STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT LEE WRIGHT,

APPELLANT

APPELLATE CASE NO. 2014-001023

BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in ruling the defenses of accident and self-defense are mutually exclusive and whether this issue is preserved for appellate review?

STATEMENT OF THE CASE

On June 12, 2010, a Charleston County grand jury indicted Appellant for murder (2010-GS-10-6153). R. 417-418. The state, represented by Benjamin Simpson and Jessica Baldwin, called the case for trial before the Honorable Kristi L. Harrington and a jury on February 24, 2014. Lorelle Proctor and Alicia Penn represented Appellant. R. 1. The jury found Appellant guilty of murder. R. 405, lines 4-10. Judge Harrington sentenced Appellant to forty years' imprisonment. R. 413, lines 5 – 9; R. 419.

Appellant filed a notice of appeal. On April 7, 2015, Appellant filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967). On March 3, 2016, the Honorable Paul E. Short, Jr., of this Court denied undersigned counsel's motion to be relieved and directed the parties to brief the following issue: Whether the trial court erred in ruling the defenses of accident and self-defense are mutually exclusive and whether this issue is preserved for appellate review. Pursuant to this Court's order, Appellant now files this brief.

ARGUMENT

The trial court erred in ruling the defenses of accident and self-defense are mutually exclusive, and this issue is preserved for appellate review.

Relevant facts

Christopher "Chris" Jenkins and Appellant's mother, Betty Scott, had been involved in a long-term romantic relationship. R. 277, lines 20-21; R. 278, line 2-9; R. 302, lines 1-3. When Betty ended the relationship, Chris was unwilling to accept her rejection of him. Instead, Chris vacillated between trying to win Betty's affections back through gifts and expressing his anger by berating her publicly or stealing from her. R. 279, line 1 – R. 280, line 9; R. 286, lines 8-12; R. 287, line 17 – R. 290, line 25; R. 293, lines 14-25; R. 302, lines 14-16; R. 274, lines 13-21; R. 276, lines 4-9. Chris's conduct escalated. In fact, several months before his death, Chris tried to hit Betty while at a birthday party. R. 280, line 10 – R. 281, line 13; R. 302, line 17 – R. 304, line 1; R. 319, line 19 – R. 320, line 22.

Approximately, one month later in April 2010, Appellant learned that Chris made his mother cry. R. 304, lines 2-9; R. 323, lines 3-14. At the insistence of his grandmother, who was worried about Betty's safety, Appellant went to talk to Chris. Appellant found Chris at a nearby basketball court. R. 304, line 19 – R. 305, line 3; R. 323, lines 17-24; R. 327, lines 3-9. When Appellant approached, Chris became belligerent and combative. Appellant and Chris threw punches. The fight lasted mere seconds, however, with both men walking away unscathed. R. 305, line 3 – 12; R. 322, lines 13-19; R. 324, lines 1-15.

On June 10, 2010, Appellant parked his car at his mother's house and attended softball practice at a nearby field. R. 305, lines 13-19; R. 306, lines 14-16; R. 325, lines 6-10. After softball practice, Appellant went to retrieve his car. R. 294, lines 17-21; R. 306, lines 16-18. While at his mother's home, he learned that Chris had been peeping around the corner and hanging out in the area of Betty's apartment building that day. R. 281, line 14 – R. 282, line 15; R. 292, line 9-25; R. 293, lines 11-18; R. 325, lines 11-20; R. 326, lines 3-6; R. 267, lines 10-19; R. 268, lines 2-8; R. 268, line 25 – R. 269, line 1; R. 269, lines 11-17. When Chris peeped around the corner while Appellant was present, Appellant walked around the building to see Chris, but all Appellant saw was Chris walking away. R. 307, lines 1-10; R. 325, lines 21-25.

