ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Richland County

Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMES KEVIN BETHEL, JR

APPELLANT

APPELLATE CASE NO. 2013-002478

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On October 10, 2012, a Richland County grand jury indicted appellant James Bethel for murder and attempted murder. R. 815. On November 4, 2013, appellant was tried before the Honorable Deadra Jefferson and a jury. R. 1. Kathryn "Luck" Campbell, Jeremiah Shellenberg, and Meghan Walker represented the State. R. 1. Tristan Shaffer represented appellant. R. 1. The jury convicted appellant. R. 797, ll. 14 – 24. Judge Jefferson sentenced appellant to concurrent terms of thirty and fifty years' imprisonment. R. 810, l. 22 – 811, l. 7. This appeal follows.

ARGUMENT

1.

The trial judge erred in ruling that the defendant was not entitled to an involuntary manslaughter charge because some evidence of malice existed in the case.

This case involved a shooting in the parking lot of a strip club. During his opening statement, defense counsel told the jury that the reason they were in court was "that not all shootings are murders." R. 22, ll. 15 – 19. He conceded that appellant Bethel fired the shot that killed Dwyane Franklin ("Franklin"). R. 23, ll. 1 – 14. But he told the jury that the State would not have proof of malice. R. 23, l. 22 – 25, l. 11.

The Testimony from the State's Witnesses

The shooting occurred on August 19, 2012. R. 26 l. 15 – 27, l. 21. The first officer on the scene said that there was a crowd of "maybe a hundred" in the parking lot of the strip club, Mr. Lucky's. R. 30, l. 23 – 31, l. 5. She said they "periodically" get calls from Mr. Lucky's. R. 31, ll. 6 – 15.

The general manager of Mr. Lucky's was Edward Simpkins. R. 32, ll. 15 – 22. He said Mr. Lucky's had "seven or eight" video cameras. R. 33, ll. 6 – 7. Mr. Lucky's had one camera in the lobby and the rest were outside. R. 33, ll. 11 – 18. Through Edward Simpkins, the State introduced an edited version of the video recordings made by the cameras at Mr. Lucky's that night. R. 33, l. 25 – 35, l. 25. State's Exhibit 71. The State played the video and had Edward Simpkins identify some of the people depicted. R. 36, l. 1 – 38, l. 15. He identified Bethel talking to the decedent Franklin. R. 38, ll. 9 – 11.

Edward Simpkins said that "a couple of crowds" were "a little rowdy." R. 39, ll. 10 – 14. He spoke to Bethel. R. 39, ll. 15 – 18. Edward Simpkins separated Franklin and the group with Bethel. R. 40, ll. 1 – 12. Bethel's group was leaving. R. 40, ll. 1 – 12. Franklin followed the group out of the building and "that's when all the commotion started." R. 40, ll. 1 – 12.

Edward Simpkins did not give a statement to the police that evening. R. 41, ll. 8 – 13. He managed the club with his brother. R. 41, ll. 17 – 19. His mother is the owner. R. 41, ll. 20 – 23. Edward Simpkins could not explain why some of the cameras only showed all-black. R. 43, ll. 4 – 10.

Edward Simpkins said that Mr. Lucky's employs independent contractors to handle their security outside. R. 54, l. 13 – 55, l. 19. The name of the company employed by Mr. Lucky's was "Black Ops Security." R. 54, ll. 17 – 19. Black Ops Security checks IDs and pats people down. R. 55, ll. 10 – 19. Edward Simpkins admitted that law enforcement had to come to Mr. Lucky's at times. R. 55, ll. 20 – 24.

The police collected a total of twelve shell casings from the scene that were of different makes and calibers. R. 77, ll. 14 – 16. There were ten Smith & Wesson .40 caliber casings. R. 77, l. 17 – 22. There was one CBC .380 caliber casing. R. 77, ll. 17 – 22. There was also one RP .45 caliber casing. R. 77, ll. 17 – 22. The .45 caliber casing was collected near the silver Chevy Suburban in the parking lot. R. 86, l. 9 – 87, l. 20. The crime scene investigator testified that he was told "that one of the security officers at the club shot the tire of the vehicle out to prevent the vehicle from leaving the scene." R. 87, ll. 8 – 14. In the back of the Chevy Suburban, the police collected a .380 automatic pistol that

was fully loaded. R. 120, l. 14 – 121, l. 6. The police collected jeans from a ditch near Mr. Lucky's. R. 97, ll. 1 – 2. The police found $1,500.00 in the pocket. R. 88, ll. 5 – 12.

David Richardson "(Richardson") worked as a bouncer for Mr. Lucky's (but not for Black Ops Security). R. 143, ll. 8 – 11. R. 158, ll. 10 – 13. Richardson described Franklin as "like a brother." R. 143, ll. 14 – 15. He was not working at Mr. Lucky's on the night of the shootings, but went to the club at approximately 2:30 AM. R. 143, l. 24 – 144, l. 11. Franklin's nickname was "Black." R. 144, ll. 12 – 15.

