would have had the same belief.

R. 403, line 25 – R. 404, line 7. Next, he charged the jury that "[i]n deciding whether the defendant actually was or believed he was in imminent danger ... [the jury] should consider all the facts and the circumstances surrounding the crime, including the physical condition and the characteristics of the defendant and of the victim." R. 404, lines 8-13. Later, he instructed the jury that "[t]he defendant has the right to act on appearances even though the defendant's beliefs may be mistaken." R. 404, lines 18-19.

He completed the self-defense instruction by informing the jury of the fourth element regarding avoiding the danger and covered the limitations on the degree of force used. R. 404, line 24 – R. 405, line 15.

Discussion

The South Carolina Supreme Court has long held that a trial judge has the responsibility to craft a self-defense charge tailored to the facts of a case. State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011); State v. Fuller, 297 S.C. 440, 444-45, 377 S.E.2d 328, 331 (1989). As recognized in Fuller, there is a "body of common law self-defense" and trial judges must "consider the facts and circumstances of the case at bar in order to fashion an appropriate charge." Fuller, 297 S.C. at 443, 377 S.E.2d at 330.

In Fuller, the defendant solicited a prostitute. Id. at 441, 377 S.E.2d at 329. However, when the pair arrived at the prostitute's trailer, they discovered it was occupied. The defendant then left. Id. When the defendant later returned to the prostitute's trailer, he found a car driven by a white woman was blocking the road. Id. The defendant asked her to move her car. Id. Two men approached the defendant's car and asked him "what he was 'trying to do to that white lady.'" Id. One of the men used a racial slur and grabbed the defendant by the throat. Id. at 441, 377 S.E.2d at 329-30.

The defendant fired a warning shot allowing him to drive away. Unbeknownst to the defendant, the street was a dead end. Id. at 442, 377 S.E.2d at 330. Due to the men blocking his escape, the defendant ultimately crashed his car against a rail. Id. The two men yelled, "'we're going to take care of you.'" Id. The defendant thought he saw something shiny in one of the men's hands and fired four shots at them, killing both. Id. No gun was found on the men. Id.

The trial judge only instructed the jury on the basic elements of self-defense. Id. The Court held it was error to only give the general charge when the defendant "repeatedly requested additional charges." Id. at 443, 377 S.E.2d at 330. The Court found the trial judge erred by not giving three specific charges on self-defense that further explained the principles in the general charge. First, the trial judge failed to charge the jury that the defendant had the right to act on appearances. Id. at 443-44, 377 S.E.2d at 330-31(citing State v. Jackson, 277 S.C. 271, 87 S.E.2d 681 (1955)). Second, the trial judge failed to charge the jury that "words accompanied by hostile acts, may, depending on the circumstances, establish a plea of self-defense." Id. (citing State v. Harvey, 220 S.C. 506, 68 S.E.2d 409 (1951)). Third, the trial judge failed to charge that an individual has no duty to retreat "if by doing so he would increase his danger of being killed or suffering serious bodily injury." Id. (citing State v. Hardin, 114 S.C. 280, 103 S.E. 557 (1920)).

The South Carolina Supreme Court held a trial judge erred in failing to charge on the specific elements of self-defense that were applicable to the defendant's theory in State v. Day, 341 S.C. 410, 418, 535 S.E.2d 431, 435 (2000). As stated by the Court, "[a] self-defense charge is erroneous where the trial court fails to charge on elements of the defense which were applicable to the issues raised by the defendant." Id. The Court found the instruction given in Day incomplete because the trial judge failed to instruct the jury that the defendant had the right to judge the conduct of the deceased more harshly than otherwise because of the deceased's drug consumption. Id.; see also State v. Hendrix, 270 S.C. 653, 660-661, 244 S.E.2d 503, 507 (1978)(including the intoxication of the deceased under its analysis of the imminent peril element of self-defense and stating intoxication would

provide a basis for the defendant to judge the conduct of his adversary more harshly than otherwise).

The trial judge erred in failing to tailor the self-defense instruction to the evidence presented at trial. Burno's intoxication and size were important considerations for the jury to determine whether Appellant was in imminent danger, whether the belief was reasonable, and the amount of force necessary to repel the threat. It is reasonable to believe that a person who is intoxicated and of significant size poses a greater threat than otherwise and that greater force may be necessary to repel such a threat. The trial judge failed to guide the jury's consideration of self-defense with these specific factors, which was required to enable the jury to understand how to make a determination of the reasonableness of the threat posed by Burno.