When Appellant prepared to leave, someone suggested that he talk to Chris about his continued harassment of Betty. R. 308, lines 2-8. While driving home, Appellant saw Chris walking down the street. Appellant stopped his car, got out, and called out to Chris. R. 308, lines 9-15; R. 312, lines 3-5; R. 312, lines 17-22; R. 328, lines 4-10. Chris stepped into the street with his fists up. R. 313, lines 1-9; R. 328, lines 10-11; R. 328, line 25 – R. 329, line 3. Despite Appellant telling Chris he had no interest in fighting, Chris continued to approach in a threatening way. R. 313, lines 11-25; R. 328, lines 11-13. The two men then started fighting. This fight, like the previous one, lasted only seconds with both men walking away at the end. R. 314, lines 2-25; R. 315, lines 1-6; R. 329, line 21 – R. 331, line 6.

Chris walked home where he told no one of the fight. R. 85, lines 1-6; R. 101, lines 4-8; R. 133, lines 3-5; R. 157, lines 2-7. Instead, he went to bed. R. 85, lines 14-21; R. 140, lines 6-8; R. 157, lines 2-6. The following day, Chris's brother checked on him.

Chris appeared to be having a seizure. His family called for help, and Chris was transported to a hospital where he later died. R. 86, lines 8-10; R. 143, line 9 – R. 144, line 6. The pathologist concluded Chris died from blunt force trauma to the chest. R. 234, lines 4-16. There were almost no external injuries, but Chris suffered ten fractured ribs on his right side and internal bleeding. R. 226, line 9 – R. 228, line 1; R. 243, line 6 – R. 244, line 14. Had Chris received medical attention more quickly, he would have survived. R. 244, lines 15-25.

During the charge conference, the state conceded that the evidence supported a jury instruction as to involuntary manslaughter, and the judge agreed to give the instruction. R. 333, line 17 – R. 334, line 11. Additionally, the state conceded the facts supported the judge instructing the jury on the law of self-defense. R. 336, lines 4-17.

However, the state objected to Appellant's request for an instruction on accident. R. 337, lines 7-21. Appellant argued he was entitled to a jury instruction on accident because the evidence showed he did not intend to cause the death of the decedent. Citing State v. Burris, 334 S.C. 256, 513 S.E.2d 104 (1999) for the proposition that in order to charge the law of accident, the evidence must demonstrate the killing was unintentional and that the defendant was acting lawfully, Appellant argued the evidence showed just that. R. 338, lines 1-8.

The judge asked Appellant to explain "the difference between accident and self-defense in this particular case" because the judge was "having a hard time distinguishing between the two." R. 338, lines 10-15. According to the judge's view, in order to claim self-defense, Appellant was admitting that he "intended to do that act of defending himself." The judge further expressed that "even if the facts did fit those two are appositive defenses,

meaning you can't act in self-defense and it be an accident." R. 338, lines 19-23. Thereafter, the judge asked defense counsel to reconcile the two. R. 338, line 25 – R. 339, line 1. Defense counsel responded, "I'm probably not that good, Your Honor, but if the Court is telling me that it's one or the other in that case we would ask for self-defense." R. 339, lines 2-4. The judge indicated she wanted the charge to be "the accurate statement of law based upon the facts as presented." R. 339, lines 507. Further, the judge stated she did "not know in this scenario how it can be both." R. 339, lines 7-8. To this, defense counsel responded, "In that case we would just ask for self-defense." R. 339, lines 9-10. Thereafter, the judge announced she would "not be charging accident." R. 339, line 14.

During her closing argument, defense counsel argued the case involved "a fight between two grown men." R. 354, lines 17-18. Further, defense counsel argued the question before the jury was what Appellant "thought." R. 355, lines 1-2. It was necessary for the jury to "look at the intent, the intent behind the act." R. 355, lines 5-6. The jury would be required to examine what Appellant intended. R. 355, lines 7-8. According to defense counsel, the evidence showed Appellant "did not intend to kill Chris." R. 355, lines 8-10. Defense counsel told the jury "[i]t never crossed [Appellant]'s mind that he would be charged with murder because he didn't mean it. He didn't mean to kill Chris." R. 363, lines 11-13. She told the jury that Appellant "did not mean for any of this to happen. He never wanted to hurt Chris that bad. He never wanted him to die." R. 364, lines 7-9.