Richardson described the security situation at Mr. Lucky's. R. 144, l. 23 – 145, l. 8. "[A]rmed security" worked outside. R. 144, l. 23 – 145, l. 1. The bouncers worked inside and were not armed. R. 144, l. 23 – 145, l. 4. Franklin was one of the unarmed security bouncers who worked inside. R. 145, ll. 5 – 8.

Franklin pointed out the group of five people who were acting "belligerent" and needed to be ejected from the club. R. 146, l. 5 – 147, l. 16. While Richardson saw Franklin approach the group twice, he did not see him interact with Bethel. R. 147, l. 17 – 148, l. 9. The members of Black Ops Security from outside came into the club to help the inside bouncers escort the group out of Mr. Lucky's. R. 148, l. 15 – 149, l. 7. According to Richardson, "outside security escorted them out." R. 149, ll. 3 – 7. The last one of the group out "kind of nudged" Franklin. R. 149, ll. 3 – 9. Richardson said "that caused [Franklin] to go out the door." R. 149, ll. 10 – 11. Richardson followed to make sure Franklin "wouldn't get jumped." R. 149, ll. 16 – 20.

Once outside the club, Richardson described the situation as a "ruckus" with everybody arguing. R. 149, l. 23 – 150, l. 4. One of the members of the group was taunting Franklin. R. 150, ll. 6 – 9. The man, who was wearing a yellow shirt, told Franklin, "oh, I

know where you live at, you trying to beef with me. I know where you live at." R. 150, ll. 6 – 9. R. 164, ll. 15 – 23. The man with the yellow shirt was appellant's cousin, Ernest Bethel. R. 410, l. 21 – 411, l. 3. Franklin replied, "Oh, you know where I live at, I'm right here, you know, if you want to do something, I'm right here, I'm right here." R. 150, ll. 10 – 12. Franklin jumped off the balcony along with Ernest Bethel. R. 150, ll. 13 – 17. Richardson followed them off the balcony. R. 165, ll. 16 – 22. He turned his hat backwards in case there was a fight. R. 168, ll. 6 – 12.

Richardson saw Franklin and Ernest Bethel "talking to each other" after they left the balcony. R. 151, ll. 1 – 4. The rest of the group was still on the balcony. R. 165, ll. 2 – 12. Somebody sprayed mace. R. 165, ll. 2 – 12. Richardson testified, **"The next thing I know I hear <u>two gunshots. Pow. Pow.</u>"** R. 151, ll. 1 – 8 (emphasis added). Richardson did not see the gunshots; he only heard them. R. 151, ll. 1 – 8. Richardson ducked and ran behind a trash can. R. 151, ll. 11 – 16. Franklin was on the ground and Richardson checked to see if he was breathing, but he was not. R. 151, ll. 19 – 23.

Richardson heard more gunshots. He looked up and saw a person running and one of the security guards shooting at him. R. 152, ll. 1 – 3. The rest of the group, including Ernest Bethel, got in a Chevy Suburban but Richardson prevented them from leaving. R. 152, l. 20 – 153, l. 25. Law enforcement arrived about ten minutes later, but Richardson did not give them a statement until the next day. R. 154, ll. 6 – 12. In the statement he gave the next day, he told the police he heard two or three gunshots. R. 169, l. 5 – 171, l. 7.

William Ingram ("Ingram") worked for Black Ops Security. R. 174, ll. 6 – 7. He worked the door at Mr. Lucky's. R. 174, ll. 8 – 14. Ingram remembered the group of bouncers pushing Bethel's group down the walkway. R. 177, ll. 9 – 15. Ingram said that his

"captain" Kendron Hope ("Hope") sprayed mace. R. 178, ll. 4 – 10. According to Ingram, both Bethel and Franklin were on the balcony when the mace was sprayed. R. 178, ll. 11 – 15. Ingram believed that approximately five to seven seconds elapsed between the mace being sprayed and the shooting. R. 178, l. 25 – 179, l. 6. Hope maced "a short guy, white shirt, khaki's with a hat." R. 178, ll. 18 – 20. This person was Troy Griffin. R. 490, ll. 10 – 11.

Ingram confirmed that the man arguing with Franklin was the yellow-shirted Ernest Bethel. R. 182, ll. 20 – 22. He agreed that Franklin jumped over the balcony to go after Ernest Bethel. R. 183, ll. 8 – 24. Ingram believed that Hope was the only person who sprayed mace. R. 185, ll. 5 – 10. Ingram believed appellant was on the ramp when the mace was sprayed. R. 187, ll. 13 – 18. He agreed that "some of the people got a taste of it." R. 188, ll. 21 – 25. Ingram confirmed that it was not Franklin's job to escort someone to their car and that duty belong to "outside security" – Black Ops Security. R. 189, ll. 17 – 21.

