

VOLUME II OF II

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Pickens County

Honorable Edward W. Miller, Circuit Court Judge

CHRISTOPHER MURRAY,

RECEIVED

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S.C. SUPREME COURT

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-002279

APPENDIX

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Second, Appellant was engaged in lawful activity, as he was armed in self-defense. "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." Crosby, 355 S.C. at 52, 584 S.E.2d at 112; see also Light, 378 S.C. at 649, n.6, 664 S.E.2d at 469, n.6; Burriss, 334 S.C. at 265, n.10, 513 S.E.2d at 109, n.10. In the present case, the trial court deemed evidence was present in the record from which to instruct the jury on the law of self-defense. As such, it is irrelevant whether Appellant was allowed to possess a handgun; what is relevant is that Appellant was entitled to arm himself in self-defense at the time the fatal shot fired.

Finally, Appellant was prejudiced by the trial court's failure to give an involuntary manslaughter jury instruction. Succinctly stated, Appellant was denied the opportunity to have the jury consider a lesser included offense when deliberating his case. See, e.g., Hill, 315 S.C. at 262, 433 S.E.2d at 849 (stating reversible error is committed if the trial court fails to give a requested charge on an issue raised by the evidence). As Counsel indicated in his opening statement to the jury, the defense's strategy was at least partly based upon the facts supporting an involuntary manslaughter instruction: "Intent and circumstances . . . will shape and help you decide whether or not the killing was a murder, a voluntary manslaughter, *or an involuntary manslaughter*. . . . [Appellant] went there to scare the guy, but was immediately attacked. The guy was on him and in the heat of the fight, the gun went off." Tr. 115, ll. 4-11 (emphasis added). Thus, Appellant was prejudiced by the trial court's refusal to charge involuntary manslaughter. As a result, Appellant seeks reversal of his conviction, and a new trial granted.

CONCLUSION

Accordingly, Appellant Christopher R. Murray respectfully requests reversal of his conviction, and remand for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Breen Richard Stevens", written over a horizontal line.

Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

This 1st day of June, 2012.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Pickens County
G. Edward Welmaker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CHRISTOPHER MURRAY,

APPELLANT

**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment;
- (2) Trial transcript, pp. 1-58; pp. 60-72; pg. 84; pg. 94; pp. 108-163; pp. 165-224; pg. 227; pp. 232-336; pp. 338-435; pp. 437-475; pg. 480; pp. 483-490;
- (3) State's Exhibit # 1 (DVD of in-car video);
- (4) State's Exhibit # 3 (DVD of Interview);
- (5) State's Exhibit #53 (Voluntary Statement of Matt Brissey);
- (6) Sentence sheet.

I certify that this designation contains no matter which is irrelevant to this appeal.

June 1st, 2012



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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Pickens County
G. Edward Welmaker, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

CHRISTOPHER MURRAY,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 1st day of June, 2012.



Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 1st day of June, 2012.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: October 2, 2013.

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Pickens County
G. Edward Welmaker, Circuit Court Judge

Appellate Case No. 2011-192046

THE STATE OF SOUTH CAROLINA,

Respondent,

v.

CHRISTOPHER MURRAY,

Appellant.

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133 L.Ed.2d 671 (1996) 12**

APPELLANT'S STATEMENT OF ISSUE ON APPEAL

Whether the trial court reversibly erred by failing to charge the lesser-included offense of involuntary manslaughter where evidence was present in the record indicating a struggle occurred between Appellant and the decedent?

RESPONDENT'S STATEMENT OF THE CASE

The Appellant, Christopher Robert Murray, was indicted on January 18, 2011 by the Court of General Sessions for Pickens County for murder involving the January 18, 2010 death of James Anthony Gibson. ROA __. State v. Christopher Robert Murray, 2011-GS-39-0026. The matter was called to trial before the Honorable G. Edward Welmaker, Presiding Judge. The Appellant was represented by retained counsel Gary Mallard. The prosecution was represented by Assistant Solicitors Doug Richardson and Baker Cleveland of the Thirteenth Circuit Solicitor's Office. On April 14, 2011, a competency hearing was held. Tr. p. 9-24, 57-58. A Jackson v. Denno hearing was also held. Tr. 24-27. The trial was convened on April 18, 2011. Tr. 64. On April 20, 2011, the jury convicted the Appellant of murder. He was sentenced to a term of forty (40) years. Tr. 489-490.

This appeal follows.

RESPONDENT'S STATEMENT OF THE FACTS

Under the state's theory of the case, the death of James Gibson was the result of a premeditated robbery, where the Appellant was seeking money. The targeting of James Gibson, who his girlfriend used to date, as a victim of a planned robbery began almost two weeks before during an angry conversation that involved a threat to his girlfriend, Faye Brissey and Christopher Meyer, in addition to the Appellant. For two days, he declared that he was going to get James to Matt Brissey and to a potential conspirator, James Kuykendall. In his quest for easy money, Gibson fell prey to his planned scheme. An initial attempt to conceal his identity was aborted when a car drove up while Appellant was knocking on the door, as the evidence revealed, almost immediately upon entry, three shots from Appellant's Hi-Point 380 automatic pistol exploded while it was under his control, one fatally entering the victim. Importantly, the operation of the .380 pistol required two handed operation. The operator was required to hold the gun in one hand and push the slide back with the other hand. Tr.p. 384-385. The Appellant fled, apparently without recovering any money, leaving the victim to die, after covering his face with a pillow, leaving his toboggan behind.

Christopher Meyer testified he knew Faye Brissey, the Appellant's girlfriend, because they were neighbors. Meyer was Gibson's friend. About two weeks before the crime, Meyer called Faye to get in touch with Matthew Brissey and Gibson got on the phone with Faye and started arguing with her. Tr.p. 171-172. The Appellant, Chris Murray then got on the phone at Faye's end and started arguing with Gibson. Meyer learned the day after the conversation that Murray was still angry with him through text messaging. Tr.p. 172-173. Meyer had thought that the Appellant was not angry with him about the conversation until the next day when he realized

that Appellant was also mad at him after Meyer apologized on his behalf. Tr.p. 177, l. 1-15.

There was no evidence of any further conversations between Christopher Murray and the victim until the night of his death.

Murray then acquires a .380 handgun. He returns from Manning to Easley carrying the weapon. State Exhibit 3. He is known to carry the gun in his waistband.

At some point, Jack Kuykendall, who Appellant and Brissey had met a few months before the incident, became aware that Appellant carried the weapon. On the day of the incident, at some, Kuykendall had the gun when he dropped them off at Dollar General and then returned it to him when he dropped them off again on Moore Road. Tr.p. 219-220, 223.¹ Kuykendall confirmed that he had a conversation with Murray about his argument with Gibson and Murray told him that he "would deal with it later" and that he thought he meant "fist-fighting." Tr.p. 220-221. Kuykendall stated that he had asked him if he knew anybody they could rob. Tr.p. 220, l. 6-15, p. 221, l. 5-4. Later that night, Kuykendall received a text around 10:30 PM that he knew a house he could hit if Kuykendall came with him. Kuykendall said that it was too late and he went to sleep without responding back to him. Tr.p. 221. Kuykendall also said at one point while there were driving around the house he was going to hit (rob) was — Black Snake road - the house the James Gibson lived in. Tr.p. 222. Kuykendall stated that the next day he received telephone messages from Murray saying he needed money before he got arrested. Tr.p. 222, l. 2-7.

Faye Brissey, the Appellant's girlfriend, testified that She was friends with Gibson and had known him for about one year before his death. She met Murray after calling her cousin

¹Kuykendall stated that he kept the gun while gathering his belongings for protection due to threats that he had received the previous night Tr.p. 223-224.

and asking for her cousin to set her up with a guy. She met Murray three days before Christmas 2009 when she picked Murray up from a bus station. Murray was returning from Louisiana. After staying at her parent's house the night, Brissey and Murray traveled to Florence, South Carolina to stay with Murray's friends. Then, the pair traveled to Manning, SC, because there was not room for them to stay in Florence. They stayed in Manning for approximately two to three weeks. Tr.p. 260, l. 25- p. 264, l. 10.

Brissey saw that Murray had a .380 gun in Manning. She noted that he had purchased hollow tip bullets for the gun Tr.p. 264.

While in Manning, Gibson called her looking for her cousin (Matt Brissey). She confirmed that Gibson and Brissey got into an argument with Gibson threatening to slice her throat if she did not tell him where Matt Brissey was. Tr.p. 265. She stated that Murray then got on the phone and argued with Gibson. Brissey, however, did not take Gibson's threat seriously, and the next day, they (Gibson) texted Brissey and told her they were sorry. Tr.p. 265-266.

Around the first week in January, Brissey and Murray returned to Easley and eventually ended up staying with Matt Brissey on Moore Drive. Murray purchased the white Chevy Cavalier from a junkyard for \$400 prior to January 18th. Murray never got tags for the car because he did not have title to the car (he did not pay full price and owed \$200 before he could get title). Tr.p. 268-269.

Brissey testified about the incident on January 18. According to her, she was at the Moore Road residence all day until Murray woke her up in the evening and asked if she wanted to go to the Z Mart. It was around 8:30 pm and the Z-Mart was closed so Murray drove to the street where Brissey's parents and Gibson lived. Murray pulled in backwards at Gibson's house in

the Cavalier. Brissey described Murray jumping out of the car, leaving the car door open. She said he went to Gibson's porch and knocked on the door. She stated at first he put on a toboggan to conceal his face. Tr.p. 273-275. When he saw a car coming, he jerked it down, when the victim answered the door. At that point she stated that Appellant went in, and after "not even a second", she heard three back to back gunshots. Tr.p. 274, l. 3- 275, l. 10.

Faye Brissey stated that Murray ran back to the car, got in the driver's side and then sped away. Tr.p. 275. After they had crossed the bridge on Highway 123, Murray told her that he had killed James. Tr.p. 276, l. 6-12. Murray and Brissey then returned to Moore Drive where they changed clothes. The Appellant then told her that they needed to "get the hell out of Easley." Tr.p. 277, l. 24-25. Brissey stated that they were still without money and they drove to the Hot Spot, someone there gave them \$10.00. Tr.p. 278. They used it to buy gas. They proceeded to get more money and gas from people as they traveled. Tr.p. 278-279. They eventually got to Aiken whether Murray's half-sister Crystal lived. Tr.p. 280-81.

After sleeping about two hours, Faye went with Crystal to the park. When they returned, the Chevy Cavalier was gone and Brissey did not find out what happened to the car. After sleeping at Crystal's again the next night, Brissey and Murray accompanied Crystal to the cookout. After learning the police were after them, Murray and Brissey fled the cookout with Crystal and were dropped off in the location with the abandoned car. When the police arrived, Brissey ran into the woods but she was quickly apprehended. She is charged with accessory to murder after the fact. The day after her capture, Brissey gave a statement to the police at the

Pickens County Sheriffs Office. Tr.p. 278-288. Also Tr.p. 294-304.²

During the Appellant's questioning, he led law enforcement to the location where he had buried the gun used in the crime. Five hollow point bullets were removed. The gun was buried approximately 12 inches in a wooded lot next to Crystal's house in Aiken. Tr.p. 294-310.

The Appellant did not have any visible signs of bruising or contusions on his face or body. Tr.p. 313, l. 3-22. (Bergmann); Tr.p. 328, l. 10-11. (Goodwin); Tr.p. 339, l. 6-10 (Taylor).

The Appellant stated in his statement that he had been in a fight with the victim. He had stated that the victim, at one point had been on top of him. Tr.p. 342.

The Appellant's cellphone was recovered. It included a message to Jack that "I need money. I have to get out of here before I go to jail." Tr.p. 361, l. 22-25. It was delivered at 12:35 am. Tr.p. 362.