The judge instructed the jury concerning murder, voluntary manslaughter, involuntary manslaughter, and self-defense. R. 392, line 3 – R. 398, line 24. During its deliberations, the jury requested a definition of malice. R. 401, lines 22-24; R. 416. In

response, the judge re-instructed the jury on malice. R. 402, line 25 – R. 404, line 2. Just over one hour later, the jury reached a verdict. R. 404, lines 7-8; R. 404, lines 21-22.

Discussion

Legal error

During the prosecutor's opening statement, he told the jury "the central issue in this case, is that exactly what [Appellant] had in mind when he violently beat Christopher Jenkins? I don't know. *And at the close of this trial you won't either.*" R. 59, lines 3-10 (emphasis added). From the very beginning, the jury was put on notice – by the prosecution – that the evidence was not definitive as to what Appellant intended to do. Rather, the jury would be required to examine the evidence before it to deduce Appellant's intent. Continuing in his opening statement, the prosecutor asked the jury if Appellant "set out to do violence? Did [Appellant] set out to hurt someone? If the answer to that question is yes and the person died as a cause of those injuries then the correct verdict is guilty of murder." R. 59, lines 3-10. Thus, the prosecutor understood that the facts before the jury would require a determination of what Appellant intended to do, specifically whether he intended to cause harm, the issue at the very heart of the accident defense. Nevertheless, when the time arrived for the jury to make this determination, the defense of accident was not permitted due to the judge's misapprehension that self-defense and accident were mutually exclusive defenses.

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). A trial court's refusal to grant a jury

instruction based upon a sound principle of law applicable to the case before the trial court is an error of law. Clark v. Cantrell, 339 S.C. 369, 390, 529 S.E.2d 528, 539 (2000). If there is any evidence to support a jury charge, the trial judge should give the charge in question. State v. Burris, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999); State v. Light, 378 S.C. 641, 648, 664 S.E.2d 465, 468 (2008).

Much of the case law in South Carolina involving the defense of accident includes discussions of the elements of self-defense and how those elements integrate with the defense of accident. "In South Carolina, the defense of accident requires a showing that the harm caused was unintentional, that the defendant was acting lawfully at the time of the incident, and due care was exercised in handling the weapon." State v. Harris, 382 S.C. 107, 116, 674 S.E.2d 532, 537 (Ct. App. 2010); see also State v. Wharton, 381 S.C. 209, 672 S.E.2d 786 (2009) (citing Burriss, 334 S.C. at 259, 513 S.E.2d at 106); State v. Goodson, 312 S.C. 278, 440 S.E.2d 370 (1994); State v. Brown, 205 S.C. 514, 32 S.E.2d 825 (1945); State v. Williams, 400 S.C. 308, 316, 733 S.E.2d 605, 610 (Ct. App. 2012).

In the context of a death caused by a gunshot wound, the homicide is excusable as an accident when the evidence shows the defendant was acting lawfully in self-defense and the victim was shot by accident through the unintentional discharge of a gun. Goodson, 312 S.C. at 281, 440 S.E.2d at 372 (citing State v. McCaskill, 300 S.C. 256, 387 S.E.2d 268 (1990)). "[A] person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting." Burris, 334 S.C. at 262, 513 S.E.2d at 108. Thus, a person armed in self-defense is entitled to a charge of accident if the killing was unintentional. Id.

In State v. Chatman, 336 S.C. 149, 519 S.E.2d 100 (1999), the South Carolina

Supreme Court affirmed a trial court's refusal to instruct the jury on accident. The evidence showed Chatman was holding another person in a non-traditional chokehold. Id. at 152-153, 519 S.E.2d at 101-102. Analyzing the requirement that a defendant must act lawfully in order for accident to apply, the Court reasoned that Chatman "was not acting lawfully, since he was engaged in an assault and battery, unless he was acting in self-defense." Id. at 153, 519 S.E.2d at 102. Thereafter, the Court analyzed the evidence of Chatman's conduct to conclude he was not acting in self-defense. The Court reasoned "[i]f [the defendant] was not acting in self-defense, then he could not have been acting lawfully and he was not entitled to an accident charge." Id. at 154, 519 S.E.2d at 102.