Clinton Brown ("Brown") worked for Black Ops Security. R. 210, ll. 21 – 22. He was in the deck area when "the disturbance happened." R. 212, ll. 17 – 22. Brown said approximately ten people were being kicked out of the club. R. 213, ll. 15 – 18. He saw Franklin jump over the ramp. R. 216, ll. 12 – 17. Franklin was the first person who jumped over the ramp. R. 217, ll. 15 – 16. Brown said appellant also jumped over the ramp. R. 217, l. 17 – 19. Brown said he heard two gunshots, attributing the shots to appellant. R. 218, ll. 1 – 23. Brown saw Hope "discharging his weapon" at appellant "to try to eliminate the threat." R. 219, ll. 10 – 15. Brown identified Hope as the member of Black Ops

Security who used pepper spray. R. 224, ll. 7 – 13. Brown testified that Ernest Bethel was still on the ramp at the time Franklin jumped over the rail. R. 232, ll. 16 – 233, l. 6.

Hope was in charge of Black Ops Security personnel at Mr. Lucky's on the evening of the shooting. R. 246, ll. 15 – 21. Hope described Franklin as "more or less the lead bouncer." R. 247, l. 19 – 248, l. 2. Inside security were not supposed to walk patrons who had been ejected to their cars. R. 292, ll. 11 – 15.

Hope said that Edward Simpkins called his name and told him to eject the defendant's group. R. 251, ll. 1 – 17. Hope heard arguing between the bouncers and the patrons who were leaving. R. 251, l. 18 – 252, l. 6. Hope used his pepper spray. R. 251, l. 18 – 252, l. 6. Hope said he only sprayed two people and that the defendant was not one of them. R. 251, l. 18 – 252, l. 8. Hope heard threats going back and forth and remembered Franklin saying, "I'm right here. I'm right here." R. 253, ll. 9 – 12. Hope claimed he saw appellant shoot Franklin in the back of the head. R. 254, ll. 1 – 25.

Hope pulled his gun and fired. R. 255, ll. 9 – 12. Hope's gun was a Glock .40 caliber. R. 286, ll. 12 – 13. He claimed appellant shot Franklin "multiple times, shooting him in the head and then shooting him as he fell, then turning on Hope and firing. R. 255, ll. 13 – 18. Hope believed appellant fired "two or three rounds" at Franklin. R. 257, ll. 11 – 17. Appellant ran and Hope chased him. R. 255, l. 19 – 256, l. 19. They continued to exchange shots and Hope believed that he hit Bethel because Bethel fell. R. 256, ll. 5 – 22. Hope called 911 during the chase. R. 259, ll. 13 – 23. Bethel climbed under a fence and by that point, the police arrived. R. 260, l. 1 – 261, l. 22. Hope emptied one magazine and believed he fired one more shot. R. 287, ll. 16 – 18.

Hope testified that when he uses pepper spray, he aims for an individual's chest and works his way up to the face. R. 276, ll. 12 – 13. He agreed that the pepper spray he was using can blind someone, cause someone to involuntarily close their eyes, and cause shortness of breath. R. 277, ll. 7 – 278, l. 2.

Hope agreed that appellant Bethel was not really the aggressor. R. 294, l. 22 – 295, l. 1. Hope described Ernest Bethel as the aggressor. R. 294, ll. 19 – 21. Frederick Simpkins agreed with Hope and described his conversation with appellant in the lobby of the club as "a peaceful conversation" and "pretty pleasant." R. 312, ll. 5 – 17. According to Frederick Simpkins, appellant was helping keep the other people inside the club manageable. R. 311, l. 24 – 312, l. 4. Frederick Simpkins and appellant talked about appellant having "a little get-together party" at the club and said the defendant spent a lot of money. R. 314, ll. 4 – 13.

The pathologist testified that Franklin died from a single gunshot wound to the head. R. 391, ll. 7 – 396, l. 16. The bullet recovered from the autopsy was from a .380 caliber bullet. R. 458, l. 21 – 459, l. 3. The police did not find the firearm that fired the bullet. R. 379, l. 18 – 380, l. 1. It was not a contact wound. R. 395, l. 20 – 396, l. 4. The gunshot could have been from as far away as three feet. R. 400, ll. 24 – 25. Franklin was 6'2" tall and weighed 308 pounds. R. 391, ll. 5 – 6. Franklin's blood alcohol level was .071. R. 397, ll. 4 – 6.

Rodney White ("White") worked for Black Ops Security and was at the club the night of the shooting. R. 430, ll. 12 – 19. He claimed he saw appellant shoot Franklin in the head. R. 433, ll. 18 – 23. White was on the deck when Hope sprayed the pepper spray. R.

432, l. 17 – 433, l. 17. He claimed appellant did not get hit with Mace pepper spray. R. 435, l. 25 – 436, l. 7.

White said it was not common for the bouncers to escort people to their cars. R. 435, ll. 6 – 8. He was not sure whether Franklin jumped over the rail to confront appellant's group. R. 435, ll. 3 – 5. Franklin was confronting approximately fifteen people. R. 436, ll. 23 – 25. He agreed that there "was shouting back and forth." R. 435, ll. 9 – 11.

The police found appellant at an apartment complex near Mr. Lucky's. R. 332, ll. 7 – 333, l. 3. Bethel was sitting on the steps bleeding heavily from a wound in his back. R. 333, ll. 1 – 7. EMS arrived and took him to the hospital. R. 333, l. 20 – 334, l. 7.