Matt Brissey testified at the trial. He stated that he had seen Murray and his cousin Faye in January 2010. He stated that Appellant was known to carry a weapon, a black .380. He saw this the day before the crime. Tr.p. 141. He stated that he saw the Appellant using it to shot at a tree. Tr.p. 142. He shot the gun with the Appellant using hollow point bullets. Brissey described Murray coming to the house, waking up Faye and asking her to go to the store around 7 o'clock. Tr.p. 142. Around 11:15 PM, he recalled that Faye returned crying and hysterical, claimed that Chris had shot James. Tr.p. 142-143. After Faye went in the house, Appellant had changed his clothes, and then he told Matt: ". . .he went over to James' house and he knocked on the door

²Faye Brissey testified that she had told police that Appellant told her that they were fighting. Tr.p. 408-409. However, Detective Baker stated that she told them that she knew that the defendant and James were fighting because she could see fists flying through the window. Tr.p. 409, l. 22-24.

and James went to open the door and Chris opened the door, and when he oped the door Chris hit his self in the mouth with the door.³ He stated that there was a struggle , that he was trying to shoot him. He shot one in his wall, one in the couch and rolled and James -- he rolled James on his back when they was wrestling and shot him in the chest. . ." Tr.p. 144, l. 1-12. He stated that Appellant put a couch pillow over his face. Appellant told Matt that "he was going over there to find some money ..." Tr.p. 144, l. 23-24. He never stated to Matt if he found any money. Tr.p. 145, l. 3-8.

Matt stated that Appellant never told him that Gibson had any type of weapon during the struggle. Tr.p. 146, l. 12-15. However, Appellant did state that he lost his hat over there. Tr.p. 17-22.⁴ Matt stated that Appellant had told him that when they left his house that they intended to go rob the Z-Mart. Tr.p. 147, l. 4-7. However, he returned stating that the Z-Mart was closed. He stated that the Wal-Mart and Sphinx, but thought that the Wal-Mart had inch thick glass and the Spinx had too many police in the parking lot. Tr.p. 147. He then advised him that he was headed to his sister's house in Aiken. Tr.p. 147.

Matt testified that Faye had told him that Gibson had made a threat to her stating that he would slit her throat and blacken her eye during a telephone call, but that he had texted her within ten (10) minutes and apologized. Tr.p. 151, l. 1-6. Importantly, Matt stated that the victim dated Faye before she started dating Chris Murray. Tr.p. 150, l. 22-23. In a written statement introduced at trial, Matt Brissey stated:

³On cross-examination, Matt denied that Appellant told him that he was hit in the mouth by James. He clarified that the door hit Appellant in the mouth when it was opened. Tr.p. 149.

⁴A blue knit hat was located in the victim's trailer. Tr.p. 205, l. 12-13.

Chris and Faye came down from Manning. They were staying with Faye's mama three days or four and Faye and her mother got into a fight and Chris and Faye came to stay with me, because they didn't have no place to go. And they -- well, Christopher Murray said he was going to get James. And then the next day he said the same thing. And then the next night, they left and then came back. Chris and Faye, that is who I am talking about. Faye said that Chris killed James and then Chris told me the whole story. That when he got there, Chris knocked on the door and James opened the door and hit Chris in the mouth. And Chris jerked the door open and tried to kick James. James grabbed Chris' foot and pulled him in, and then they started wrestling in the living room. And first shot hit the wall, and then the second one hit the ceiling, and the third one he put the gun, the 380 that had hollow point tips, to his chest and shot him. And that he, James, was bleeding out the mouth. And the whole time, Faye was out in the car. And he got the car from Barlet Brothers. And went to find money there and he threw the couch pillow on his body, meaning James' body. And the woman bought the gun to rob Wendy's in Florence. He even said that he was going to rob Z-Mart, but they was closed. And then he went to Wal-Mart. And he said that they had an inch glass window and something about the door would lock. He said he went to Spinx and they was a cop there or something like that.

Tr.p. 366, l. 19-367, l. 21. (emphasis added).⁵

The victim died as a result of a gunshot wound fired within an inch or two from the chest, according to the pathologist. Tr.p. 232-247.

In flight, the Appellant attempted to get money in addition to his aborted decisions concerning the Spinx and Wal-Mart. Harriet Millman, Christopher Meyer's mother, testified that around 1:30 am, Faye and Appellant showed up at her house asking for money. Tr.p. 165-168. She quickly closed the door because she felt threatened by them. Tr. P. 168. Crystal Murray, the Appellant's sister in law, received a call asking for money from Appellant. Tr.p. 249. She stated that he told her that she wanted him to send her money and that he was wanting to come down

⁵Rebecca Chastain (Espinosa) testified that Murray had gotten into an argument with her at the Bi-Lo and told her that he had something in his pocket that would take care of her. Tr.p. 413. She stated that she was calling the Easley Police when he took off. Id. She stated that Murray told her that he was going to take care of the boys that were hurting Faye. Tr.p. 414-415.

and visit her, however, she told him that she did not have any money to send him for gas. Tr.p. 249-250.

SLED firearm and tool mark examiner Suzanne Cromer testified on the testing of the .380 weapon that was recovered. She opined that it was functioning properly. She noted that the gun would not fire with the safety on. She described that the gun has two safety features - a rotating thumb safety and a magazine safety. The gun will not fire with the safety on. She stated that the safety fits into the slide and that the slide must be pushed down or cut it off to be able to push the slide rearward to get a bullet in the chamber. The gun is such that it will fire successive shots without needing to be manually reloaded. Tr.p. 382-383. Essentially, the gun reloads itself. The gun also ejects the shell automatically. However, due to operator error, the gun may fail to properly eject the shell as the shell may get stuck. Cromer test fired the gun in the SLED lab. Importantly, the expert testified that it is a two handed operation. "You'd have to hold the gun in one hand and push the slide back with the other." Tr.p. 384, l. 25- p. 386, l. 1. She stated that it could not easily accidentally happen. Tr.p. 385, l. 2-3.

The hollow point bullets are made to "mushroom" when they hit an object to be more effective. Cromer could not render a conclusive statement that the bullets she received as evidence were fired from the gun. However, Cromer could not rule out that the bullets were not fired from the gun. Tr.p. 381-391.

On cross-examination, Cromer stated that the rotating thumb safety feature can be manually turned on and off, which will prevent the gun from firing even if the magazine is inserted. Cromer does not know the amount of pressure necessary to engage or disengage that safety feature, but she was unwilling to state that it is impossible for the safety to be turned off

accidentally, because she did not know how the gun was being held. Tr.p. 391-392.

ARGUMENT

- I. **The trial judge properly denied the request to instruct on the lesser offense of involuntary manslaughter where there was no evidence to support the instruction. The evidence revealed that the Appellant entered the house of James Gibson with an intent "to deal with him" and rob him and the use of the pistol was intentional, not the result of criminal negligence sufficient to support an instruction on involuntary manslaughter.**

In denying the request to charge involuntary manslaughter, the trial judge opined that although there was a fight after the Appellant entered the domicile of James Gibson, there was no fight over a weapon to justify an instruction on involuntary manslaughter. The Appellant asks this Court to revise history and assume facts not in evidence to create existence of evidence to support his instruction. This is not the role of this Court or the lower court. In his brief before this court, the Appellant asserts that because there was some evidence that the unarmed victim, within his own home, was on top of the intruder (who entered the home armed with a Hi-Point .380 automatic pistol, he is entitled to have an instruction on involuntary manslaughter. Ignoring the applicability of the Castle Doctrine and the actions of the victim within his home,⁶ the request still must fail. Where the record is void of evidence that the victim ever possessed or controlled this or any weapon, the mere fact that three shots were fired by the Appellant - two that missed - is insufficient to create a lesser offense, even though one shot entered the floor and the other near

⁶Had the victim killed the Appellant during their struggle, the Castle Doctrine would have applied. See State v. Dickey, 394 S.C. 491, 716 S.E.2d 97 (2011). Further, the trial judge instructed on the applicability of the common law Castle Doctrine, upon the prosecution's request. Tr.p. 434, l. 25- p. 435, l. 5, p. 472, l. 20-23.

the ceiling.⁷

⁷ The first case James N. Tucker may be persuasive in this area. In Tucker, there were multiple shootings in Tucker's assault on the victim and struggle. This Court concluded that there was no evidence to support an involuntary manslaughter charge. The Court addressed two separate areas for the rejection:

Because Appellant was engaged in committing burglary, kidnapping and armed robbery at the time the shooting occurred (all felonies), he was not entitled to have this charge. State v. Young, 319 S.C. 33, 459 S.E.2d 84 (1995), cert. denied, 516 U.S. 1051, 116 S.Ct. 718, 133 L.Ed.2d 671 (1996); State v. McCall, 304 S.C. 465, 405 S.E.2d 414 (Ct.App.1991).

Even if the first shooting was unintentional, the same cannot be said of the second. Appellant stated, "I shot her again before I left just because-as stupid as it sounds-I thought she was suffering. So I put her out of her misery. That's basically what the second shot was for." n. 6. (omitted). It is difficult to imagine a more intentional shooting. See State v. Thompson, 278 S.C. at 7, 292 S.E.2d at 585 (involuntary manslaughter charge improper where there was testimony that first shot was accidental but second shot was meant to insure victim's death).

State v. Tucker, 324 S.C. 155, 170-171, 478 S.E.2d 260, 268 (1996). In State v. Thompson, 278 S.C. 1, 7-8, 292 S.E.2d 581, 585 (1982), the Court held:

A charge of involuntary manslaughter would have been improper, also, as there was no evidence to support the charge. State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979). When we review a jury charge for error, we consider it as a whole in light of the evidence presented during the trial. State v. Hyman, 281 S.E.2d 209 (S.C.1981); State v. Tucker, 273 S.C. 736, 259 S.E.2d 414 (1979). There were two shots fired into the victim. Although there was testimony that the first shot fired by appellant was an "accident", there was also testimony that appellant fired the second shot deliberately to insure the victim's death. We have held that it is only necessary to charge a lesser included offense when there is evidence tending to show that only such lesser crime was committed. State v. Mickle, 273 S.C. 71, 254 S.E.2d 295 (1979); State v. Funchess, 267 S.C. 427, 229 S.E.2d 331 (1976). **Therefore, it was not error to refuse to charge involuntary manslaughter when at least one of the two shots was fired deliberately.**

State v. Thompson, 278 S.C. 1, 7-8, 292 S.E.2d 581, 585 (1982) (emphasis added).

STANDARD OF REVIEW

The evidence presented at trial determines the law to be charged, and a trial court commits reversible error in failing to give a requested charge on an issue raised by the evidence. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). In determining whether to charge the lesser included offense of manslaughter the court must view the evidence in the light most favorable to the defendant. *Id.* Declining to charge the lesser included offense is warranted when it “very clearly appear[s] that ... no evidence whatsoever [exists] tending to reduce the crime from murder to manslaughter.” State v. Brayboy, 387 S.C. 174, 179, 691 S.E.2d 482, 485 (Ct.App.2010); State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000). In order to amount to reversible error, the failure to give a requested charge must be both erroneous and prejudicial. State v. Patterson, 367 S.C. 219, 232, 625 S.E.2d 239, 245 (Ct.App.2006).

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. To constitute involuntary manslaughter, there must be a finding of criminal negligence, statutorily defined as a reckless disregard of the safety of others. Recklessness 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. 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. The mere negligent handling of a loaded gun will support a charge of involuntary manslaughter. State v. Brayboy, 387 S.C. at 180, 691 S.E.2d at 485 (internal citations

and quotations omitted).

HOW THE ISSUE WAS RAISED BELOW.

The defense requested an instruction on involuntary manslaughter. Tr. p. 419, ll. 14-15. As support for the instruction, defense counsel Mallard urged that while the Appellant arrived at Gibson's house with a gun on him, it was not initially pointed at the victim, but may have pointed it after the scuffle began at the doorway. Tr. p. 420, ll. 3-6. He relied upon the taped statement and Matt Brissey's testimony. Counsel further contended that Murray did not anticipate great bodily harm until the victim grabbed the gun. Tr. p. 420, ll. 6-9. Alternately, counsel urged that what he was doing at Gibson's was legal activity where James let him in, but that it could be viewed as a reckless disregard in the manner it was done.