In Tisdale v. State, 378 S.C. 122, 124, 662 S.E.2d 410, 412 (2008), the South Carolina Supreme Court held defense counsel provided ineffective assistance by failing to request an instruction as to accident. Id. At the trial, the defendant testified that when he refused to drive the alleged victim where he wanted to go, the alleged victim began yelling and punched him in the face. Id. Then, the alleged victim pulled a gun. Id. The two struggled over the gun. Id. The gun went off while it was still in the alleged victim's hand. Id. The defendant testified that the gun was never in his hand. Id. The Court held that evidence indicated the alleged victim was the aggressor as shown by him punching the defendant in the face and presenting a gun. This evidence along with evidence that the gun discharged accidently supported the charge of accident. Id. at 126, 662 S.E.2d at 412-413.

Contrary to the trial judge's contention that self-defense and accident were mutually exclusive, the two may work in conjunction. In fact, this Court made exactly this point in State v. Williams, 400 S.C. 308, 317, 733 S.E.2d 605, 610 (Ct. App. 2012)

by explaining that when the evidence in the record supports both charges, then both must be given. Thus, the trial judge committed a legal error in concluding that accident could not be charged if self-defense were also charged. The judge's legal error forced Appellant to select a single defense. Further, the trial judge's legal error prevented the jury from considering a defense supported by the evidence.

Without question, Chris's death was unintentional. The evidence before the jury was that Appellant was defending himself when he struck Chris. Thus, Appellant was acting lawfully.

There was no evidence that Appellant used a weapon so the third requirement of exercising due care in the handling of a weapon is not applicable. However, if this Court were to determine Appellant's use of his hands during the fight were to qualify as use of a weapon, then Appellant still exercised due care. Appellant recognizes that under South Carolina common law, "ordinary objects also may become deadly weapons when the facts indicate that they have been used to inflict serious bodily harm or death." State v. Davis, 309 S.C. 326, 343-344, 422 S.E.2d 133, 144 (1992), overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999). In Davis, 309 S.C. at 344, 422 S.E.2d at 144, the Court held that whether an object had been utilized as a deadly weapon depended upon the facts and circumstances of each case. The pathologist testified the deceased sustained blows to her head caused by being battered against a wall, which were consistent with injuries that a person who had been struck with a heavy object would receive. Additionally, the pressure from strangulation caused the deceased's thyroid gland and a portion of her larynx to hemorrhage. The Court "discern[ed] no reason to distinguish injuries caused by an instrumentality from similar

injuries inflicted by a hand or fist." Id. The Court concluded "that a hand or fist may be found by the jury to be a deadly weapon or object, depending upon the manner and means of its use, the wounds inflicted, and other relevant facts." Id. Appellant's testimony was that Chris approached him in a threatening manner, Appellant swept his legs forcing Chris to fall, but Chris's momentum forced Appellant to fall as well. R. 314, lines 2-8. Appellant "threw punches" and the two men separated. R. 314, line 9. Appellant's conduct during this fight was not reckless or negligent.

Even if the third element were to be read to require that a person exercise due care more generally, then Appellant satisfied that element as well. There was no evidence that Appellant was acting recklessly or negligently when he was fighting with Chris. The evidence established the two fought, the fight lasted mere seconds, and the two walked away from the fight.

Chris's death was an accident, and the judge's erroneous legal conclusion that the defenses of accident and self-defense were mutually exclusive denied Appellant a just verdict.