III. The trial judge erred in instructing the jury on the law of defense of others where the instruction served only to confuse the jury because Appellant was not asserting defense of others as a defense to the charged offense and the instruction concerned the conduct of the deceased.

Relevant facts

During his opening statement, the prosecutor told the jury that the state would present evidence regarding "how Hydrick Burno went and tried to intercede on his cousin's behalf." R. 10, lines 13-14. He further stated the jury would "hear about ... the law of defense of others; about how, if there's a family member or a friend of yours and they're being attacked, that you can stand in their shoes and you can try to help them and you can try to save them and intercede." R. 10, lines 14-19. On this point, the prosecutor concluded that "Burno was trying to help his cousin, Saca Jawea Coleman, and was murdered for his troubles." R. 10, lines 20-22.

The only evidence presented in the state's case-in-chief on this point was one response from Stallworth that Burno was trying to help Coleman. R. 36, lines 20-22. Appellant called Russ Padgett, the police officer who responded to the scene, to testify as a witness. On cross-examination by the prosecutor, Padgett claimed Stallworth told him that Burno "came out to assist his cousin and to try to calm" Appellant down. R. 165, line 25 – R. 166, line 4. Padgett further claimed that "in this case [he] found that Hydrick Burno was coming out to assist his cousin" and this "factor[ed] into [his] consideration of what charge to give." Through questioning by the prosecutor, this was characterized as "coming in

defense of another person, a family member." R. 168, lines 18-24.[5] During the prosecutor's cross-examination of Coleman, the following exchange occurred concerning this point:

> Q. Because you recognize the fact that Hydrick, whether or not he was your cousin by blood or not, but somebody that you were very close to came out to try to save you that day, didn't he?
>
> A. Yes.

R. 186, lines 18-22. When the prosecutor asked Appellant if Burno "came out to help [Coleman]," Appellant responded, "I'm assuming." The prosecutor followed up by asking if Burno was acting in defense of her. Appellant answered that Burno "came out to calm us down." R. 239, lines 4-9.

The prosecutor crafted his closing arguments around the theme that Burno was defending Coleman. He told the jurors that "Burno was the only person man enough there to responsibly come out and defend her." R. 326, lines 2-3; R. 332, lines 19-20; R. 333, lines 16-19; R. 334, lines 16-18; R. 372, lines 19-23; R. 373, lines 2-4. Immediately, he discussed with the jury "the doctrine of defense of others." He characterized this as a person's "right to defend a friend or family member." He explained "a person coming to the defense of a friend or family member stands in their shoes and can exercise any rights that they have." R. 326, lines 4-11; R. 333, lines 20-21. He elaborated on this point – "The law in that case is if one comes to the assistance of his friend or relative and takes part in a difficulty in which a friend or relative is engaged, he enters the combat on the same footing as the person to whose assistance he comes and under the same legal status." R. 333, line 22 – R. 334, line 1.

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[5] The judge sustained Appellant's objection to Padgett testifying that "someone has the right to defend [his or her] family members." R. 355, lines 4-14.

He then told the jurors that a person being attacked can resist the attack and can try to stop it. According to the prosecutor, "when Hydrick Burno came out of the house there and tried to come to [Coleman's] defense, to the defense of others, he stood in her shoes." R. 326, lines 16-18; R. 334, lines 5-14; R. 383, line 24 – R. 384, line 1. He characterized Burno's conduct as coming out "to defend this woman in an appropriate and responsible fashion." R. 332, lines 21-22. Thus, the prosecutor argued, Appellant could not exercise self-defense against Burno. R. 326, lines 19-20. Furthermore, the prosecutor claimed that Appellant did not have sufficient legal provocation, as required for voluntary manslaughter, because Burno "had every right to intercede on behalf of a friend or loved one and stood in her shoes." R. 334, lines 1-4; R. 388, lines 10-14.

During the charge conference, the prosecutor requested "a defense-of-others charge." Specifically, the prosecutor requested the judge charge the jury that "[i]f one comes to the assistance of a friend or relative and takes part in a difficulty in which a friend or relative is engaged, he enters the combat on the same footing as the person whose assistance he comes and under the same legal status." R. 301, lines 3-4; R. 301, lines 14-19.

