STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

JAMES KEVIN BETHEL,

APPELLANT

APPELLATE CASE NO. 2013-002478

Appeal from Richland County

Honorable Deadra L. Jefferson, Circuit Court Judge

Opinion No. 2016-UP-473

PETITION FOR REHEARING

Appellant James Bethel asks this Court to re-examine its opinion in this case as to Issue 1 (failure to charge involuntary manslaughter) and grant rehearing. Appellant is not seeking rehearing on Issue 2. Respectfully, the Court's opinion is in contradiction with existing precedent and appellant's conviction should be reversed.

The cases cited by the Court do not indicate that it applied a harmless error analysis, but instead only determined that appellant was not entitled to an involuntary manslaughter charge. The Court may have overlooked portions of appellant's testimony that, under the cases cited by the Court and by appellant, satisfy the "any evidence" standard entitling him to an involuntary

manslaughter charge. The standard for giving a manslaughter charge was correctly stated in a case cited in the Court's opinion, State v. Brayboy, 387 S.C. 174, 180, 691 S.E.2d 482, 486 (Ct. App. 2010). In Brayboy, this Court held "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." Brayboy at 180, 691 S.E.2d at 486 (emphasis added). In a more recent case, 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.**" State v. Battle, 408 S.C. 109, 119-121, 757 S.E.2d 737, 742-43 (Ct. App. 2014) (emphasis added).

Appellant testified in his own defense and his testimony alone justified the charge. Appellant satisfied the second requirement of involuntary manslaughter—that he acted with reckless disregard for the safety of others. State v. Burriss, 334 S.C. 256, 264, 513 S.E.2d 104, 109 (1999). Appellant testified that he never intentionally fired his gun:

> 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.**

R. 581, l. 9 – 583, l. 21 (emphasis added). Appellant had the gun by his side. R. 581, l. 9 – 583, l. 21. 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 (emphasis added). 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 (emphasis added). A defendant's testimony that a gun fired unintentionally supports a charge of involuntary manslaughter. Battle at 119-21, 757 S.E.2d at 742-43. See also State v. Light, 378 S.C. 641, 648, 664 S.E.2d 465, 468 (2008).

In Light, the Supreme Court reversed for failure to give an involuntary manslaughter charge because there was "evidence petitioner recklessly handled the gun because, **according to his testimony**, it fired almost immediately after he took possession of it." Light at 648-49, 664 S.E.2d at 469 (emphasis added). Citing Burriss, the Court in Light held "the negligent handling of a loaded gun will support a finding of involuntary manslaughter." Id. Appellant's testimony, recited above, satisfies the "any evidence" standard that he negligently handled a gun and fired unintentionally, flinching after hearing a gunshot.

The parentheticals included in the Court's opinion indicate that perhaps the Court believed appellant was not lawfully armed in self-defense. Specifically, the Court cited Burriss for the proposition that "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." Court's Op. at 2, citing Burriss at 262, 513 S.E.2d at 108. The Court then cited State v. Gibson, 390 S.C. 347, 357, 701 S.E.2d 766, 771 (Ct. App. 2010) for the proposition, "[F]or the purposes of involuntary manslaughter, the inquiries associated with whether or not to instruct on the defense of self-defense are not applicable." Court's Op. at 2. Respectfully, neither of these cases support a conclusion that appellant was not lawfully armed in self-defense.

Appellant heard that the bouncers were plotting a robbery. R. 569, l. 23 – 570, l. 5. Appellant told Curtis Long ("Long") he was ready to go because he "thought [he] was going to get robbed." R. 571, l. 25 – 572, l. 6. Long testified that appellant 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.

Troy Griffin ("Griffin") testified that appellant was trying to calm everything down but the decedent, Dwyane Franklin ("Franklin") was "out of control" and acted "like he had some type of grudge on his shoulder." R. 496, ll. 13 – 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.