The Testimony from the Defense Witnesses

Troy Griffin ("Griffin") testified for the defense. He was with the defendant the night of the shooting. R. 490, ll. 6 – 7. He wore a Gamecocks hat, white shirt, and khaki shorts. R. 490, ll. 10 – 11. Franklin "just came up and just pushed" Griffin when they were in the club. R. 491, l. 15 – 492, l. 9. After Franklin pushed the 5'4", 130 pound Griffin, there was an argument between their party and the bouncers. R. 493, ll. 5 – 19.

Appellant's group ended up in the hallway where appellant Bethel was already talking to the owner. R. 495, l. 22 – 496, l. 17. Bethel was trying to calm everything down. R. 496, ll. 13 – 19. Franklin was "out of control" and acted "like he had some type of grudge on his shoulder." R. 496, ll. 20 – 25. Franklin threatened them. R. 497, ll. 1 – 5. Once outside, Griffin said the pepper spray was all around the ramp area. R. 497, ll. 11 – 23. Bethel was only a couple of feet away from Griffin when he was pepper sprayed. R. 500, ll. 8 – 16. Griffin could not see. R. 500, ll. 17 – 25. The pepper spray was "all in the

air." R. 501, ll. 15 – 22. When Griffin got to the bottom of the ramp, he heard gunshots. R. 501, ll. 4 – 14. R. 502, ll. 7 – 10.

Curtis Long ("Long") testified for the defense. Long was in the lobby with Bethel talking with the club managers when the other members of their party were forced into the lobby by the bouncers. R. 533, l. 5 – 534, l. 22. Bethel was trying to figure out why they were being ejected from the club. R. 535, ll. 12 – 16. Halfway down the ramp outside the club, Long was pepper sprayed. R. 535, l. 17 – 25. He could not see and he could not breathe. R. 536, ll. 15 – 19. He heard several gunshots. R. 536, l. 20 – 537, l. 1. Long believed that everyone in their party suffered the effects of the pepper spray. R. 547, ll. 8 – 9.

Bethel testified. Bethel first noticed Franklin when Franklin approached his cousins Ernest Bethel and Griffin and told him to calm down. R. 563, ll. 1 – 8. Franklin followed them around the club. R. 564, ll. 1 – 5.

Bethel was not armed when he first entered Mr. Lucky's. R. 564, ll. 8 – 9. At some point evening, he went to the bathroom and discovered Long had his gun. R. 564, ll. 10 – 15. Bethel did not know why Long had his gun. R. 564, ll. 22 – 24. He took the gun from Long. R. 564, ll. 13 – 15. R. 565, ll. 15 – 18.

Bethel heard that the bouncers were plotting a robbery from one of the dancers. R. 569, l. 23 – 570, l. 5. He told Long he was ready to go because he "thought I was going to get robbed." R. 571, l. 25 – 572, l. 6. Long and Bethel were talking to the manager. R. 572, ll. 7 – 14. The bouncers began forcing Griffin and Ernest Bethel from the club. R. 573, ll. 20 – 24. Franklin was threatening their entire party. R. 573, ll. 8 – 14. Bethel was trying to calm everyone down. R. 574, ll. 10 – 13.

Bethel was walking down the ramp when other security guards came up the ramp from the parking lot and stopped him. R. 575, ll. 20 – 25. He saw Franklin and another bouncer jump over a rail. R. 658, ll. 13 – 21. There was "a whole bunch of like cursing and threats." R. 660, ll. 1 – 2. The bouncers were preparing to fight and Bethel's party was pepper sprayed. R. 660, ll. 11 – 25. Bethel was pepper sprayed. R. 581, ll. 6 – 7.

Bethel testified about what happened next:

> A. I tried to rub my eyes and that's when – I guess it was on my hands and it got worse, and I kind of like, you know, panicked. I couldn't see, and that's when I grabbed my gun out of my back pocket.
>
> Q. Why did you grab your gun?
>
> A. I was scared. I couldn't see anything. I heard my cousin and them yelling, and I didn't know what was going on.
>
> Q. Okay. What did you do with your gun once you grabbed it?
>
> A. I just kept it in my hand. I kept it in my hand, and I was like trying to regain my eyesight.
>
> Q. Okay. What happened – what happened while you were doing that? Were you making your way down the ramp?
>
> A. Yeah, I was going towards my cousin and them voices, all the yelling and stuff. I was walking towards the voices. In the scene is I – I don't know where exactly I was, but I heard a gunshot, and like it scared me. It caught me off guard, and as soon as I heard that, that's when I tensed up and I shot the gun.
>
> **Q. Okay. Did you intend on shooting the gun?**
>
> **A. No, I didn't. It caught me off guard. I heard – I couldn't see, and then I heard the gunshot and my body tensed up. I got – I jumped.**
>
> Q. Where did you have the gun at?
>
> A. I had it – I had it on my side.
>
> Q. You had it on your side?

A. Yes.

...

Q. Where was your gun at whenever you heard a gunshot?

A. On my side.

Q. What happened after that?

A. I jumped like trying to block my face, and when I did that, the gun went off and I was running from the gunshots. I didn't know where I was running to. I was just running away from the gunshots.