Recognizing that involuntary manslaughter could not be charged if he was "presenting and pointing" a loaded weapon at someone, he thought it was a jury question [relying upon State v. Reese, 370 S.C. 1, 633 S.E.2d 898 (2006)], whether or not the Appellant had the gun out and pointed when he approached the victim's house. Tr. p. 421, ll. 1-4.

The prosecution responded that the critical issue was whether it was an unintentional killing. Tr. p. 421, ll. 8-9. He stated that the Appellant's taped statement revealed that he ultimately pointed the gun and shot three times, which removed it from involuntary manslaughter by the intentional killing. Tr. p. 421, ll. 8-15. Noting that Appellant initially claimed the gun was in the waistband and then on the floor, the prosecutor stated the Appellant had to pick up the gun, cock the gun with two hands, thus removing it from being an unintentional killing based upon expert testimony. Further, he noted the possession of the weapon in his waistband was illegal. Tr. p. 422, ll. 8-18.

The prosecution further noted that there were three (3) shots, not one shot and the gun held nine (9) shots. The ninth shot was in the barrel and cocked out by his actions. Tr. 423.

The defense speculated that when the gun was in play in the scuffle, the safety could have accidentally unlocked, or several other things could have happened and it could be involuntary. Tr. 423.

The prosecution responded that under their version the gun is pick up off the floor and did not have to be cocked, Appellant still had to pick it up, aim it and shot it. Solicitor Richardson noted that in the video statement he shot until he hit the victim. Tr. 423-24.

The defense denied that there was evidence that he deliberately shot into the ceiling and one went into the floor. Tr. 424. Counsel further stressed that there was evidence by Appellant in his statements that the victim was on top him, and he claimed the gun could have gone off accidentally. Tr. p. 424, ll. 3-12.

However, the State questioned that this weapon could have gone off three (3) times accidentally. Tr. p. 424, ll. 13-14. The defense claimed that his client contended that he was trying to hold onto the gun the whole time to keep the victim from getting it. "Application of pressure by the deceased to resist and stuff could also have ..." However, the trial court agreed with the prosecution that there was no evidence to support the last speculation. Tr. p. 424, ll. 16-23.

The question of whether self-defense should be charged was presented. Tr. 425-432. The State urged that the Appellant was at fault in bringing on the difficulty by arriving at scene illegally armed. Tr. 425-27. He further noted that the victim was authorized under the Castle Doctrine to defend himself. Tr. 431.

In concluding that involuntary manslaughter should not be charged, Judge Welmaker concluded:

I've read recent case law on the involuntary charge that I've brought up to both of you . . . I think . . . There was testimony, as I can remember, about a struggle going on, but I never really heard anything about a fight over the weapon. Based upon the recent case of State v. Brayboy [387 S.C. 174, 691 S.E.2d 482 (Ct. App. 2010)] and State v. Rivera [389 S.C. 399, 699 S.E.2d 157 (2010)], I'm not going to charge involuntary manslaughter.

...

Tr. p. 434, ll. 6-13. The trial judge did charge self-defense. Tr. p. 434, ll. 12-16.

THE SHOOTING WAS INTENTIONAL

Involuntary manslaughter was properly rejected where the evidence did not suggest that the shooting of the firearm was unintentional. The Appellant does not present evidence that the shooting was unintentional. He has failed to present any evidence that the weapon was defective or the manner of its use was purely negligent. As the State urged in seeking rejection of the instruction, the mere fact that two bullets missed does not make the shooting "unintentional." There was no evidence that the gun accidentally discharged. Tr.p. 382-383, 385. However, regardless of whether Appellant was lawfully armed in self-defense, the essence of involuntary manslaughter is the involuntary nature of the killing. See Douglas v. State, 332 S.C. 67, 74, 504 S.E.2d 307, 310 (1998) (finding no involuntary manslaughter charge warranted where defendant admitted he intentionally fired a gun into a crowd in self-defense despite testimony that the defendant had been rushed by a group of people during a fight); State v. Pickens, 320 S.C. 528, 466 S.E.2d 364 (1996) (holding where a defendant admitted he intentionally shot his gun, contending he was acting recklessly but lawfully in self-defense, involuntary manslaughter

charge was not warranted); State v. Morris, 307 S.C. 480, 483–84, 415 S.E.2d 819, 821–22 (Ct.App.1991) (noting that under involuntary manslaughter, the act must be unintentional and defendant intentionally shot his gun though he claimed self-defense); accord State v. Light, 378 S.C. 641, at 648 –49, 664 S.E.2d 465 at 468 –69 (2008) (finding the defendant had lawfully armed himself in self defense and was entitled to an instruction on involuntary manslaughter, in a case in which there existed evidence the gun unintentionally discharged); State v. Brayboy, 387 S.C. 174, at 181–82, 691 S.E.2d 482 at 486 (S.C. App. 2010) (holding that although unlawful to point and present a firearm, when a defendant lawfully armed himself in self defense his failure to immediately disarm himself when the threat subsided did not amount to unlawful pointing and presenting a firearm and evidence suggesting the gun accidentally discharged was sufficient to warrant instruction on involuntary manslaughter).

The trial court's reliance on the Brayboy and Rivera opinions is particularly instructive. In Brayboy, there are important distinguishing features not present in Appellant's case.

According to Brayboy's statement, Simone pulled the gun on Brayboy, Brayboy pushed Simone causing the gun to fall to the ground, the two both grabbed for the gun, Brayboy reached the gun first, they were both arguing and swinging their arms, and Simone was "up in [Brayboy's] face" when the gun discharged shortly after Brayboy grabbed the gun. There is evidence from the videotaped statement that the gun discharged when Brayboy swung his arm around, right after he picked it up, and he did not "even remember the gun" at the time. See Crosby, 355 S.C. at 53, 584 S.E.2d at 112 (finding involuntary manslaughter charge should have been given where defendant admitted he closed his eyes and pulled the trigger, but added that "he didn't even know he had pulled the trigger.") (emphasis in original). As in Light II, there is evidence the victim pulled out a gun, the defendant struggled with the victim to obtain the gun, and in the moments right after the defendant obtained possession of the gun, the weapon discharged. Accordingly, there is evidence from which the jury could determine Brayboy was lawfully armed in self-defense, and he negligently handled the loaded gun causing it to discharge.

State v. Brayboy, supra. Here, unlike Brayboy, the trial court concluded that there was no evidence that the victim ever possessed the weapon (or any weapon) or that the gun accidentally discharged in any manner during the Appellant's entry. Although he missed on two shots, he hit the victim with a third.

Similarly, State v. Rivera, 389 S.C. 399, 404-407, 699 S.E.2d 157, 159 - 161 (2010) does not provide a basis for an involuntary manslaughter instruction for Murray. In Rivera, the defendant did not assert that he was in fear of death or great bodily injury. Thus, the Supreme Court concluded that the trial judge reasonably found that Rivera was not acting in self-defense and refused to charge the jury on those grounds. Further, it affirmed that because the death at issue here occurred as a result of the discharge of a firearm, there is no evidence in the record to support a jury charge on the first theory of involuntary manslaughter: the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm.⁸

⁸The dissent in Rivera is probative of what facts the Rivera court was facing. Therein, Justice Beatty noted:

The record in this case is replete with testimony that Rivera was the victim of an unprovoked physical attack by Delman Mauricio Arias. The testimony also indicates that although Rivera had the gun on his person he did not present it until after he was beaten, knocked to the ground, and repeatedly kicked. Even then, the gun was unintentionally presented when it fell down Rivera's pant leg and onto the ground resulting in a scramble for the gun between Rivera and Arias. Rivera testified that he got control of the gun and fired it into the ground when Arias continued to advance. Furthermore, in response to the solicitor's question concerning why Rivera pulled the gun, Rivera testified "The truth is that I did it just because I was nervous and because somebody was hitting me, beating me."

Id., at 389 S.C at 406-407, 699S.E.2d at 160-161. He contended that according to the majority, the evidence did not support the threat level did not increase sufficiently to arm himself in self-defense. He suggested that the law does not require a person to submit to a physical beating and

Here, the evidence revealed that the door opened at his intended and unarmed victim's trailer and the door hit Appellant in the face. Tr.p. 144, 366 According to the Brissey statements, Appellant entered the trailer, initially trying to kick the victim and then they began wrestling. As the evidence stated: "first shot hit the wall, and then the second one hit the ceiling, and the third one he put the gun, the 380 that had hollow point tips, to his chest and shot him." Tr.p. 366. There was no struggle over the weapon. The alleged fact that the victim, at some point was on top of Murray does not provide a basis alone for involuntary manslaughter under Rivera. The trial court was correct to reject it.

Like the situation in State v. Smith (David Dwight), 391 S.C. 408, 414-415, 706 S.E.2d 12, 15 - 16 (2011), the victim here was always unarmed. Like Smith, there was no evidence that Murray was unable to retreat. To the contrary, he created the situation. It is improper to suggest that he was entitled to arm himself in self-defense, when he entered the crime scene with an intent to get even with the victim, even attempting to cover his face to avoid recognition. Like Smith, it cannot be said that Murray was not without fault in bringing on the difficulty. There prior run in based upon the alleged threats made to his girlfriend and the expressed intent to target him to "hit" and rob defeat any suggestion that "involuntary manslaughter should apply. Tr.p. 220-223, 366.

The Appellant claims that he was lawfully armed in self-defense merely because the trial judge instructed , over the state's objection the defense of self-defense. Initial Brief of Appellant, p. 10. Accepting this theory, involuntary manslaughter would be required to be instructed any

to refrain from defending himself until the beating results in serious injury. Here, the only alleged injury here was that before he entered the trailer, the door hit the Appellant in the face. Tr.p. 144-145, 366.

time self-defense is charged. As noted herein, this is not the case. There must be an unintentional use of the weapon while engaged in a lawful activity. The Appellant, under these facts, has failed in that showing. This is particularly true where the Appellant has failed to show that his purpose on confronting Gibson was ever lawful, under the facts of this case.

However, regardless of whether Appellant was , “was engaged in a lawful act, i.e. was [he] lawfully armed, and not whether he actually acted in self-defense when the shooting occurred., the essence of involuntary manslaughter is whether there was an involuntary nature to the killing.” He woefully fails to show evidence to support this prong also. See State v. Gibson, 390 S.C. 347, 356-358, 701 S.E.2d 766, 770-772 (S.C. App. 2010). The evidence showed that the even if the gun dropped onto the floor , as in Rivera, the evidence appears to be that . Appellant still had to pick it up, get the safety off, cocked it and fire it with two hands. While the defense is urging that the gun could have gone off three times accidentally, it does not appear that the evidence presented at trial was that it went off three times accidentally. Rather the evidence was that it was fired three times and the last shot hit the victim. This is a difference with a distinction that defeats any entitlement to involuntary. As the trial court noted, there was no evidence to support Appellant’s speculative theory concerning whether the victim could have applied pressure to resist causing the firing of the gun.

For an instruction on involuntary manslaughter to be necessary, there must be more than the fact that a gun was fired during a struggle. The firing of the gun must be unintentional. There must be more than a claim that at some point a victim was on top of the defendant in a struggle.⁹

⁹There was no evidence of any injury, bruising or contusions on the Appellant. Tr.p. 313, 328, 339.

It must be more than the fact that two errant shots from the gun held by the Appellant missed the victim, one going in the floor and the other near the ceiling during the struggle. Here, the Appellant, intentionally place the weapon that he brought into the conflict within an inch and one-half of the victim's chest and fired. "Struggle" is not a magic term automatically creating an entitlement to involuntary manslaughter. To the contrary, where the firing of a weapon during a struggle is intentional, involuntary manslaughter cannot exist. Similarly, where the perpetrator enters the fray with the intent to commit a crime, either of robbery, an assault "to get James" "deal with it," "take care of," have a fist-fight or a "hit" on the victim, involuntary manslaughter should not exist. As he stated to Matt Brissey, "he was trying to shot him." Tr.p. 144, 200-223, 336, 414-415. The lower court did not err in excluding it from the jury's consideration, where, under the discrete facts of this case, there was no evidence to support it.