Appellant objected and argued that "defense of other[s] is a defense to a charge." Therefore, it was inapplicable to the instant matter because there was no charge against Burno, and no defense was needed. Appellant argued the charge would be confusing to the jury. Initially, the judge admitted the charge would be confusing to the jury because it was a defense, but was not being used as a defense in this case. R. 301, lines 6-13. Appellant found no reported case in South Carolina "where the state was able to get a defense based off of the victim's actions." R. 308, lines 1-7. Again, Appellant noted the confusion created in charging the jury on a defense – the defense of others – when Burno had not been charged

with any crime and no defense to his conduct was needed. R. 308, lines 8-15; R. 310, line 14 – R. 311, line 3; R. 311, line 16-21.

However, in support of the charge, the prosecutor argued it was "consistent in this case, especially if you're talking about self-defense." R. 301, line 24 – R. 302, line 1. According to the prosecutor, Burno "came to the aid" of Coleman. R. 302, lines 1-6. He then claimed that "with stand-your-ground law," Coleman "could've killed him and used deadly force." The prosecutor argued that Burno had the same legal status as Coleman. R. 302, lines 7-12.

He continued, arguing the charge was significant for two reasons. First, informing the jury that Burno was acting in defense of Coleman and "stood in her shoes" would negate the element of sufficient legal provocation required for voluntary manslaughter. Second, the charge would "counter any self-defense issues." R. 302, line 13 – R. 304, line 3. According to the prosecutor, this was a "Good Samaritan case" with an "unusual fact circumstance." R. 309, lines 3-15. Under the prosecutor's view of the facts, if Burno had killed Appellant, Burno would "be entitled to complete and total immunity under the new stand-your-ground statute." R. 309, lines 16-21. The prosecutor argued that the instruction on defense-of-others and its component about Burno standing in her shoes was "vitally important when they're trying to raise self-defense." R. 309, lines 22-25.

Specifically, the prosecutor wanted "a statement from the judge that that's the state of the law in this case." He reasoned that if Appellant were entitled to a self-defense charge, then the state was entitled to a charge on defense-of-others. He argued it would be unfair for the jury not have this information. On this point, the prosecutor stated that it was "information that a jury should have to make an informed decision, certainly where they're

being called upon to consider self-defense[b]ecause that is a total negation of the self-defense claim." He also explained that if Burno were standing in Coleman's shoes, then voluntary manslaughter was "out the window." R. 312, line 9 – R. 313, line 9.

Ultimately, the judge decided to charge the jury as requested by the prosecution. Specifically, after the trial judge instructed the jury concerning the elements of self-defense, the judge instructed the jury as follows concerning the law of defense of others in South Carolina: "Now, under South Carolina law, if one comes to the assistance of a friend or a relative and takes part in a difficulty in which a friend or a relative is engaged, he enters the combat on the same footing as the person whose assistance he comes and under the same legal status." R. 405, lines 16-20.

Discussion

Appellant is unaware of any case in South Carolina, any other state, or the federal courts, in which a trial judge instructed a jury on the defense of others to explain the conduct of a deceased individual. The only cases where the defense of others appears are where it is used as a defense to the charged offense, usually a homicide. Although this fact alone does not require reversal, it certainly indicates the rarity of a charge on defense of others being given to juries to explain the conduct of an alleged victim.

The law to be charged is determined from the evidence presented at trial. State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241, 241 (1996). "The office and purpose of instructions are to enlighten the jury and to aid them in arriving at a correct verdict. It is error to give instructions which are calculated to confuse or mislead the jury." State v. Hewitt, 205 S.C. 207, 31 S.E.2d 257, 259 (1944). "Under the theory of defense of others, one is not guilty of taking the life of an assailant who assaults a friend, relative, or bystander

if that friend, relative, or bystander would likewise have the right to take the life of the assailant in self-defense." State v. Long, 325 S.C. 59, 64, 480 S.E.2d 62, 64 (1997); see also State v. Starnes, 340 S.C. 312, 322-323, 531 S.E.2d 907, 913 (2000)(holding the defendant was not entitled to a defense of others charge where there was no evidence the defendant acted to protect a third person); Mack v. State, 348 So.2d 524, 527 (Ala. Crim. App. 1977)(holding the defendant could not assert defense of others where the person being defended was the initial aggressor and therefore at fault in bringing on the difficulty). The South Carolina Supreme Court has held that in order for the trial judge to give a defense of others instruction, there must be "some evidence adduced at trial that the defendant was indeed lawfully defending others." Douglas v. State, 332 S.C. 67, 73, 504 S.E.2d 307, 310 (1998); see also State v. Long, 325 S.C. 59, 64, 480 S.E.2d 62, 64 (1997); Bozeman v. State, 307 S.C. 172, 414 S.E.2d 144 (1992); State v. Alford, 264 S.C. 26, 212 S.E.2d 252 (1975), overruled on other grounds State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009).