Preservation

"It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)(citing Creech v. South Carolina Wildlife and Marine Resources Dep't, 328 S.C. 24, 491 S.E.2d 571 (1997)). "Moreover, an objection must be sufficient specific to inform the trial court of the point being urged by the objector." Id. "Error preservation requirements are intended 'to enable the lower court to rule properly after it has considered all relevant facts, law, and

arguments.'" Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000)(quoting I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)). "Without an initial ruling by the trial court, a reviewing court simply would not be able to evaluate whether the trial court committed error." Id. The rationale of issue preservation is to prevent "a party from keeping an ace card up his sleeve – intentionally or by chance – in hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case." I'On, L.L.C., 338 S.C. at 422, 526 S.E.2d at 724. Further, an appellant may waive his right to appeal a decision by the trial judge through acquiescence. State v. Benton, 338 S.C. 151, 156-157, 526 S.E.2d 228, 231 (2000); Erickson v. Jones Street Publishers, L.L.C., 368 S.C. 444, 481, 629 S.E.2d 653, 673 (2006).

Generally, the rules of issue preservation are strictly enforced. However, the appellate courts have carved out certain limited exceptions. First, the "lack of subject matter jurisdiction may be raised at anytime, including for the first time on appeal." State v. Passmore, 363 S.C. 568, 584, 611 S.E.2d 273, 282 (Ct. App. 2005). Another exception is the "doctrine of futility." Id. Our courts have recognized "that in circumstances where it would be futile to raise an objection to the trial judge, failure to raise the objection will be excused." Id. A third "exception exists where the interests of minors or incompetents are involved." Id. at 585, 611 S.E.2d at 282. The final exception is where exceptional circumstances require excusal of error preservation. Id. For example, the Supreme Court found exceptional circumstances existed where failure to review the merits of a sentencing error would result in the defendant remaining incarcerated beyond the legal sentence. State v. Johnston, 333 S.C. 459, 463-464, 510 S.E.2d 423, 425 (1999); see also State v. Vick, 384

S.C. 189, 203, 682 S.E.2d 275, 281-282 (Ct. App. 2009)(excusing error preservation where the sentencing for kidnapping was in violation of the statute).

Appellant's request for a jury instruction concerning the defense of accident is preserved for review by this Court. Defense counsel requested the charge and the judge made a ruling. Defense counsel cited State v. Burris, supra, and noted the elements of accident, which Appellant argued were supported by evidence presented. R. 338, lines 1-8.

Although the judge requested additional argument and wanted to know the "the difference between accident and self-defense in this particular case" because the judge was "having a hard time distinguishing between the two," R. 338, lines 10-15, there was no additional argument to provide. Defense counsel made the request, supported the request by citation to applicable case law, and the request was denied. Defense counsel even made clear that she was not acquiescing in the ruling by explaining that she understood the judge's ruling, which was based upon a legal error, to require trial counsel to select between self-defense and accident. See R. 339, lines 2-4 (defense counsel responding to the judge by stating "if the Court is telling me that it's one or the other in that case we would ask for self-defense"); R. 339, lines 9-10 (defense counsel responding to the judge by stating, "In that case we would just ask for self-defense").

If this Court determines the issue is not preserved for review, then this Court should apply one of the exceptions to error preservation. Further argument with the trial judge regarding the instruction would have been futile. The judge was applying a wrong standard to determine what instructions she would give because she was requiring trial counsel to differentiate between two defenses – self-defense and accident. The question for a trial judge is not how do two defenses differ, but whether *any evidence* exists to support the

instruction. The judge indicated her view that a person could not be acting in self-defense and that the resulting harm be an accident, and therefore, both could not be charged, regardless of the set of facts presented. In short, she viewed the two as mutually exclusive. Further, there was no need to continue argument with the judge as the request had been made fully and rejected. There was simply no addition argument to provide to change the judge's mind in light of the judge's misapprehension of the law in this regard. Thus, even if this Court were to determine the error were not preserved for review, this Court should excuse the failure based on the futility doctrine.

CONCLUSION

Appellant respectfully requests this Court reverse his conviction for murder in remand for a new trial.

Respectfully submitted,

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of March, 2016.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT LEE WRIGHT,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Brief of Appellant in the above referenced case has been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Robert Lee Wright, #358939, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 29th day of March, 2016.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 29th day of March, 2016.

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