CONCLUSION

For all the foregoing reasons, the judgment of conviction must be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

October 15, 2012.

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Pickens County
G. Edward Welmaker, Circuit Court Judge

Appellate Case No. 2011-192046

THE STATE OF SOUTH CAROLINA,

Respondent,

v.

CHRISTOPHER MURRAY,

Appellant.

**DESIGNATION OF MATTER
TO BE INCLUDED IN RECORD ON APPEAL**

The Respondents propose the following additions to be included in the Record on Appeal:

Respondent has no additions to the designations of the Appellant.

I certify that this Designation contains no matter which is irrelevant to the appeal.


DONALD J. ZELENSKA
ATTORNEY FOR RESPONDENT

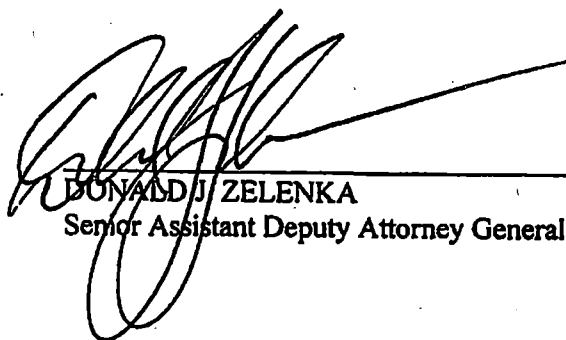
October 15, 2012.

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the *Initial Brief of Respondent and Designation of Matter* in the foregoing action by depositing copies in the Inter-Agency Mail to:

Breen Richard Stevens
Appellate Defender
S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, SC 29201

This 15th day of October, 2012.



DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent

v.

Christopher Murray, Appellant.

Appellate Case No. 2011-192046

Appeal From Pickens County
G. Edward Welmaker, Circuit Court Judge

Opinion No. 5150
Heard May 7, 2013 – Filed June 26, 2013

AFFIRMED

Appellate Defender Breen Richard Stevens, of Columbia,
for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy
Attorney General John W. McIntosh, Senior Assistant
Deputy Attorney General Donald J. Zelenka, all of
Columbia, and Solicitor William Walter Wilkins III, of
Greenville, for Respondent.

FEW, C.J.: A jury found Christopher Murray guilty of murder for the shooting death of James Gibson. Murray argues the trial court erred by not charging the jury on the lesser-included offense of involuntary manslaughter. We affirm the trial court's decision not to charge involuntary manslaughter because there is no evidence the shooting was unintentional.

I. Factual and Procedural History

On the evening of January 18, 2010, Murray and his girlfriend Faye Brissey drove to Gibson's residence. According to Faye's testimony, she remained in the car while Murray walked to Gibson's front door and knocked. When Gibson opened the door, Murray went inside. "Not even a second" after he entered, Faye heard three gun shots fired "back to back."¹ Murray fled the residence, got back into the car with Faye, and sped away. He told Faye a fight occurred inside the residence and that he killed Gibson.

The State introduced a written statement from Faye's cousin, Matt Brissey, who did not witness the incident but based the statement on what Murray told him afterward:

[Murray] knocked on the door and [Gibson] opened the door and hit [Murray] in the mouth.² And [Murray] jerked the door open and tried to kick [Gibson]. [Gibson] grabbed [Murray]'s foot and pulled him in, and then they started wrestling in the living room. And [the] first shot hit the wall, and then the second one hit the ceiling, and the third one he put the gun . . . to his chest and shot him.

Matt also testified, and during his testimony stated Murray told him "there was a struggle, that he was trying to shoot [Gibson]. He shot one in his wall, one [in] the couch and . . . he rolled [Gibson] on his back when they was wrestling and shot him in his chest." An investigation by police confirmed there was a bullet hole in the living room floor beneath the couch and another in the wall near the ceiling.

Murray did not testify at trial, but his videotaped interview with two police detectives was shown to the jury. In this interview, Murray stated that after Gibson

¹ Gibson's neighbor corroborated Faye's story and testified the gun shots "were in correct measurement from each other. They were exact. . . . Not like firecrackers . . . [that] go off at different intervals. They were exactly pop, pop, pop."

² Matt testified at trial that Gibson did not strike Murray, but instead the door hit Murray in the mouth when Gibson opened it.

attacked him in the doorway, a fight took place inside the residence. Murray claimed the gun was on his waist when he arrived, and he did not "remember taking the gun off [his] waist." He stated, "The only thing I can think of that might have happened right now is when I was tussling, it fell out." Murray went on to explain,

I think the gun fell and that's how I got it in my hand. So it probably went off once or twice accidental. And that's whenever I pulled it on [Gibson].

The video showed one of the detectives prompting Murray to "show [him] what happened." Murray then acted out the fight with one of the detectives, who, following Murray's direction, portrayed the actions of Gibson. The demonstration showed Murray and Gibson standing, with Gibson "leaned over [Murray]," and Murray bent under Gibson's body with his head against Gibson's chest. At that point in the demonstration, Murray said, "I think [the gun] dropped on the floor . . . while he was over me." Murray demonstrated the gun falling to the floor between them, and then explained, "I went down and got it to keep him from getting to it." Murray gave no indication that Gibson also reached for the gun. As Murray stood up from the demonstration to speak directly to the detective, he said "and from there it went off probably two times It just went off, and that's whenever I pulled it up." Murray then demonstrated the manner in which he "pulled [the gun] up" to Gibson's chest and explained, "[Gibson] was still on me." When the detective told Murray to "put [the gun] wherever you think it was" when he shot Gibson, Murray held his hand in the shape of a gun—pointed at the detective's chest—and said, "somewhere between his waist and up in here," demonstrating Gibson's upper chest.

Murray asked the court to instruct the jury on self-defense and voluntary manslaughter—which the court charged—and also involuntary manslaughter. Murray argued the shooting was not intentional because the gun fired during a struggle over the weapon, and the gunshots were accidental because they were "all over the place." In denying the request to charge involuntary manslaughter, the court stated, "I don't remember any testimony -- there was testimony, as I can remember, about a struggle going on, but I never really heard anything about a fight over a weapon." The jury found Murray guilty of murder, and the court sentenced him to forty years in prison.

II. Involuntary Manslaughter

Involuntary manslaughter is the unintentional killing of another without malice while (1) engaged in an unlawful activity not naturally tending to cause death or great bodily harm or (2) engaged in a lawful activity with reckless disregard for the safety of others. *State v. Smith*, 391 S.C. 408, 414, 706 S.E.2d 12, 15 (2011). To warrant a jury charge on involuntary manslaughter, there must be some evidence the killing was unintentional. *See Douglas v. State*, 332 S.C. 67, 74, 504 S.E.2d 307, 310 (1998) (stating "involuntary manslaughter is at its core an unintentional killing"); *State v. Gibson*, 390 S.C. 347, 357, 701 S.E.2d 766, 771 (Ct. App. 2010) (stating "the essence of involuntary manslaughter is the involuntary nature of the killing"). In this case, the evidence conclusively demonstrates Murray killed Gibson intentionally.

In his interview, Murray claimed the gun "probably went off once or twice accidental." On appeal, he argues this is supported by the random location of the bullet holes—one in the floor beneath the couch and another in the wall near the ceiling. Even if the first two shots were unintentional, however, there is no evidence Murray did not intend to fire the third shot. In fact, Murray stated in his interview that after he grabbed the gun and the first two shots discharged, he "pulled [the gun] on [Gibson]" and fired the third shot, which hit Gibson "[a]nywhere from his waist up to about his solarplex." Murray's statements to Matt also demonstrate Murray intentionally fired the third shot: "[The] first shot hit the wall, and then the second one hit the ceiling, and the third one [I] put the gun . . . to his chest and shot him." Thus, even if a jury could reasonably conclude Murray accidentally fired the first two shots, there is no evidence the third shot, resulting from Murray "put[ting] the gun . . . to [Gibson's] chest" and shooting, was unintentional. Because there is no evidence the killing was unintentional, the trial court correctly refused to charge involuntary manslaughter. *See State v. Tucker*, 324 S.C. 155, 171, 478 S.E.2d 260, 268 (1996) (holding involuntary manslaughter charge improper because "[e]ven if the first shooting was unintentional, the same cannot be said of the second"); *State v. Thompson*, 278 S.C. 1, 7, 292 S.E.2d 581, 585 (1982) (holding involuntary manslaughter charge not warranted "when at least one of the two shots was fired deliberately"), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991).

Murray argues, however, there is evidence Gibson was accidentally shot during a struggle for control of the gun. Murray cites *State v. Light*, 378 S.C. 641, 664 S.E.2d 465 (2008), and *Tisdale v. State*, 378 S.C. 122, 662 S.E.2d 410 (2008) for

the proposition that "evidence of a struggle between the defendant and the victim over a weapon supports submission of an involuntary manslaughter charge." 378 S.C. at 125, 662 S.E.2d at 412. Like this case, however, *Light* and *Tisdale* turn on the existence or non-existence of evidence of an unintentional killing. In those cases, and in other cases like them, our courts held a struggle over a gun warrants a charge on involuntary manslaughter because, on the facts before them, the finding that such a struggle occurred is evidence the shooting was unintentional. See *Light*, 378 S.C. at 646, 648-49, 664 S.E.2d at 467, 468-69 (holding involuntary manslaughter charge appropriate where defendant attempted to take gun from victim, and gun "went off" immediately after defendant "jerked it away from [the victim]"); *Tisdale*, 378 S.C. at 124, 126, 662 S.E.2d at 412 (holding involuntary manslaughter charge warranted where defendant and victim fought for gun, and it "went off" while still in victim's hands). For example, in *State v. Brayboy*, 387 S.C. 174, 182, 691 S.E.2d 482, 486 (Ct. App. 2010), the victim pulled a gun on the defendant. In response, the defendant pushed the victim, causing the gun to fall to the ground. *Id.* Both men reached for the gun, but the defendant grabbed it first and picked it up. *Id.* When he did, the gun fired, killing the victim. *Id.* The defendant claimed he did not "even remember the gun" at the time it discharged. *Id.* This court held the defendant was entitled to a charge of involuntary manslaughter because on those facts the struggle for control of the gun was evidence that the defendant did not intentionally pull the trigger. *Id.*

In this case, however, there is no evidence the struggle was for control of the gun. Murray's gun was in his waistband when he arrived, but there is no evidence Gibson knew Murray had it. Although Murray stated he "got [the gun] to keep [Gibson] from getting to it," there is no evidence Gibson knew the gun had fallen, much less that Gibson also tried to grab it. This case is distinguishable from *Light*, *Tisdale*, and *Brayboy*, therefore, because the facts provide no basis upon which a jury could find the third shot was unintentionally fired during a struggle over the gun. In addition, Murray admitted he "pulled [the gun] on [Gibson]" and fired the third shot intentionally.³ On these facts, we hold the trial court correctly refused to charge involuntary manslaughter.

³ See also *Douglas*, 332 S.C. at 74, 504 S.E.2d at 310-11 (finding no involuntary manslaughter charge warranted where defendant admitted he intentionally fired a gun into a crowd); *State v. Pickens*, 320 S.C. 528, 531-32, 466 S.E.2d 364, 366-67 (1996) (holding defendant not entitled to charge on involuntary manslaughter because defendant admitted intentionally shooting the gun recklessly in self-defense); *Gibson*, 390 S.C. at 358, 701 S.E.2d at 772 (holding trial court properly

III. Conclusion

For the reasons set forth above, the trial court's refusal to charge involuntary manslaughter is **AFFIRMED**.