When a person acts in defense of another, the person "is in the same situation and upon the same plane as those who act in defense of themselves." Hewitt, 205 S.C. at ___, 31 S.E.2d at 258. Only those facts "which excuse the killing in defense of self likewise excuse a killing in defense of [another]." Id.; see also, State v. Harvey, 110 S.C. 274, 96 S.E. 399, 400 (1918)(noting that "[w]hile a man may take life in defense of himself or another, yet the slayer, or the person in whose behalf the slayer strikes, must not only be without fault in provoking the difficulty, but there must be a necessity to kill"); State v. Norris, 253 S.C. 31, 38, 168 S.E.2d 564, 567 (1969)(holding "[t]he right of the father to defend his daughter is coextensive with the right of the daughter to defend herself").

> The right of one to justify a slaying on the ground that it was necessary in defense of another person stands upon the same plane or footing as, and is coextensive with, the right of the person to whose aid he or she goes, under the existing circumstances of the particular occasion; or as is sometimes stated, the right to justify killing in defense of another depends upon the same conditions as would be necessary to excuse such other person under the plea of self-defense.

40 Am.Jr.2d Homicide § 168 (2014). In other words, "[t]he right is commensurate with self-defense, and every fact requisite to excuse a killing in the defense of self must be present in order to excuse a killing in defense of another." Id.

The defense of others imposes the "alter ego" rule, meaning "an intervenor who used deadly force to defend a person not entitled to use deadly force himself would be held criminally liable." Marco F. Bendinelli, James T. Edsall, Defense of Others: Origins, Requirements, Limitations and Ramifications, 5 Regent U. L. Rev. 153, 153 (Spring 1995).[6] "'[A] person is justified or excused in killing in defense of another person when, and only when, the circumstances are such that the latter would be justified or excused if he had committed the homicide in his own defense.'" Id. at 158 (quoting Lovejoy v. State, 15 So.2d 300, 301 (Ala. Ct. App. 1943))(emphasis in the original). When a person interferes in a difficulty on behalf of another, "he may lawfully do in another's defense what such other might lawfully do in his own defense but no more; he ... is subject to the same conditions, limitations, and responsibilities as the person defended." Id. (quoting Lovejoy, 15 So.2d at 301)(emphasis in the original).

[6] Although many jurisdictions have abandoned a strict adherence to the alter ego rule, they have done so only to "allow exculpation based upon the intervenor's reasonable belief that his defensive action was required." Marco F. Bendinelli, James T. Edsall, Defense of Others: Origins, Requirements, Limitations and Ramifications, 5 Regent U. L. Rev. 153, 159-160 (Spring 1995).

The amount of force used in self-defense is limited; therefore, the amount of force used in defense of others is likewise limited. One may use only "such force as is necessary for his complete self-protection, or which in the mind of a person of ordinary reason and firmness would reasonably prevent the assailant from taking his life or inflicting serious bodily harm." State v. Campbell, 111 S.C. 112, 112, 96 S.E. 543, 543-544 (1918). Likewise, one defending another may use only the amount of force necessary for complete protection of the third person under a reasonable person standard.

In State v. Sales, 285 S.C. 113, 328 S.E.2d 619 (1985), the South Carolina Supreme Court examined the defense of others instruction as it applied to the defendant in the criminal case. Sales' sister and her boyfriend were fighting in their shared home over the boyfriend's use of grocery money to buy liquor. The boyfriend hit the sister in the face with an iron poker. Sales' nieces ran to his home and begged him to help sister. Sales found sister at her home holding her face. When sister and boyfriend began to struggle over a heavy object, Sales separated the two. The boyfriend then swung the heavy object at Sales. A fight between Sales and the boyfriend ensued. The boyfriend died. The Court held the trial judge properly instructed the jury that, "under the law of self-defense, a person may not only take the life in his own defense but also in defense of a relative," and "that the right to intervene to protect the relative is subject to the same limitations as the right of self-defense." However, the judge instructed the jury on the duty to retreat, which the court found to be in error. Instead, Sales had no duty to retreat because sister had no duty to retreat from her home and Sales assumed the rights and limitations of the person he acted to protect. Id. at 114-15, 328 S.E.2d at 619-620.