Q. Okay. How many times did your gun fire at that point?

A. Once.

Q. Okay. And while you are one of running away from the gunshot, what happened to you?

A. I got shot.

R. 581, l. 9 – 583, l. 21 (emphasis added). During cross-examination, Bethel said, "I didn't intend to shoot nobody. I didn't try to shoot nobody. I was – I couldn't see. I just got maced, and I heard a gunshot and I flinched." R. 624, ll. 17 – 23. When asked on redirect if he meant to pull the trigger, Bethel replied, "No, I didn't. It was like a reflex, like I got scared and my body tensed up. I had my hand on the trigger. I like – when I jumped, it call me off guard. I couldn't see. I didn't know – I thought I was getting shot at." R. 637, ll. 21 – 25.

Bethel dropped his gun when he fell after being shot by Hope. R. 584, ll. 2 – 16. Hope was still shooting at Bethel. R. 584, ll. 10 – 16. He did not shoot back at Hope. R. 584, ll. 17 – 19. Hope trapped Bethel and told him to take his pants off. R. 315, ll. 5 – 8. Bethel was able to scramble over a fence and escape. R. 586, ll. 6 – 587, l. 9.

The Video

An edited version of the surveillance video was admitted into evidence as State's Exhibit 71. R. 34, l. 3 – 35, l. 10. The edited video shows the time of day. (State's Exhibit 71). For the Court's convenience, appellant will also refer to the time elapsed when the video is played.

The video depicts the following. Bethel enters the lobby of Mr. Lucky's. (State's Exhibit 71, 3:32:33; 18:19). Long is already in the lobby talking to Fred Simpkins. (State's Exhibit 71, 3:32:33; 18:19). The two men are calm. Approximately two minutes later, Ernest Bethel (wearing a yellow shirt) enters the lobby, followed by Griffin (wearing a white shirt). (State's Exhibit 71, 3:34:27; 20:13). Two girls then enter the lobby. (State's Exhibit 71, 3:34:39; 20:25). Franklin enters the lobby six seconds later, headed straight for Griffin, and the two begin arguing. (State's Exhibit 71, 3:34:46; 20:31). More people then enter the lobby from the club and Bethel gets between Franklin and Griffin. (State's Exhibit 71, 3:34:51; 20:37). Ernest Bethel and Franklin begin arguing and Ernest Bethel leaves with Franklin right behind him. (State's Exhibit 71, 3:35:00). More people follow Franklin out of the door. (State's Exhibit 71, 3:35:16; 21:01).

At this point in the video, the view switches from the lobby to the balcony. Bethel enters the frame along with Ernest Bethel. (State's Exhibit 71, 3:35:04; 21:12). Franklin appears then exits to the right of the screen. (State's Exhibit 71, 3:35:06; 21:14). Bethel walks down the ramp and exits the frame. (State's Exhibit 71, 3:35:16; 21:24).

The video again switches camera angles to the parking lot. No one is in the frame. (State's Exhibit 71, 3:35:45; 21:38)). Franklin enters the frame, walks into the parking lot and turns around. (State's Exhibit 71, 3:35:48; 21:41). Ernest Bethel enters and begins

arguing with Franklin. (State's Exhibit 71, 3:35:57; 21:50). Appellant enters the frame slightly behind Franklin and disappears behind Franklin. (State's Exhibit 71, 3:35:59; 21:51). There is a muzzle flash in the vicinity of Franklin. (State's Exhibit 71, 3:36:01; 21:51). It then appears that there are several muzzle flashes by Hope's side as he is drawing his gun. (State's Exhibit 71, 3:36:03; 21:56). Muzzle flashes can be seen in the back of the parking lot near a fence. (State's Exhibit 71, 3:36:11; 22:04). Neither the resolution nor the zoom on the video contradicts appellant's testimony.

The Charge Conference

Following the conclusion of testimony, the trial judge told the attorneys what she intended to charge the jury. When discussing self-defense, Judge Jefferson noted that Bethel testified "that his act was unintentional, that he had mace in his eyes. He was trying to get his bearings. He was jittery basically and inadvertently pulled the trigger of the gun." R. 655, ll. 10 – 14. After further discussion, Judge Jefferson asked defense counsel which lesser included offenses he was requesting. R. 664, ll. 9 – 11. Defense counsel responded, "Certainly involuntary, Your Honor. I think that there might be some evidence – involuntary under State v. White.[1] Your Honor, I believe that –" R. 664, ll. 12 – 14. The trial judge interrupted:

> There is no evidence that he was involved with handling a weapon and accidentally discharged it. Involuntary manslaughter is negligence basically and you kill somebody, but you have to be acting lawfully basically. I just don't think there's any testimony to support an involuntary manslaughter in this case.