GEATHERS and LOCKEMY, JJ., concur.

refused to charge on involuntary manslaughter because defendant admitted he intentionally fired his weapon); *State v. Morris*, 307 S.C. 480, 484, 415 S.E.2d 819, 821-22 (Ct. App. 1991) (holding involuntary manslaughter charge not warranted because evidence showed an intentional shooting).

FORM 5

STATE OF SOUTH CAROLINA AUG 15 PM 12 06

COUNTY OF Pickens CLERK OF COURT

IN THE COURT OF COMMON PLEAS

Christopher Robert Murray SCDC# 5390026 PICKENS COUNTY

2013-CP-391 052

Full name and prison number (if any) of Applicant.)

v.)

State of South Carolina)

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and veified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make chr to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay thées and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention McCollick Correctional Institution
2. Name and location of Court which imposed sentence Pickens County Court of General Sessions
3. Name(s) of co-defendant(s) (if any) Beulah Faye Brissey
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2011G5390026 Murder
 - (b) _____
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) 4/20/2011
 - (b) _____

(c) _____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty _____

(b) after a plea of not guilty _____

(c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?

Yes _____

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. South Carolina Court of Appeals _____

ii. _____

iii. _____

(b) the result in each such Court to which you appealed:

i. Conviction Affirmed _____

ii. _____

iii. _____

(c) the date of each such result:

i. June 26, 2013 _____

ii. _____

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. State v Murray. 2013 WL 3200069 _____

ii. _____

iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) _____

(b) _____

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) ineffective assistance of counsel
- (b) _____
- (c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) counsel did not object to witness committing perjury/did not ask questions of substance in
- (b) counsel did not interview witness prior to trial / counsel slept in motion hearing and ^(cross-examination of witnesses, parts of trial)
- (c) counsel did not investigate witness post for impeachment purposes

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? Yes
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
- (d) any other petitions, motions or applications in this or any other Court? _____

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

- (a) the specific nature thereof:
 - i. whether the trial court erred by refusing a charge on involuntary manslaughter.
 - ii. _____
 - iii. _____
 - iv. _____
- (b) the name and location of the Court in which each was filed:
 - i. South Carolina Court of Appeals
 - ii. _____
 - iii. _____
 - iv. _____
- (c) the disposition thereof:
 - i. Affirmed
 - ii. _____
 - iii. _____

- iv. _____
- (d) the date of each such disposition:
 - i. June 26, 2013
 - ii. _____
 - iii. _____
 - iv. _____

- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
 - i. State v. Murray 2013 WL 3200067
 - ii. _____
 - iii. _____
 - iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

- (a) which grounds have been presented:
 - i. _____
 - ii. _____
 - iii. _____
- (b) the proceedings in which each ground was raised:
 - i. _____
 - ii. _____
 - iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

- (a) Ineffective assistance of counsel / Issue is not a appeal court issue
- (b) _____
- (c) _____

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? Yes
- (b) your trial, if any? Yes
- (c) your sentencing? Yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. Gary Paul Mollerud 33 Donaldson Street Greenville, S.C. 29611-3514

ii. Breen Richard Stevens Current address Unknown

iii. _____

(b) the proceedings at which each such attorney represented you:

i. arraignment, Trial, and sentencing

ii. Appeal

iii. _____

19. State clearly the relief you seek in filing this application:

New Trial

20. Are you now under sentence from any other court that you have not challenged?

NO

2013 CP-39-1052

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

STATE OF SOUTH CAROLINA

County of Pickens

)
)

VERIFICATION

I, C.M., being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Christopher R. Murray

SWORN to and subscribed before me this 07
day of August, ~~2019~~ 2013

J. C. Franklin (L.S.)
Notary Public

My Commission Expires: 12-16-2019

2013 AUG 15 PM 12 06 APPLICATION TO PROCEED WITHOUT PAYMENT OF COSTS AND AFFIDAVIT IN SUPPORT THEREOF 2013-CP-391-052

CLERK OF COURT

I, C. M. [Name], hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
(2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

[Signature] Applicant

SWORN or affirmed to and subscribed before me this

07 day of August, 2013.

[Signature]

Notary Public

My Commission Expires: 12-16-2019

STATE OF SOUTH CAROLINA)
)
 COUNTY OF PICKENS)
)
 Christopher Robert Murray,)
 S.C.D.C. No. 345729,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 C.A. No. 2013-CP-39-1052

RETURN

In response to the post-conviction relief application filed August 15, 2013, the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Pickens County Clerk of Court's orders of commitment. The Pickens County Grand Jury indicted the Applicant at the January 2011 term of General Sessions for murder (2011-GS-39-0026). Gary Mallard, Esquire represented the Applicant.

After the State brought the case to trial, the Applicant was found guilty. On April 20, 2011, the Honorable G. Edward Welmaker sentenced the Applicant to forty years imprisonment.

A notice of appeal was filed at the South Carolina Court of Appeals. Breen R. Stevens, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal. The Court of Appeals affirmed the Applicant's conviction and sentence on June 26, 2013. State v. Murray, 404 S.C. 300, 744 S.E.2d 607 (Ct. App. 2013). The Remittitur was sent on July 15, 2013.

Attached herewith and incorporated herein by reference are the records of the Pickens

County Clerk of Court regarding the subject conviction, the Applicant's records from the South Carolina Department of Corrections, the trial transcript, and the appellate records.

II.

In his application for post-conviction relief, the Applicant alleges he is being held in custody unlawfully for the following reason:

1. Ineffective assistance of counsel:
 - a. Did not object to witness committing perjury.
 - b. Did not ask questions of substance in cross-examination of witnesses.
 - c. Did not interview witness prior to trial.
 - d. Did not investigate witness for impeachment purposes.

III.

The Respondent asserts the Applicant's allegation that his attorney was ineffective is without merit. The Respondent asserts the Applicant's attorney rendered effective assistance well within the standard of "reasonableness within professional norms" for a defense attorney.

Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386

S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

The Respondent submits the Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (citing Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981)).

IV.

The Respondent denies each allegation not expressly admitted, qualified or explained.

V.

WHEREFORE, having made its Return, the Respondent requests that a hearing be held and counsel appointed to represent the Applicant.

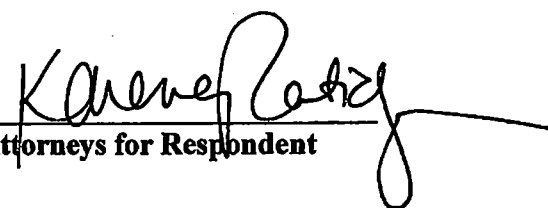
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

P.O. Box 11549
Columbia, S.C. 29211

By: 
Attorneys for Respondent

April 8, 2014

STATE OF SOUTH CAROLINA)
)
 COUNTY OF PICKENS)
)
)
)
 CHRISTOPHER ROBERT MURRAY, 345729)
)
 Applicant,)
)
 vs)
)
 STATE OF SOUTH CAROLINA,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS

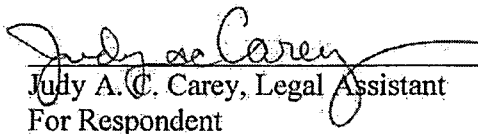
2013-CP-39-1052

AFFIDAVIT OF SERVICE BY MAIL

4. I am an employee of the Respondent in the above-captioned action.
5. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
6. I have this day served a copy of the Return in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

**Christopher Robert Murray, 345729
 McCormick Correctional Institution
 386 Redemption Way
 McCormick SC 29899**

DATED this 8th day of April, 2014.


 Judy A. C. Carey, Legal Assistant
 For Respondent

| | | |
|------------------------------|---|-----------------------|
| STATE OF SOUTH CAROLINA |) | COURT OF COMMON PLEAS |
| |) | 2013-CP-39-1052 |
| COUNTY OF PICKENS |) | |
| |) | |
| |) | |
| |) | |
| |) | |
| CHRISTOPHER MURRAY, |) | |
| PLAINTIFF, |) | |
| |) | |
| vs. |) | TRANSCRIPT OF RECORD |
| |) | |
| THE STATE OF SOUTH CAROLINA, |) | |
| DEFENDANT. |) | |
| _____ |) | |

April 22, 2015
Greenville, South Carolina

B E F O R E:

THE HONORABLE EDWARD W. MILLER, JUDGE.

A P P E A R A N C E S:

R. MILLS ARIAIL, JR., ESQ.
Attorney for the Plaintiff

KAREN C. RATIGAN, ESQ.
Attorney for the Defendant

CHERYL A. SMITH
Circuit Court Reporter

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(PW) - Denotes Plaintiff's Witness
 (SW) - Denotes State's Witness

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EXHIBITS

| <u>NO</u> | <u>DESCRIPTION</u> | <u>ID</u> | <u>EVD</u> |
|-----------|--------------------|-----------|------------|
|-----------|--------------------|-----------|------------|

No exhibits were introduced.

P R O C E E D I N G S

1
2 MS. RATIGAN: May it please the Court, Your Honor.

3 This is the case of Christopher Robert Murray vs. The State
4 of South Carolina. The docket number is 2013-CP-39-1052.

5 Mr. Murray was indicted for murder. He was represented on
6 those charges by Mr. Mallard. The case was brought to
7 trial before Judge Welmaker, and Mr. Murray was found
8 guilty. On April 20, 2011, Judge Welmaker sentenced him to
9 40 years imprisonment. His appeal was filed. The Court of
10 Appeals affirmed his conviction and sentence in June of
11 2013.

12 The application was timely filed, and the State is
13 ready to proceed.

14 MR. ARIAIL: Your Honor, we're ready to proceed. I
15 call Mr. Murray to the stand.

16 THE COURT: Let's go.

17 WHEREUPON,

18 CHRISTOPHER MURRAY,

19 After first having been duly sworn, testified as follows:

20 THE CLERK: Please state your full name for the
21 record.

22 THE WITNESS: Christopher Robert Murray.

23 THE CLERK: Thank you. You may be seated.

24 ///

25 ///

DIRECT EXAMINATION

1
2 BY MR. ARIAIL:

3 Q Mr. Murray, how are you doing today?

4 A I'm all right.

5 Q Okay. This is your PCR hearing in regards to the
6 representation that you had by Mr. Mallard in regards to
7 your case over there in Pickens. We've gone through this,
8 and I know this was a lengthy trial in regards to it and
9 you were indicted on murder in this case; is that ---

10 A Yes, sir.

11 Q Did he represent you on those charges -- that charge?

12 A Yes, sir.

13 Q Okay. Now, as part of that, was he appointed or did
14 you retain him?

15 A He took my case pro bono.

16 Q Pro bono?

17 A Yes, sir.

18 Q And when you say "pro bono," how did you -- did you
19 contact him and he ---

20 A Yes, sir.

21 Q You didn't pay him anything?

22 A No, sir. We came to an agreement, something we were
23 working out.

24 Q Something y'all were working out?

25 A Yes, sir. I was supposed to, what do you call it, do

1 push-ups. Like he had me do a certain amount of push-ups,
2 sit-ups, stuff like that. And I was ---

3 THE COURT: What? I'm sorry. I didn't understand.

4 THE WITNESS: He had me do push-ups and sit-ups as a
5 way to pay him, and if I didn't complete that agreement, I
6 was supposed to donate some time to Homeless for Humana
7 [phonetic] when I get out.

8 BY MR. ARIAIL:

9 Q Okay. So y'all had an agreement where it was based on
10 you doing a certain amount of push-ups and sit-ups?

11 A Yes, sir.

12 Q No money?

13 A No, sir.

14 Q Okay. And how did you get -- how did you and
15 Mr. Mallard get connected?

16 A Another guy in the county jail had told me about him.

17 Q Okay. And so you met with him and decided to hire him
18 on your case; is that right?

19 A Yes, sir.

20 Q Okay. And how long were you incarcerated over there
21 after you were arrested?

22 A 15 months.

23 Q Okay. When was the first time you met with
24 Mr. Mallard?

25 A I can't be sure. Probably -- it was very soon because

1 I -- we had made an agreement before my bond hearing, so it
2 was in the first two or three months, probably.

3 Q Okay. And did you have any discussions about his --
4 if he'd handled a murder case before?

5 A Yes, sir. We did. He said he'd never -- he'd never
6 handled a murder case.

7 Q Okay. Did he do criminal work? Did he tell you?

8 A I'm not sure what his resume was.

9 Q Okay. I guess my question is, why did you decide to
10 hire him rather than you getting a public defender or
11 hiring somebody else?