In the instant case, the trial judge's instruction regarding the defense of others was confusing to the jury as the theory of defense of others is a defense to a criminal charge and the instruction was incomplete as to how the jury should evaluate the conduct of an individual who is acting in defense of others, specifically as whether the person being defendant was in imminent danger of losing his life or sustaining serious bodily injury, the amount of force to be used, and the duty to retreat.

The trial judge's total instruction on the defense of others was as follows: "Now, under South Carolina law, if one comes to the assistance of a friend or a relative and takes part in a difficulty in which a friend or a relative is engaged, he enters the combat on the same footing as the person whose assistance he comes and under the same legal status." R. 405, lines 16-20. This instruction had no place in the case because it concerns a defense to a criminal charge that was not being asserted in this case. Appellant was not claiming that he was acting in defense of others, and no criminal charges had been filed against Burno. Defense of others is a defense and should not have been charged to the jury because it was not asserted as a defense by Appellant.

Additionally, the instruction provided no explanation of what the theory of defense of others means or how it related to the case; thus, creating greater confusion. Specifically, the judge failed to instruct that a person being defended must satisfy all the elements of self-defense, including not being at fault in bringing on the difficulty, being in imminent danger of losing his life or sustaining serious bodily injury, the reasonableness of that belief, the limitation on the use of force, and the duty to retreat.

There was no evidence that Coleman was in imminent danger of losing her life or great bodily injury or had a reasonable belief of such an imminent threat. At worst, the

evidence showed that Appellant and Coleman were verbally arguing, that Appellant was "pulling" on Coleman, and that "licks" were passed. There was no evidence that Coleman was in danger of great bodily injury or would have entertained a reasonable belief of such a threat. Burno's act of grabbing Appellant in a bear hug, picking him up, and moving several feet exceeded the amount of force that Coleman would have been permitted to use under the law of self-defense. Coleman was permitted only to use the amount of force as appeared to be necessary against any perceived threat from Appellant if the threat amounted to imminent danger of losing her life or great bodily injury. The bear hug and moving of Appellant surpassed the amount of force necessary to repel any threat posed by Appellant. Additionally, Coleman may have been under a duty to retreat because the argument began when Coleman was in the car, Appellant exited the car leaving Coleman in the car, and Coleman was not in her home or place of business.

The trial judge's instruction to the jury regarding the defense of others simply did not belong in this case because there provided no defense to the charged offense. The charge was inaccurate and incomplete further confusing the jury and failing to guide the jury regarding proper consideration of the conduct of the players as it related to the criminal charges.

IV. The trial judge erred in failing to provide the specific and clarifying instruction to the jury that an unintentional killing resulting from an unlawful assault and battery not of a character of itself to cause death is involuntary manslaughter.

Relevant facts

The prosecution's witness, Stallworth, testified that she saw Appellant punch Burno in the face and knock him out. Burno then fell to the ground. R. 35, lines 1-18; R. 53, lines 16-18. Creech, the prosecution's star witness, also testified that Appellant hit Burno only once causing him to fall to the ground. R. 63, lines 13-16. The forensic evidence confirmed the eyewitnesses' accounts. The pathologist found two areas of injury to Burno's head, which were consistent with Burno being struck in the head and falling to the ground. R. 108, lines 19-23; R. 109, lines 2-23; R. 129, lines 1-15; R. 130, lines 10-13. Additionally, the pathologist testified to the rarity of a person dying after receiving a single punch. R. 124, line 1 – R. 125, line 19; R. 130, lines 14-24; R. 134, lines 9-24; R. 138, lines 22-25.