R. 664, ll. 15 – 20. Defense counsel attempted to further argue for involuntary manslaughter, stating that being lawfully armed in self-defense and negligently handling a

[1] Defense counsel was likely referring to State v. Light, 378 S.C. 641, 664 S.E.2d 465 (2008).

weapon would constitute involuntary manslaughter. R. 665, l. 25 – 666, l. 3. The trial judge then stated that being lawfully armed in self-defense equated to having a license or a concealed weapons permit. R. 666, ll. 4 – 20. The trial judge then said, "But involuntary manslaughter is really about circumstances where there's negligence **and there is an utter lack of malice or a failure of proof of malice**, and this case is not – certainly does not factually support it." R. 666, l. 23 – 667, l. 1 (emphasis added). Court soon thereafter adjourned for the evening.

The next morning, Judge Jefferson began by reiterating her rulings. She stated that she would not instruct involuntary manslaughter because it was not supported by the facts. R. 673, ll. 15 – 23. Judge Jefferson ruled:

> In order to establish involuntary manslaughter, it would have to be established 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. **Clearly the evidence in the record is that malice did exist.** There is evidence that he was engaged in an unlawful activity. However, there is no evidence that that unlawful activity would not naturally tend the cause death or great bodily injury or that the defendant unintentionally killed the victim without malice while engaged in a lawful activity with reckless disregard for the safety of others.
>
> There is his testimony that he unintentionally killed the victim. **However, there is evidence of malice** and there is evidence that there is – there is evidence that he was engaged in an unlawful activity, that being the possession of an unlicensed handgun in the parking lot of a – of an establishment.

R. 673, l. 24 – 674, l. 16 (emphasis added). Appellant renewed his objection to the failure to charge involuntary manslaughter at the conclusion of the charge. R. 785, ll. 12 – 17.

Discussion

The existence of evidence of malice does not negate a defendant's right to a lesser-included offense. If this were the case, almost no defendant tried for murder would be entitled to either a voluntary or involuntary manslaughter charge. The trial judge erred in ruling that because some evidence of malice existed, Bethel could not receive an involuntary manslaughter charge.

A defendant's testimony that a gun fired unintentionally supports a charge of involuntary manslaughter. State v. Battle, 408 S.C. 109, 119-121, 757 S.E.2d 737, 742-43 (Ct. App. 2014). In Battle, this Court stated, "[O]ur jurisprudence makes clear that when determining whether a charge on involuntary manslaughter is proper, the trial court must look to the presence of evidence, not its weight. Id. In Battle, the defendant was entitled to an involuntary manslaughter charge because of his testimony that the gun unintentionally fired during a struggle despite the State's evidence that the gun described was not the murder weapon. Id. As is clear from Battle, the existence of some evidence of malice does mean that a defendant's testimony cannot support an involuntary manslaughter charge.

The law to be charged is determined from the evidence presented at trial. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). Reversible error is committed if the trial court fails to give a requested charge on an issue raised by the evidence. State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). Moreover, when determining whether the evidence requires a charge on a lesser included offense, the court views the facts in the light most favorable to the defendant. See Knoten, 347 S.C. at 302, 555 S.E.2d at 394 (requiring the trial court to view facts in the light most favorable to a defendant when determining whether to charge involuntary manslaughter).

"Importantly, our courts have long emphasized that to warrant a court's eliminating the offense of manslaughter, it should very clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter." State v. Brayboy, 387 S.C. 174, 180, 691 S.E.2d 482, 486 (Ct. App. 2010); see also State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000); State v. Burriss, 334 S.C. 256, 265, 513 S.E.2d 104, 109 (1999). Thus, a request to charge a lesser-included offense is properly refused only when there is no evidence that the defendant committed the lesser rather than the greater offense. Casey v. State, 305 S.C. 445, 447, 409 S.E.2d 391, 392 (1991).

Involuntary manslaughter (1) is 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. Crosby, 355 S.C. 47, 51-2, 584 S.E.2d 110, 112 (2003); Burriss, 334 S.C. 256, 265, 513 S.E.2d 104, 109 (1999); State v. Light, 378 S.C. 641, 648, 664 S.E.2d 465, 468 (2008).

Bethel received a self-defense charge, which was supported by the evidence. Tr. v.2, 602, l. 3 – 606, l. 6. Therefore, since there was evidence Bethel was lawfully armed in self-defense, his testimony that the gun fired only after he was pepper sprayed, could not see, and he jumped after hearing a gunshot meets the definition of acting with reckless disregard for the safety of others. Bethel unequivocally testified that he did not intentionally fire the gun.

Burriss is similar to the facts of this case. As an attacker advanced on the defendant, the defendant reached for his gun and "it went off," killing another man who had earlier participated in the attack. Burriss at 258-59, 513 S.E.2d at 105-06. The defendant was only

sixteen and could not legally possess a pistol, but had lawfully armed himself in self-defense. Id. at 259, 513 S.E.2d at 106. The Court held that since the evidence supported a finding that the defendant was lawfully armed in self-defense at the time the fatal shot occurred, that "the negligent handling of a loaded gun will support a finding of involuntary manslaughter." Id. at 265, 513 S.E.2d at 109. Just as in Burriss, Bethel was afraid after hearing of a robbery plot, watching Franklin and the other bouncers threaten him and other members of his party, and being pepper sprayed as he was trying to leave. Bethel would have been entitled to arm himself in self-defense and his testimony that he jumped after hearing a gunshot shows negligent handling of a weapon. The fact that evidence of malice existed in the case does not negate the evidence presented during Bethel's testimony that necessitated an involuntary manslaughter charge and this case must be reversed. If the trial court's reasoning were correct, there would never be any lesser included offenses charged in a murder prosecution since there is always some evidence of malice