12 A I didn't have money, and, basically, I figured -- I
13 thought I would be better off with a -- with an outside
14 attorney than a public defender.

15 Q Okay. So when you hired him, did y'all go over -- did
16 you get discovery? Did y'all discuss it?

17 A Somewhat, yes, sir.

18 Q When you say "somewhat," tell me what you discussed.

19 A Well, I mean, we got -- we got our discovery, and we
20 talked about a few of the statements and stuff, but -- and
21 what happened and what didn't happen and stuff like that.

22 Q I mean, so the crux of this case was basically -- I'm
23 going to summarize it somewhat -- that you either went in
24 to rob an individual ---

25 A No. Originally it was supposed -- it was just a

1 premeditated murder charge. They were saying that it was
2 never a struggle or whatever, and our defense was that
3 there was a struggle. We -- me and my victim was fighting,
4 and my victim being shot was the result of us wrestling
5 with the gun.

6 Q Okay. And the individual died. And I guess you
7 discussed with him the self-defense aspect of it; is that
8 correct?

9 A Yes, sir.

10 Q Okay. What did y'all discuss in regards to what your
11 theory or defense was going to be in the case?

12 A I mean, basically, it was that I was there, we got
13 into it, we got into an altercation, was fighting, and the
14 gun -- the gun dropped. I supposedly had it in my waist,
15 and the gun dropped on the floor. And we were wrestling
16 with the gun, the gun went off and hit and killed my
17 victim, and was -- basically, was going to go off of that.

18 Q So your theory was that you went in, there was an
19 argument or some type of wrestling, some issue, you dropped
20 the gun, and the gun fired and shot him?

21 A No, sir. I -- we was actually -- I had the gun in my
22 hand by the time -- while we was wrestling, I dropped the
23 gun on the floor from my waist.

24 Q Okay.

25 A I got the gun, was wrestling with it?

1 Q Okay. And there were three shots, correct?

2 A Yes, sir.

3 Q So what was -- did y'all discuss, I guess, two shots
4 came in the beginning and the third shot ---

5 A Yes, sir.

6 Q --- hit him; is that correct?

7 A Yes, sir.

8 Q Okay. So your theory was it was self-defense?

9 A Yes, sir. Or accidental.

10 Q Okay. And so he went to trial and represented you on
11 that and got a self-defense charge, correct?

12 A Yes, sir.

13 Q Okay. So tell me -- and what I'm trying to understand
14 is what are you saying -- and you've put together a list of
15 things for me. What are you saying that he did during this
16 that was ineffective and prejudiced you?

17 A During trial?

18 Q I mean your whole representation.

19 A Well, he slept through parts of my trial, and then
20 like when -- like witnesses, my codefendant, for instance,
21 sat on the stand and lied, he didn't try to -- he didn't
22 try to impeach her, he didn't try to -- I didn't request no
23 perjure charges, he didn't try -- he didn't -- he didn't
24 even examine all the evidence before the trial. Like
25 whenever we come into the trial, the State hands him a big

1 thing -- a big stack of pictures. And all I ever saw
2 before that was four pictures, you know. And ---

3 Q And so let's take it one step at a time. You're
4 saying the codefendant lied and he didn't impeach her?

5 A Yeah. He didn't try -- he didn't try to impeach her
6 or nothing. He didn't try to discredit her at all.

7 Q And that was Faye Brissey?

8 A Yes, sir.

9 Q How did she lie on the stand?

10 A Well, she initially wrote a statement that, you know
11 what I'm saying, supporting me and my victim was fighting
12 whenever the -- when the gun went off and everything. And
13 -- but when she got on the stand, she said there was never
14 a fight. She claims that I was wearing a mask when I
15 entered my victim's home -- or before I entered and
16 basically saying it was a robbery.

17 But the mask supposedly that they had, the hat I was
18 wearing when I went into my victim's house had no holes.
19 It could not have been worn as a mask. And if I pulled it
20 down over my face the way she said I did, it would have
21 been -- I'd have effectively blindfolded myself.

22 She just -- she tried to say that she had never gone
23 with me earlier in that day. She was at her cousin's house
24 all day. But I guess multiple -- or at least, what, three
25 other people's statements that put -- places her at

1 different places with me throughout the day. And then
2 eventually -- well, she -- she told me my -- my -- the --
3 all the investigators and everything, she had everybody
4 under the impression that she was pregnant, you know. I
5 mean, there's plenty of evidence to show that. But then
6 whenever -- when she was on the stand, she denied ever
7 telling anybody she was pregnant. He didn't try to put
8 none of that off.

9 Q You're saying that he -- his cross-examination of her
10 did not bring out inconsistencies in the statement of
11 things that she previously said?

12 A No, sir. I don't think he asked about two or three
13 questions. He asked her about the altercation. She said
14 "no." I can't remember exactly how it was worded, but he
15 asked her -- basically, in her statement, she said that me
16 and James was fighting. And she said "no." She lied when
17 she wrote her statement. Her whole statement was a lie.

18 And he said, "No further questions," and sat down.

19 Q At trial, and correct me if I'm wrong on this, I think
20 it was her direct she said, "Murray jumped out of the car,
21 went to the porch, knocked, put a toboggan to conceal his
22 face, gets an answer at the door. Murray went into the
23 trailer and Brissey said he immediately fired three quick
24 shots in succession. He ran back to the car and sped
25 away." Is that ---

1 A That was her testimony.

2 Q Okay. So you're saying that in a statement that she
3 had previously given, that was not consistent. She never
4 mention anything about a toboggan or anything like that?

5 A In her -- in her initial statement, she said we went
6 over there, I got out of the car, knocked on his door, he
7 opened the door, hit me in the mouth and we started -- we
8 started tussling. She said she looked in through the
9 window and seen fists flying and said she put her head in
10 her hands and started crying. That's when she heard the
11 three gunshots. And then I came running out of the car --
12 running out of the house, jumped in the car and we took
13 off.

14 Q Okay. Now, are there any other -- I mean, did you
15 discuss with him why he didn't go into that or what his
16 reasoning was?

17 A No. It's -- after the trial, I was immediately taken
18 away. I mean, I never -- I didn't have really much time to
19 speak with him after that.

20 Q Did you ask him to do that during the trial or a
21 question in regards to that?

22 A I mean, I'm -- multiple times during the trial I give
23 -- told -- you know, like different witnesses, I would give
24 him -- tell him questions to ask, and, yes, things like
25 that. And like he just -- he wouldn't do it.

1 Q Okay. Any other items during trial that you bring out
2 now or review that you think he was at fault or ineffective
3 in not doing?

4 A Well, I mean, throughout the trial -- and, yes, when
5 trial first started, the State kept hinting toward my
6 financial -- I have financial struggles, you know. They
7 kept hinting toward that. And I kept telling, you know,
8 whenever they had their investigators, the detectives or
9 whatever, James' family and people like that on the stand,
10 I kept telling him to ask them if anything was missing at
11 the house like it had been searched or anything like that.
12 And he told me -- he said "no." I -- he wasn't going to
13 ask that, said it wasn't necessary. And I told him it's
14 going to come back and bite us in the behind. And he's
15 just like, "No, it's not." Then end of the trial, I mean,
16 they just -- they came back and said it was a robbery.

17 Q Okay. So did you ask him to try to suppress that or
18 keep that out, any type of financial issues that you were
19 having?

20 A I mean, it was -- it was inevitable it was going to
21 come out that I was broke, you know, I didn't have no
22 money. But, I mean, in the end, I didn't care that people
23 knew I was broke. What I cared about is the fact that they
24 was leading me -- leading -- trying to approach the case in
25 the direction of trying to say that I was robbing the guy.

1 And, I mean, I didn't rob him. There was nothing missing.
2 The house wasn't searched or anything. There was nothing
3 to support that.

4 Q Did Faye Brissey testify about anything about you
5 going over to rob him or saying, "I'm going to take care of
6 this," or anything of that nature?

7 A I can't think right off. I know she didn't say
8 anything about I was planning on robbing him or anything
9 like that.

10 Q Because their theory of the case was you had an
11 argument over a text message over the phone a couple weeks
12 before.

13 A Telephone -- yeah. A telephone conversation.

14 Q And that you went over there, I think it was either
15 Mr. Kirkendall [phonetic] or Ms. Brissey said that you had
16 said you were going to go take care of that later or
17 something like that.

18 A Yeah. But I -- to talk about that there for a minute.
19 He said -- Kirkendall -- Mr. Kirkendall told -- said that I
20 pointed James' house out to him while riding in a vehicle
21 and said I had problems with him, was -- was going to take
22 care of it later. But in the detective's summary report,
23 it says that Jack Kirkendall told him that Faye Brissey was
24 the one that pointed the house out to him.

25 Q Okay.

1 A I mean, that's something else I told Mr. Mallard, and
2 he didn't -- he didn't try to point it out or nothing.

3 Q Any witnesses he didn't interview or things you asked
4 him to do that would help during trial?

5 A I mean, I asked him to ask the firearms examiner a
6 couple questions, and he refused to do that. And he got up
7 and asked one simple question that was completely
8 irrelevant. So ---

9 Q What was the firearm question you asked him to ask
10 about?

11 A The State was -- has a theory that -- I mean, there
12 was a live -- there was a live round found at the scene and
13 -- as a result of the gun jamming up. The State was using
14 the theory that I cocked the pistol before firing, I guess,
15 as an intimidation tactic or something like that. But I
16 told him to ask the firearms examiner if she had examined
17 the live round because she was explaining like the
18 different markings that would be on it -- on the round once
19 it's in the chamber and stuff like that. And I asked him
20 to basically ask her what the markings on that particular
21 round were, was there any markings that would be consistent
22 with a jam-up or did he understand what I was saying. And
23 he just -- he stood up and he just simply asked her how
24 much pressure it took to disarm the safety. And she
25 actually said it doesn't -- it's irrelevant. They don't

1 even test it. So . . .

2 MR. ARIAIL: Okay. Your Honor, I have no further
3 questions.

4 CROSS EXAMINATION

5 BY MS. RATIGAN:

6 Q Mr. Murray, did you ever make bond or were you always
7 at the detention center?

8 A I was always at the detention center.

9 Q So your meetings with Mr. Mallard would have been at
10 the jail?

11 A Yes, sir -- yes, ma'am. Sorry.

12 Q That's okay.

13 And how many meetings would you say you would have had
14 with him before the trial?

15 A I had a lot.

16 Q A lot?

17 A Yeah. He used to come up there. He would supervise
18 me doing my push-ups and sit-ups.

19 Q Okay. And you reviewed the State's evidence with
20 Mr. Mallard?

21 A We looked over some of it. Mostly it was me doing
22 push-ups and sit-ups and just him watching and counting.

23 Q And did you tell him your side of the story what had
24 happened that day with the victim?

25 A Yeah. I told him what me and Faye's combined story

1 was supposed to have been.

2 Q Okay. And did you tell him that you had shot the
3 victim in self-defense?

4 A Yeah. I told him -- and as a result of us wrestling
5 with the gun. I didn't mean to shoot him, but you could
6 say self-defense, I guess.

7 Q Okay. And your testimony -- well, let me strike that.

8 But the State's argument was this was some kind of
9 premeditated robbery that had gone wrong; would that be
10 fair to say?

11 A Yeah. That's what they used in closing.

12 Q Right.

13 A But they never said anything about armed -- about
14 robbery at any time before or even during the trial. It
15 was just up to closing.