Appellant testified that he "turned and just threw a punch" when Burno grabbed him. R. 210, lines 6 – 9; R. 227, lines 17-21; R. 243, lines 10-13. Appellant punched Burno because he was "trying to get away." R. 211, lines 1 – 2; R. 227, lines 24-25. Appellant was not aiming at anything in particular. R. 227, lines 22-23. Appellant was not angry at Burno or Coleman. R. 211, lines 3 – 6; R. 240, lines 17-19. Unequivocally and unambiguously, Appellant testified that he was not trying to kill Burno and never meant to hurt him. In fact, Appellant did not even mean to knock him out. R. 211, lines 15 – 20; R. 228, lines 1-2; R. 247, lines 13-25.

During the prosecutor's closing argument on the law, he discouraged the jury from finding Appellant guilty of involuntary manslaughter because Appellant's act was

intentional. According to the prosecutor, "every bit of evidence in this case points that this was an intentional act." The prosecutor continued, "he absolutely intended to strike him, to punch him. And that set in motion his death. It killed him, the fatal blow." R. 329, lines 8 – 12. Additionally, the prosecutor argued "it was intentional. It wasn't accidental. When we're talking about involuntary manslaughter, that's something for an automobile accident." R. 329, lines 13 – 18. Using the same line of reasoning, the prosecutor argued "this was no accident. When you know that this is an intentional act, involuntary manslaughter is completely and totally off the table." R. 329, lines 19 – 22.

Appellant objected to the prosecutor's mischaracterization and misstatement of the law. R. 329, lines 23 – 8. The trial judge sustained the objection and informed the jury that he would charge on the law at a later time. R. 330, lines 13 – 14. During his closing argument, Appellant argued against the prosecutor's mischaracterization of the law of the involuntary manslaughter. Appellant noted "other classic cases of [in]voluntary manslaughter, like accidental shootings." He explained this would cover "recklessly discharg[ing] a firearm." R. 358, lines 19 – 25. Further, Appellant argued to the jury that "unlawful assault not the type of assault that would kill somebody is involuntary manslaughter." R. 359, lines 1 – 4.

During the charge conference, Appellant requested the trial judge instruct the jury as follows concerning involuntary manslaughter: "The unintentional killing resulting from an unlawful assault and battery not of a character of itself to cause death is [in]voluntary manslaughter." R. 315, lines 15-22. The judge insisted that his standard charge "basically state[d] that." The judge informed counsel that his charge would be as follows: "To prove involuntary manslaughter, the state must prove beyond a reasonable doubt that the defendant

unintentionally killed the victim without malice but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm." Further, he would charge the jury that "[u]nintentional means that the defendant did not intend for anyone to be killed or seriously injured." R. 315, line 24 – R. 316, line 8. However, the judge refused to charge what Appellant requested because it went "too far" by saying "not of a character of itself to cause death." R. 316, lines 10-12.

The trial judge instructed the jury as follows concerning involuntary manslaughter:

> [T]o prove involuntary manslaughter, the state must prove beyond a reasonable doubt that the defendant unintentionally killed the victim without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm or that the defendant unintentionally killed the victim without malice while engaged in unlawful activity but with reckless disregard for the safety of others.
>
> "Unintentional" means that the defendant did not intend for anyone to be killed or seriously injured.
>
> Reckless disregard for the safety of others is more than mere negligence or carelessness. Mere negligence or carelessness is the failure to use that care that a person of ordinary reason would use under the same circumstances. Recklessness is a conscious disregard to use ordinary care.
>
> Recklessness, a – – a – – a reckless disregard for the safety of others means that you are not interested in the consequence of your act or the rights and the safety of others.

R. 400, line 21 – R. 401, line 14.

Discussion

South Carolina law provides for two alternative definitions of involuntary manslaughter. "Involuntary manslaughter is (1) the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others." State v. Brayboy, 387

S.C. 174, 180, 691 S.E.2d 482, 485 (Ct. App. 2010)(citing State v. Wharton, 381 S.C. 209, 216, 672 S.E.2d 786, 789 (2009)); see also State v. Burris, 334 S.C. 256, 264-265, 513 S.E.2d 104, 109 (1999). Further defining involuntary manslaughter, our Supreme Court has held that "[r]ecklessness is a state of mind in which the actor is aware of his or her conduct, yet consciously disregards a risk which his or her conduct is creating." State v. Pittman, 373 S.C. 527, 571, 647 S.E.2d 144, 167 (2008).