Appellant testified that he heard threats and cursing when he was outside on the ramp. R. 660, ll. 1 – 2. He thought the bouncers from Black Ops Security were preparing to fight. R. 660, ll. 11 – 25. After appellant was pepper sprayed, he could not see and took the gun out of his back pocket. R. 581, l. 9 – 583, l. 21. Appellant was scared and "didn't know what was going on." R. 581, l. 9 – 583, l. 21. He heard his cousin yelling. R. 581, l. 9 – 583, l. 21. Appellant testified that the gun only fired **after** he heard a gunshot. R. 581, l. 9 – 583, l. 21. These facts amply support that appellant was lawfully armed in self-defense.

In Burriss, the defendant was attacked and, after a brief respite in the fight, thought he was going to be attacked again. Burriss at 263-64, 513 S.E.2d at 108-09. The gun fired unintentionally

as Burriss was trying to get to his feet and escape. Id. The trial judge found that Burriss was not acting lawfully because he was in unlawful possession of a firearm, but the Supreme Court rejected this contention. Id. Much like in Burriss, the bouncers attacked appellant with pepper spray, appellant thought the bouncers were plotting to rob him, and he was in the middle of a confusing, chaotic, fluid situation when his gun fired unintentionally. Burriss supports appellant's argument that he was entitled to an involuntary manslaughter charge.

In Gibson, the defendant was charged under the hand of one, hand of all theory for his brother's actions in firing a gun during a similar melee that spilled into the parking lot of a bar. Gibson at 351-54, 390 S.E.2d at 768-69. The defendant did not fire the fatal shot. Id. at 354, 701 S.E.2d at 770. The defendant's brother, Jacques, said he fired his gun into the air. Id. at 353, 701 S.E.2d at 769. The Gibson Court discussed the State's argument that Jacques was not lawfully armed in self-defense, but ultimately **made no conclusion on this point.** Id. at 356-57, 701 S.E.2d at 771. Instead, the Court affirmed the denial of an involuntary manslaughter charge because Jacques had "voluntarily and intentionally fired his weapon." Id. at 359, 701 S.E.2d at 772.

Here, unlike Gibson, appellant testified **he fired unintentionally**—flinching after he heard a gunshot. Gibson reached no conclusion that the defendant was not lawfully armed in self-defense and cannot serve as controlling precedent in this case where appellant was afraid of being robbed, was threatened, and was pepper-sprayed. Just like Burriss, Gibson supports appellant's argument that he was entitled to an involuntary manslaughter charge.

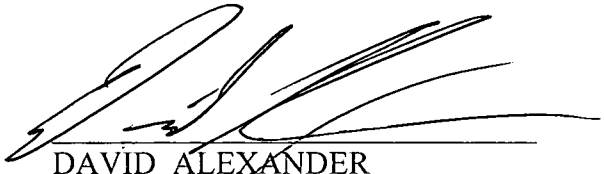
Finally and respectfully, the Court overlooked the manifest error in the trial judge's analysis. Instead of assessing the record for any evidence to support a manslaughter charge, the court improperly denied appellant's request because she believed there was evidence of malice. The trial judge said, "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). Inexplicably, when the court ruled, it recognized appellant's testimony that he "unintentionally killed the victim," but then immediately stated, "However, there is evidence of malice...." R. 673, l. 24 – 674, l. 16. Earlier the trial judge reasoned that "Clearly the evidence in the record is that malice did exist." R. 673, l. 24 – 674, l. 16. The trial judge's reasoning turned the analysis of lesser-included offenses on its head.

For purposes of charging involuntary manslaughter, it makes no difference whether evidence of malice exists. In almost every murder case, some evidence of malice will exist, otherwise the defendant would be entitled to a directed verdict on murder. Appellant's case, like many cases, had conflicting evidence. Appellant was entitled to have the jury decide the conflict. Appellant's entire trial strategy was to argue involuntary manslaughter to the jury and when the trial judge denied his request, he could not prevail. This Court should grant rehearing and reverse appellant's conviction.

For the foregoing reasons, this Court should grant rehearing and reverse on Issue 1.

Respectfully Submitted,



DAVID ALEXANDER
Appellate Defender

ATTORNEY FOR APPELLANT.

This 23rd day of November, 2016.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Alphonso Simon, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and James K. Bethel, #357782, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 23rd day of November, 2016.

David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this ~~17th~~ 23rd day of November, 2016.

(L.S)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.