The State will likely argue that the refusal of the involuntary manslaughter charge is harmless error. First, the error cannot be harmless because any such finding would require this Court to weigh the defendant's testimony against the testimony of other witnesses. The State's witnesses were all employees or former employees of Black Ops Security, so any finding of harmless error on appeal would require this Court to weigh one group of witnesses' potential for biased testimony against the credibility of the defendant and his witnesses. The video does not provide sufficient detail to provide the basis for a harmless error finding.

Furthermore, it is apparent from defense counsel's closing argument that the trial judge's unexpected refusal to give an involuntary manslaughter charge negated the entire

defense strategy. The defense certainly anticipated an involuntary manslaughter charge based on existing law and the defendant's testimony. Defense counsel told the jury in his opening statement "that not all shootings are murders" and that the State would not have proof of malice. R. 22, ll. 15 – 19. R. 23, l. 22 – 25, l. 11.

After the trial judge's ruling, defense counsel was left to argue in favor of voluntary manslaughter. R. 719, l. 25 – 721, l. 4. Defense counsel was forced to argue against his own client's testimony in an attempt to convince the jury to convict Bethel of voluntary manslaughter instead of murder. R. 729, l. 23 – 730, l. 7. Defense counsel told the jury, "Now, I know what you're saying: He didn't say he was mad. There's circumstantial evidence that he was mad. Y'all might find that it was more likely that he was mad, but my client testified that he was not mad." R. 729, l. 23 – 730, l. 7. The closing then shifted towards an accident defense. R. 730, ll. 2 – 20. The prejudice and loss of credibility with the jury from this wholesale alteration of strategy corrupted the entire trial and requires reversal of appellant's murder and attempted murder convictions.

2.

The court erred in overruling the defendant's objection to a witness's testimony that the defendant or his associates made gang signs when the State agreed pre-trial to make no mention of gang affiliation and such evidence was inadmissible pursuant to Rules 401, 402, 403, and 404 of the South Carolina Rules of Evidence.

Relevant Facts

Despite the State's assurance that gang affiliation would not be mentioned, such evidence was admitted at trial. After the completion of pre-trial motions, defense counsel noted his belief that the State did not intend to mention gangs or gang affiliation. R. 12,

ll. 12 – 22. The solicitor agreed, stating, "The only thing in reviewing the statements that I noticed is one of the statements it was mentioned that Mr. Bethel may have given some gang signs. If you want, to make it clean, **we'll be able to not mention that fact."** R. 12, l. 23 – 13, l. 2 (emphasis added). Judge Jefferson replied, "That probably would be prudent." R. 13, l. 3.

During the direct-examination of Richardson, one of the bouncers, the following questioning occurred:

> Q. Did you observe their interaction with other people?
>
> A. Yes.
>
> Q. Tell me what you saw them doing?
>
> A. Bouncing around, you know, being belligerent, **gang signs**, that's about it.
>
> MR. SHAFFER: Objection, Your Honor.
>
> THE COURT: Please approach.
>
> (WHEREUPON, there was a bench conference out of the hearing of the jury and the court reporter.)
>
> THE COURT: You may proceed. Overruled.
>
> BY MS. WALKER:
>
> Q. So you observed all this?
>
> A. Yes, ma'am.
>
> Q. And are those types of things generally things that will get you kicked out of Mr. Lucky's?
>
> A. Yes, ma'am.

R. 146, l. 15 – 147, l. 6 (emphasis added).

The next day, at a break in the proceedings, defense counsel brought to the trial judge's attention that the bench conferences that day were not being placed on the record by the court reporter. R. 320, ll. 3 – 24. The trial judge said that the problem would be corrected but "There's no requirement that I record those conferences. There's no requirement that I take argument on your objections. I do that for my protection, recording bench conferences, not yours." R. 320, ll. 8 – 12. The trial judge then told defense counsel that the bench conferences from the previous day had been recorded by the court reporter. R. 320, ll. 18 – 22. These conferences do not appear in the transcript. The trial judge told defense counsel that his objections had been preserved and that she was "not going back and rearguing" those objections. R. 321, ll. 1 – 3. The trial judge then told defense counsel, "I'm only required to take argument to aid me in making a decision, not to perfect your appeal." R. 321, ll. 6 – 11.

Discussion

Admission of the testimony regarding gang signs was irrelevant, highly prejudicial, and its only purpose was to show Bethel was a person of bad character with a violent propensity. The solicitor emphasized the idea that Bethel was in a gang by repeatedly asking further irrelevant questions about Bethel's employment and where he got the money he was spending in the club.