In State v. Chatman, 336 S.C. 149, 519 S.E.2d 100 (1999), the South Carolina Supreme Court confronted an issue similar to the one presented here. Chatman had two children with a woman, Jackie McCants, but did not live with them. Chatman learned from his son that McCants and Tim Harris, who lived with McCants and the children, were fighting and upsetting the children. Id. at 151, 647 S.E.2d at 101. After Chatman spoke to Harris about the problem, Chatman and Harris began to fight. During the fight, Harris grabbed Chatman's testicles while Chatman had Harris in a "face-to-face 'choke hold.'" Id. When Harris released Chatman, the fight ended. Harris died from asphyxiation due to manual strangulation. Id. at 152, 647 S.E.2d at 101.

The Court found the trial court erred in refusing to charge the jury on involuntary manslaughter where the facts fit under the first definition of involuntary manslaughter. Specifically, the Court found Chatman "was engaged in an assault and battery, and ... the battery was not such that naturally tends to cause death or great bodily harm." Id. The Court concluded that "'[a]n unintentional killing resulting from an unlawful assault and battery, not of a character of itself to cause death, is involuntary manslaughter.'" Id. (quoting 40 C.J.S. Homicide § 40 (1991). The Court also looked to two out of state cases for guidance: People v. Johnson, 241 N.E.2d 584 (Ill. App. 1968) and State v. Cobo, 60

P.2d 952 (Utah 1936). Id. at 152-153, 519 S.E.2d at 101. The evidence established that Chatman was not attempting to strangle Harris. Id. at 153, 519 S.E.2d at 101-102. The Court noted that the choke hold used by Chatman, "[was] not the traditional strangulation type situation. [Chatman] was not attempting to strangle [Harris] by placing his hands around [Harris's] neck." Id., 336 S.C. at 153, 519 S.E.2d at 102.

In Johnson, 241 N.E.2d at 586, the Illinois Appellate Court explained that "[d]eath resulting from a blow with a fist may be involuntary manslaughter." Further, the Court stated "[t]he striking of a blow with a fist on the side of the face or head is not likely to be attended with dangerous or fatal consequences." Id. (internal citations omitted). The law provided that a "defendant is presumed to have intended the reasonable and probable consequences of his act," but the Court explained that "death [was not] a reasonable or probable consequence of a blow with the bare fist," and therefore, the defendant "is not presumed to have intended it to produce that result." Id. (internal citations omitted).

Likewise, in Cobo, 60 P.2d at 954-955, two men, who were friends, engaged in a fist fight. When one of the men, having been struck in the face two or three times, collapsed, the other told the collapsed man's friend to take him home. Id. at 955. Later, it was learned the collapsed man died from injuries sustained during the fight. Id. Relying upon the lack of evidence of any ill feeling between the men, the undisputed evidence that the two were using their fists only, and that the defendant did not beat the deceased in a vicious manner, the Utah Supreme Court held "the evidence as disclosed by the record would not warrant a finding that the defendant was guilty of anything more than involuntary manslaughter." Id. at 956. The court explained "the great weight of authority is that an unintentional killing,

resulting from an unlawful assault and battery which in and of itself is not of a character to cause death, is held to constitute involuntary manslaughter." Id.

Appellant's requested instruction regarding involuntary manslaughter was necessary for the jury to understand the exact parameters of involuntary manslaughter. The prosecutor's erroneous and misleading closing argument on this point exacerbated the need for the clarifying instruction. The evidence disclosed Appellant and Burno were friends, Appellant threw only one punch using his fist, Appellant was surprised that Burno was knocked out, and Appellant was significantly smaller than Burno. Under those circumstances, the assault and battery committed by Appellant was not of a character to cause death, and therefore, fit within the definition of involuntary manslaughter. In order for the jury to understand that an assault and battery, which by definition is an intentional act, not of a character to cause death may result in involuntary manslaughter, it was necessary for the judge to provide this clarifying instruction, particularly in light of the prosecutor's erroneous closing argument.

CONCLUSION

As to Issue I, Appellant respectfully requests this Court direct a verdict of acquittal in his favor on the charge of murder. As to Issues II, III, and IV, Appellant respectfully requests this Court reverse his conviction and sentence and remand for a new trial.

Respectfully submitted,

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Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of June, 2015.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR.

June 29, 2015

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Saluda County
Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

STEVEN OTTS,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon J. Anthony Mabry, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 29th day of June, 2015.

Susan B. Hackett
Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 29th day of June, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.