16 Q But didn't Mr. Kirkendall testify that you had asked
17 him if he knew someone to rob?

18 A Actually, it was burglarize.

19 Q Okay. But he did testify that you'd asked him about
20 that?

21 A That's what he testified -- testified to, yes.

22 Q And your testimony is that you and the victim got to
23 fighting and then the gun went off?

24 A Well, I mean, it's -- basic -- we got to fighting, the
25 gun dropped off of my waist to the floor.

1 Q Okay.

2 A He reached for the gun, I shoved him away and grabbed
3 it.

4 Q Okay.

5 A Whenever -- whenever I had a gun in my hand, he had me
6 by my wrist and by my shirt ---

7 Q Okay.

8 A --- and we was wrestling. He was trying to shake it
9 off my hand, I was trying to hold onto it and that's when
10 it started going off.

11 Q Okay. And didn't the State's expert witness say that
12 the gun needed two hands to operate: one to hold it and
13 one to pull the slide?

14 A That's -- I mean, for to actually -- actually cock it,
15 but, I mean, it had a round in the chamber already.

16 Q And how many times was the victim shot?

17 A Once.

18 Q One time.

19 And even though you said that y'all were kind of
20 fighting over the gun and it went off, wasn't there a
21 witness who testified that she heard three evenly spaced
22 shots?

23 A There -- there was three shots.

24 Q Okay. And you gave a statement to the officers when
25 you were arrested down in Aiken?

1 A It was a video conference, but yes.

2 Q Okay. And did you tell them at that time the story
3 you're telling today, that y'all got into a fight and the
4 gun just went off?

5 A Yes, ma'am.

6 Q And do you dispute telling Mr. Kirkendall that you
7 would deal with the victim later after ---

8 A Yes, ma'am. I do.

9 Q You do dispute that? You never told him that?

10 A No, ma'am.

11 Q But he testified about that at trial?

12 A Yes. He did testify about that. But like I said, in
13 the summary report that I have from the officer where he
14 told the officer that Faye Brissey was the one who pointed
15 it out.

16 Q Okay. Did -- strike that. Faye Brissey testified
17 both during the State's case and your case, correct?

18 A I just remember her being on the stand the one time.

19 Q Okay. But did she ever -- so you don't recall her
20 testifying that things in her statement were not true?

21 A Yes, I do.

22 Q Okay. And didn't Mr. Mallard recall an officer to
23 testify that Faye had told him that she actually saw y'all
24 fighting through the window? If you don't recall, you can
25 say you don't recall.

1 A I'm not -- I'm not 100 percent sure. That does sound
2 like it might have happened.

3 Q Okay. And he did put up a self-defense case for you?

4 A You could say that.

5 Q Okay. What else did you want him to do to try and
6 prove self-defense for you?

7 A I mean, it was just -- I feel like he should -- he
8 should have tried to discredit the State's witnesses. I
9 mean, they -- there was a lot of -- there was a lot of lies
10 told in my case. He didn't try to -- he didn't try to
11 point it out or nothing. I mean, I just feel like, yes, he
12 did try to present a self-defense case, but at the same
13 time, he didn't try to, you know, defend me against the
14 State's case or the lies that were being told.

15 MS. RATIGAN: That's all I have, Your Honor.

16 THE COURT: You said there was a live round found at
17 the scene?

18 THE WITNESS: Yes, sir. There was two -- there was
19 two spent shell casings and a live round. The third spent
20 shell casing was actually jammed up in the gun.

21 THE COURT: So when did the live round come out?

22 THE WITNESS: That was after the third -- after the
23 third shot. Instead of ejecting the spent round, it got
24 stuck in the barrel some kind of way, and the live round
25 actually got pushed up.

1 THE COURT: So you must have been trying to rack-it,
2 right?

3 THE WITNESS: No, sir. It was whenever -- when the
4 gun -- when the gun went off, it was three shots. The
5 first shot, it hit, I guess, the wall. The second one
6 would have probably hit -- would have had to hit the floor.
7 The third one hit him. And whenever -- when the third --
8 when the third shot went off, it's an automatic -- racks
9 itself. And whenever -- when it was -- I guess when it was
10 racked and there was a live round in, the live round hit
11 the back of the spent shell case that was stuck in it and
12 just kind of twisted to the side and came out. I mean, it
13 didn't come all the way out. Remember, I was putting it on
14 my waist. I had not -- I did not pull it out, but it was
15 -- that was pushed out as a result of the jam-up.

16 THE COURT: Okay. Was there expert testimony about
17 that?

18 THE WITNESS: There was a firearms examiner that
19 spoke, and they -- but they didn't say anything -- that
20 specific question I asked him to ask was about ---

21 THE COURT: Why did you go over there?

22 THE WITNESS: Honestly, I wanted to fight the man.

23 THE COURT: To fight with him?

24 THE WITNESS: Yeah. That was why I went over there.

25 THE COURT: Over that girl?

1 THE WITNESS: Over the -- yeah. Over the girl, the --
2 yeah. The whole situation.

3 THE COURT: Okay. You can step down. Thank you,
4 buddy.

5 THE WITNESS: Thank you, sir.

6 THE COURT: All right.

7 MR. ARIAIL: Your Honor, that's our case.

8 MS. RATIGAN: Your Honor, we call Mr. Mallard.

9 WHEREUPON,

10 GARY PAUL MALLARD,

11 After first having been duly sworn, testified as follows:

12 THE CLERK: You may be seated. Please state your full
13 name for the record.

14 THE WITNESS: Gary Paul Mallard.

15 DIRECT EXAMINATION

16 BY MS. RATIGAN:

17 Q Mr. Mallard, do you recall representing Mr. Murray on
18 this charge?

19 A Yes.

20 Q Did you file Brady and discovery motions with the
21 State?

22 A Yes.

23 Q Did you receive discovery prior to trial?

24 A About -- I got an extensive amount of discovery maybe
25 -- maybe ten days before trial, April 6th, April 7th. I

1 believe the trial was on April 20th.

2 Q And is that the basis -- the transcript reflects you
3 asked for a continuance based on discovery?

4 A Yes.

5 Q Is that the basis for that, that it was right before
6 trial?

7 A Yeah. I had -- at the last minute, obviously, I had
8 known that Chris had given statements to police, but the
9 impact of seeing those statements, that's when I got the
10 CD's and stuff, was pretty serious. And it took me -- I
11 spent like the week before trial, basically, I mean, a lot
12 of stuff we went over, you know, a few days -- in the few
13 days immediately prior to the jury being called in and
14 stuff trying to just deal with the volume of information,
15 which was -- which was pretty overwhelming. I remember
16 downloading special programs. The solicitor's office tried
17 to be helpful in that sense, but, you know, some of the
18 programs and stuff and downloads that they suggested to get
19 to process their stuff just didn't work.

20 Q But ultimately, the judge denied your request for a
21 continuance?

22 A Yes.

23 Q Prior to the trial, had you reviewed the charge and
24 the elements of the charge with your client?

25 A Yes.

1 Q The sentencing range on the charge, did you review
2 that as well?

3 A I believe so, yes.

4 Q Did you review with Mr. Murray his version of events?

5 A Yes.

6 Q And did you review with him possible defenses?

7 A Yes.

8 Q Aside from self-defense, did you see there being any
9 other viable defenses in this case?

10 A Well, we sought to present evidence and stuff of
11 involuntary slaughter and voluntary manslaughter.

12 Q Did you ask for those to be charged?

13 A Yes.

14 Q And what did the judge decide?

15 A There was no charge on the involuntary manslaughter
16 charge and the charge of self-defense.

17 Q And voluntary as well?

18 A Yes. I believe so.

19 Q Did Mr. Murray ask you to contact any witnesses prior
20 to trial?

21 A Well, I contacted -- I contacted his codefendant, Faye
22 Brissey, and had an interview with her one time. I believe
23 it was at a Waffle House in Easley I met with her.

24 Q At that point, did you know that she was going to be a
25 state witness?

1 A Well, it became pretty clear when I began talking to
2 her, yes.

3 Q And did you explain to Mr. Murray the content of the
4 conversation you had with Ms. Brissey?

5 A Yes.

6 Q And did you tell him, in your opinion, she was going
7 to testify against him?

8 A I don't recall specifically if I did or not.

9 Q Well, was it a surprise when you went to trial and she
10 testified for the State?

11 A No.

12 Q Did he ask you to contact anyone else?

13 A Not that I recall.

14 Q And were you aware going into trial what the State's
15 theory was going to be?

16 A Partially and partially not. I wasn't aware
17 beforehand that so much emphasis would be placed on the
18 even spacing of the gunshots, for example, and how that
19 would have indicated, you know, more deliberate intent, and
20 -- yeah.

21 Q Did you, in fact, call Faye Brissey as part of the
22 defense case?

23 A Yes. In an attempt to clarify some of her earlier
24 statements and inconsistencies. And when I did, she
25 basically testified that, gee, on the night in question,

1 she was under a lot of stress, and those statements just
2 weren't true. So, I mean . . .

3 MS. RATIGAN: Okay. Beg the Court's indulgence.

4 BY MS. RATIGAN:

5 Q Do you recall Mr. Murray asking you or requesting you
6 ask the firearms examiner any particular questions?

7 A No. I don't recall that. I'm not saying that he
8 didn't, but if he did, I didn't even understand what he was
9 talking about. So no.

10 MS. RATIGAN: That's all I have, Your Honor.

11 THE COURT: Cross?

12 MR. ARIAIL: May it please the Court.

13 CROSS EXAMINATION

14 BY MR. ARIAIL:

15 Q Mr. Mallard, how did you get involved with
16 Mr. Murray?

17 A I believe somebody else, the jail suggested I talk to
18 him or he contacted me after I had spoken with somebody
19 else.

20 Q I'm trying to just understand. I know his agreement
21 said you were pro bono, and then there was some agreement
22 about sit-ups and push-ups?

23 A Yeah. As an effort -- in order to make him feel
24 invested, yeah.

25 Q Okay. So there was no money exchanged?

1 A No.

2 Q And, basically, when y'all met, he would do sit-ups
3 and push-ups, I guess?

4 A Yeah.

5 Q And as part of this, did you go over -- I mean, he was
6 in jail during this period of time. How many times did you
7 go see him?

8 A Probably at least ten, maybe more.

9 Q Okay.

10 A I mean, it was over a period of months. So there were
11 some other things that we discussed as well, some other
12 charges that did not end up getting prosecuted relating to
13 possible assaults on other people in the jail and that sort
14 of thing.

15 Q Okay. So in this case, you went over the discovery
16 with him and told -- I mean, and I know part of this was he
17 gave statements, in-car videos, he gave a statement down in
18 Aiken. Did you go over the implication of those statements
19 with him and how it could affect him at trial?

20 A I'm not sure that I can say that I did because we
21 wouldn't have been looking at that until like the week
22 before trial. And the videos were like played, and they
23 were, you know, pretty compelling. But by then we were
24 pretty much already committed to doing the trial. I don't
25 think we thought at that point about just pleading guilty

1 to the murder charge.

2 Q And was there ever any offer to plead less, to any
3 voluntary manslaughter?

4 A No. The State's offer was that if we pleaded guilty
5 to murder, the State would not specifically ask for a life
6 sentence. They would let, you know, me make my argument to
7 the judge, and they would not specifically ask for a life
8 sentence.

9 Q Okay. And the crux of this case dealt with Faye
10 Brissey who was a codefendant, correct?

11 A Yes.

12 Q She was charged with accessory after the fact,
13 correct?

14 A Yes.

15 Q Okay. And you spoke with her. And the testimony she
16 gave the day of the trial, was that consistent or
17 inconsistent with what she told you?

18 A It was pretty consistent with what she told me. I
19 mean, she was indicating, you know, she -- when I talked
20 with her, I don't believe she ever indicated that she had
21 gotten out of the car.

22 Q Okay. But it was directly -- I mean, I guess there
23 was parts of it which were inconsistent what she told
24 police afterwards, correct, that she gave a statement
25 about?