"Evidence which is not relevant is not admissible." Rule 402, SCRE. Evidence of gang affiliation that is irrelevant to the charged crime is not relevant and not admissible. Lingo v. State, 765, S.E.2d 696, 700-01 (Ga. Ct. App. 2014). Gang evidence "is admissible only where there is sufficient proof that such membership or gang activity is related to the crime charged." People v. Joya, 744 N.E.2d 891, 897 (Ill. App. Ct. 2001). In Joya, the

court held that testimony regarding gang affiliation was irrelevant and reversed the trial court. Id. at 897-98. The court wrote, "The evidence in this case showed that the incident was a bar fight and there was absolutely no testimony that anyone mentioned gang involvement in the shooting either prior to or after the shooting." Id. Similar to Joya, the evidence in this case concerned a disagreement at a strip club that had nothing to do with gangs. The solicitor's agreement pre-trial not to admit such evidence demonstrates that it had no relevance to the crime.

The gang evidence was also inadmissible under Rule 404 because it was only evidence of character introduced for the sole purpose of showing Bethel had the propensity to commit a crime. Rule 404(a) and (b), SCRE. When admitted, such evidence is an attempt to show the defendant's "unsavory character" and "thus more likely to have committed the crime." United States v. Roark, 924 F.2d 1426, 1434 (8th Cir. 1991). To be admissible as a prior bad act, the trial judge needed to make a finding that it was proved by clear and convincing evidence and that it related to one of the exceptions in Rule 404(b). State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923); State v. Cutro, 332 S.C. 100, 504 S.E.2d 324 (1998). No such findings were made. Nor could any findings have been made because there was no evidence that gang affiliation in this case related to motive, identity, common scheme or plan, or absence of mistake.

The prejudicial impact of the gang evidence far outweighed its nonexistent probative value. Rule 403, SCRE. In State v. Spears, 403 S.C. 247, 742 S.E.2d 878 (Ct. App. 2013), appellant argued that admission of gang evidence was inadmissible under Rules 403 and 404(b). The trial court ruled the evidence of gang affiliation and a prior shooting was relevant and allowed testimony that the defendant was part of a gang. Id. at

250-51, 742 S.E.2d 880. This Court remanded the case because the trial judge failed to place findings on the record concerning its Rule 403 balancing test. Id. at 254-58, 742 S.E.2d at 883-84. Spears noted the prejudice from the introduction of this evidence and that the jury could have convicted the defendant based on propensity evidence. Id. at 258, 742 S.E.2d at 884. As in Spears, the trial court failed to place any findings under Rules 403 or 404(b) on the record, so at a minimum, this case should be remanded. But since there is no probative value to the gang evidence in this case, a remand is unnecessary.

The solicitor continually asked questions designed to support the idea that Bethel was in a gang or was a criminal. Three times during Bethel's cross-examination, the solicitor asked him about his employment history and how much money he made. R. 589, ll. 3 – 18. R. 592, l. 20 – 593, l. 15. R. 598, ll. 20 – 22. Bethel stated that he had $2,000.00 because he had sold his car. R. 598, ll. 20 – 22. The solicitor asked the defense witness Griffin whether Bethel had a lot of money and where he worked, eliciting the answer "Wal-Mart." R. 506, l. 9 – 507, l. 9. During her questioning of the lead investigator, the solicitor asked how much money was found in Bethel's pants and then immediately followed by asking whether Bethel was employed. R. 461, ll. 6 – 20. The investigator responded that Bethel was not employed. R. 461, ll. 6 – 20.

During closing argument, the solicitor intimated that Bethel was a cocaine user, telling the jury that "there are multiple reasons someone could be wiping their nose while they were in that club, the least of which is a sinus infection. R. 745, ll. 10 – 18. The solicitor said, "Then [the defendant] testified that he works—he quit working at Wal-Mart because that was too taxing. So he was working at the tire place on commission or tips and

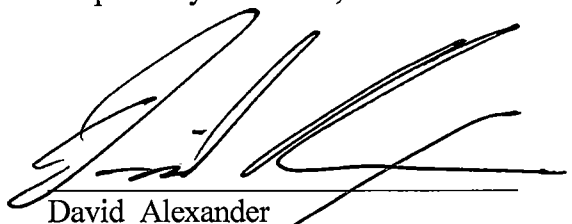
that was where the $2,000 came from until he said later that he sold his car." R. 755, ll. 3 – 6. She also argued that Bethel "made the decision that night that he wasn't going to allow himself and his friends to get kicked out of a place where he was spending money, **that he wasn't going to be disrespected like that."** R. 756, ll. 13 – 16.

The State capitalized on the admission of the gang signs testimony—that it agreed would not be admitted—to paint Bethel as a criminal member of a gang. The questions regarding Bethel's employment and the source of his money on the night in question had no other relevance. Introduction of this inflammatory and irrelevant evidence prejudiced Bethel and denied him a fair trial. This Court should reverse his convictions and remand the matter for a new trial.

CONCLUSION

For the foregoing reasons, appellant's convictions should be reversed and this case remanded for a new trial.

Respectfully submitted,



David Alexander
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ATTORNEY FOR APPELLANT

This 21st day of October, 2015.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

October 21, 2015

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMES KEVIN BETHEL,

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 Alphonso Simon Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 21st day of October, 2015.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 21st day of October, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.