1 A Well, in her statement, when I called her, we were
2 focusing on the fact that -- that Chris had talked and that
3 she was aware of the fact that there had been a fight
4 before the shooting. And so in calling her to the stand, I
5 mean, she then clarifies or whatever that she knew that
6 because of what Chris told her when he got into the car.
7 And, you know, I had received a statement from Chris that I
8 didn't necessarily feel like I could act on because it was
9 inconsistent with his prior statements that, you know, at
10 some point, he had wanted me to submit a statement that
11 basically said that Faye had gone with him to the door,
12 then pulled a knife and then he pulled a gun. And although
13 that would have implicated her more, I didn't see how it
14 would help his case.

15 Q Okay. I guess my question is, what I'm trying to
16 figure out is during her cross, there's not -- you don't
17 draw any of these -- a lot of these inconsistencies out. I
18 mean, she's a key piece that a jury is probably going to
19 look at to say, "I was there with him. I saw what
20 happened." She's saying he put something over his head.
21 Why didn't you draw these issues out during that
22 cross-examination to show the jury what she's testifying to
23 isn't correct?

24 A I'm not sure. I don't recall -- I don't recall having
25 any discussion with Chris about specifically what he was

1 wearing or not wearing, you know, at the time.

2 Q One of the key pieces was he put a toboggan over his
3 head and went in the house, is what she's saying. She
4 never says that before in her statement, does she?

5 A I don't -- I don't recall.

6 Q Okay. I'm just trying to -- if you remember why you
7 didn't go into that, why you didn't say there's
8 inconsistencies of what she's saying to try to draw ---

9 A I'm not sure. I know I did on redirect, and then at
10 that point, she's just saying, basically, you know, "I was
11 -- I was scared and my earlier statements may not have been
12 true."

13 Q Okay. Were there any -- I know you filed, I think, a
14 Jackson v. Denno or you had a hearing in regards to that.
15 Were there any other motions you discussed with him that
16 you thought you could limit any of this evidence or keep
17 anything out?

18 A I don't believe so.

19 The other thing that we tried to do is he felt like
20 he was under a lot of stress, and so I tried to, you know,
21 ask the Court in terms of his giving an examination to see
22 if he could actually do the trial right now or at the
23 time.

24 Q Was that the issue with the competency issue at that
25 time?

1 A Yes. But it wasn't really competency. It was more
2 ability to stand trial.

3 Q So you made that motion. You made a motion, I think,
4 for a continuance, and then, I think, the Jackson v. Denno
5 issue; is that correct?

6 A Yes. Well, I mean, the Jackson v. Denno issue we just
7 had a hearing on.

8 Q Right. And you were denied -- those motions were
9 denied?

10 A Yes.

11 Q Okay. Now, were there any items that Chris brought
12 up to you that he wanted to draw out? I know we talked
13 about this weapon and the jamming or anything of that
14 nature. Was there anything he wanted you to bring up as
15 part of that to show the Court why it jammed or what the
16 issue was?

17 A Not that I can remember specifically. If he did, it
18 was, you know, right at the time of the testimony of a
19 weapons expert. And like I said, I don't recall what he
20 said or recall, you know, if I'd done it, it would have had
21 much relevance, but . . .

22 MR. ARIAIL: Your Honor, I have no further questions.

23 THE COURT: Okay. Well, I'm just kind of curious.

24 Isn't one of the elements of self-defense that you've got
25 to be without fault in bringing on the difficulty? I

1 believe that's right, isn't it?

2 THE WITNESS: Well ---

3 THE COURT: Yeah.

4 THE WITNESS: --- there were -- there were statements
5 from some of the witnesses that the defendant -- Chris goes
6 to the door, had opened the door. Chris had told me then
7 that he was like initially -- initially punched, and so --
8 and there was a struggle. And he was just arming himself
9 initially to go in to protect himself.

10 THE COURT: Well, my point is, one of the elements of
11 self-defense is that you've got to be without fault in
12 bringing on the difficulty. And so his statement -- and
13 you've got -- in spite of the fact that he went there with
14 a gun, you've still got a self-defense charge, right?

15 THE WITNESS: Yes.

16 THE COURT: And I guess the only way you got that was
17 through the defendant's own statement where he actually
18 physically acted out on video what happened; isn't that
19 right?

20 THE WITNESS: Yeah. I'm not --

21 THE COURT: Okay. So that's all I've got. Y'all got
22 anything else?

23 MS. RATIGAN: No, Your Honor.

24 MR. ARIAIL: Nothing further, Your Honor.

25 THE COURT: Thanks.

1 Anything else? State rests?

2 MR. ARIAIL: No, Your Honor. That's it.

3 MS. RATIGAN: Yes, Your Honor.

4 THE COURT: Chris, where are you, man? Where have
5 they got you?

6 DEFENDANT MURRAY: McCormick.

7 THE COURT: McCormick?

8 DEFENDANT MURRAY: Yes, sir.

9 THE COURT: You doing okay?

10 DEFENDANT MURRAY: Yes, sir.

11 THE COURT: What were you doing up in Pickens?

12 DEFENDANT MURRAY: I came up here because I was dating
13 Faye Brissey. Matthew Brissey was supposed to be my best
14 friend, you know. I came to be with him.

15 THE COURT: Yeah. Wow. Well, I'm going to deny your
16 petition. I think you failed to meet your burden of proof
17 in the case.

18 Actually, my point in asking those question of
19 Mr. Mallard was just to show that, I mean, he came -- you
20 initiated the contact, and he was still able to get you a
21 self-defense charge, which was, you know, pretty good. But
22 I don't show where you've proven that his conduct fell
23 below an objective standard of reasonableness, and so I
24 won't even go to the second prong about whether or not the
25 jury's verdict would have changed, okay?

1 All right. So I wish you the best of luck. Stay out
2 of trouble down there at the jail.

3 MS. RATIGAN: Thank you, Your Honor.

4 *****END OF TRANSCRIPT OF RECORD*****
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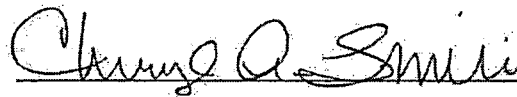
CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

I, CHERYL A. SMITH, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Pickens County, South Carolina, on the 22nd day of April, 2015.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

November 21, 2016



Cheryl A. Smith, CVR-M

Court Reporter

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA
STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
C.A. No. 2013-CP-39-1052

COUNTY OF PICKENS

2015 OCT 7 P 2:29

Christopher Robert Murray,
S.C.D.C. No. 345729,

Applicant,

v.

State of South Carolina,

Respondent.

ORDER OF DISMISSAL

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed August 15, 2013. The Respondent made its return on April 8, 2014. An evidentiary hearing was held on April 22, 2015 at the Greenville County Courthouse. The Applicant was present and represented by R. Mills Ariail, Jr., Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's trial counsel, Gary Mallard, Esquire. The Court had before it the trial transcript, the Pickens County Clerk of Court records, the South Carolina Department of Corrections records, the PCR application, the return, and the appellate records.

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Pickens County Clerk of Court. The Applicant was indicted at the January 2011 term of the Pickens County Grand Jury for murder (2011-GS-39-0026). He was represented by Gary Mallard, Esquire.

After the State brought the case to trial, the Applicant was found guilty. On April 20,

2011, the Honorable G. Edward Welmaker sentenced the Applicant to forty years imprisonment.

A notice of appeal was filed at the South Carolina Court of Appeals. Breen R. Stevens, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal. The Court of Appeals affirmed the Applicant's conviction and sentence on June 26, 2013. State v. Murray, 404 S.C. 300, 744 S.E.2d 607 (Ct. App. 2013). The Remittitur was sent on July 15, 2013.

ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel:
 - a. Did not object to witness committing perjury.
 - b. Did not ask questions of substance in cross-examination of witnesses.
 - c. Did not interview witness prior to trial.
 - d. Did not investigate witness for impeachment purposes.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly.

Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the

evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052).

The Applicant stated he and trial counsel discussed self-defense and his story that the gun "went off" while he was wrestling with the victim. The Applicant stated he also told the police this shooting was in self-defense. The Applicant stated that, in order to prove self-defense, trial counsel should have discredited the State's witnesses because they lied. The Applicant stated he asked trial counsel to question the firearms examiner about whether she examined the live round.

Trial counsel testified he reviewed the following with the Applicant: the discovery materials, the Applicant's version of events, the elements of the charges, and possible defenses. Trial counsel testified they argued self-defense at trial. Trial counsel testified the Applicant asked him to contact Faye Brissey and that, upon speaking with her, it was clear she would be a State witness. Trial counsel testified Brissey's trial testimony was consistent with what she had told him. Trial counsel testified he also called Brissey as defense witness to clarify some inconsistencies. Trial counsel testified he did not recall the Applicant requesting he ask the

firearms examiner a specific question.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have discredited State witnesses in order to help prove his self-defense argument. Initially, this Court notes that, while the Applicant stated on cross-examination that he wanted trial counsel to discredit State witnesses for allegedly lying, he failed to specify the names of these witnesses – other than Faye Brissey. He also failed to specify the portions of the trial transcript that he argued were untruthful and should have been attacked. As such, this Court finds the Applicant failed to meet his burden of proof. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174. Regarding Brissey, the Applicant's chief contention is that trial counsel could have bolstered his self-defense argument if he had challenged Brissey's testimony as false and impeached her with her statements. This Court notes, however, that during trial counsel's questioning of Brissey during the defense case, Brissey stated "the things I said in my statement wasn't really true because I was scared." (Trial transcript, p.408). This was before the jury as a factor in their determination of her credibility. See State v. Pipkin, 359 S.C. 322, 327, 597 S.E.2d 831, 833 (Cl. App. 2004) (noting the jury is "the finder of fact and weigher of credibility"). The Applicant has failed to allege with any specificity what other questions trial counsel could have asked Brissey that would have affected the outcome of his trial. See Cherry v. State, 300 S.C. at 117-18, 386 at 625.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have more thoroughly questioned the State's firearms expert. This Court finds the Applicant has failed to articulate what line of questioning trial counsel could have pursued that would have supported his self-defense argument. Further, the Applicant did not present a firearms expert at the PCR hearing, so any discussion of the methodology used by the State's expert is speculative.

See Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (finding that, as the applicant failed to have an expert testify at the evidentiary hearing, “any finding of prejudice is merely speculative”).

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in his representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by trial counsel’s performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

CONCLUSION

Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel’s representation. Therefore, this PCR application must be denied and dismissed with prejudice.

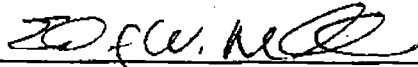
This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His

attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 1 day of April, 2015.


Edward W. Miller
Presiding Judge
Thirteenth Judicial Circuit

SL, South Carolina.

WITNESSES

Lane Byers

Pickens County Sheriff's Office

1/21/2010

ARREST WARRANT NUMBER

M385332

TRUE COPY ACTION OF GRAND JURY

Date: JAN 21 2010

Joyne V. Kavis
Foreperson of Grand Jury

VERDICT

John D. Rayton 4/20/11
Foreperson of Petit Jury Date:

DOCKET NO. 2011-GS-39-0026
WDR

The State of South Carolina

County of Pickens

COURT OF GENERAL SESSIONS

TERM 2011

THE STATE

vs.

CHRISTOPHER ROBERT MURRAY

Indictment for

0116

MURDER

VIOLATION § 16-03-0010, 0020

STATE OF SOUTH CAROLINA)
COUNTY OF PICKENS)

INDICTMENT FOR
MURDER

At a Court of General Sessions, convened on

JAN 18 2011

the Grand Jurors of Pickens

County present upon their oath:

That CHRISTOPHER ROBERT MURRAY did in Pickens County, on or about the 18th day of January, 2010, unlawfully and with malice aforethought kill JAMES ANTHONY GIBSON, DECEASED by means of shooting the victim in the upper torso of his body, and that JAMES ANTHONY GIBSON, DECEASED died as a proximate result thereof. This is in violation of §16-3-10 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



SOLICITOR