STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Chesterfield County

G. Thomas Cooper, Circuit Court Judge

WILLIAM OUTLAW,

APPELLANT,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-000811

BRIEF OF APPELLANT PURSUANT TO WHITE V. STATE

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INDEX

TABLE OF AUTHORITIES

Cases

Statutes

ISSUE PRESENTED

Did the trial judge err in failing to instruct the jury concerning the lesser-included offense of involuntary manslaughter where evidence in the record supported the instruction because Appellant did not intend to kill the deceased and admitted he acted recklessly in his handling of a weapon?

STATEMENT

A Chesterfield County grand jury indicted Appellant for murder on February 28, 2002. App. 561-562. The state, represented by Kernard Redmond and Franklin Joyner, called the case to trial before the Honorable Paul M. Burch and a jury on April 4-6, 2005. App. 1. Paul Cannarella represented Appellant. App. 1. The jury found Appellant guilty of the lesser included offense of voluntary manslaughter. App. 324, ll. 11-16. Judge Burch sentenced Appellant to twenty-five years' imprisonment. App. 338, ll. 11-14; App. 563.

Thereafter, on April 7, 2005, trial counsel filed a motion to reconsider sentence. App. 341. Then, on April 13, 2005, and April 25, 2005, trial counsel filed motions for new trial. App. 342-343. On May 13, 2005, Judge Burch signed an order requiring the solicitor to submit "all of the ballistics to SLED's Ballistics Laboratory for testing, comparison, and analysis." App. 344-345.

Although the post-trial motions remained pending, Appellant filed an application for post-conviction relief (PCR) on January 10, 2007 (2007-CP-13-0029). App. 346-353. The state filed a motion to dismiss. App. 354-357. By an order filed June 8, 2007, the Honorable John M. Milling dismissed the application without prejudice. App. 358-360.

Appellant then retained James T. Irvin to represent him. App. 415; App. 482, l. 4 – App. 483, l. 3. Irvin argued the post-trial motions. App. 483, ll. 1-18. Judge Burch denied the motions in orders dated September 1, 2010. App. 420-421. No one filed and served a notice of appeal on Appellant's behalf.

Appellant filed an application for post-conviction relief (PCR) on February 16, 2012 (2012-CP-13-0113). App. 363-388. On April 2, 2012, the state filed a return and motion to dismiss. App. 389-396. The judge, who was also the trial judge, issued a conditional order of

dismissal on May 21, 2012. App. 404-407. On September 4, 2012 and September 18, 2012, the order became final. App. 427-429; App. 430-431. Appellant appealed. App. 434-439. Robert M. Pachak represented Appellant on appeal. App. 440-448. In lieu of a formal return, the state wrote a letter consenting to remanding the case to the PCR court. App. 449. On June 18, 2014, the Court of Appeals reversed the PCR court's summary dismissal. App. 450-451. The Court concluded there was a question of whether Appellant knowingly waived his right to direct review, and therefore, the Court remanded the case to the PCR court for an evidentiary hearing. App. 450-451. Remittitur issued on July 8, 2014. App. 452.

Returning to the PCR trial proceedings, the state filed an amended return on December 30, 2016. App. 453-459. On January 10, 2017, Judge Cooper presided over an evidentiary hearing. App. 460. Lance Boozer represented Appellant. App. 460. Valerie Giovanoli represented the state. App. 460. During the hearing, Judge Cooper denied the state's motion to dismiss all claims except the request for belated direct review, finding the "case was remanded from the South Carolina Court of Appeals to consider the merits of [Appellant]'s entire application and all claims therein." App. 542. Further, Judge Cooper found Appellant "did not knowingly waive his right to a direct appeal." App. 542; App. 550-551. Thus, Judge Cooper granted Appellant a belated direct appeal. App. 550-551. However, Judge Cooper denied Appellant relief on his other claims. App. 552-559.

Appellant served his notice of appeal on April 4, 2017. This brief of appellant pursuant to White v. State, 263 S.C. 110, 208, S.E.2d 35 (1974), follows.

ARGUMENT

The trial judge erred in failing to instruct the jury concerning the lesser-included offense of involuntary manslaughter where evidence in the record supported the instruction because Appellant did not intend to kill the deceased and admitted he acted recklessly in his handling of a weapon.

Relevant facts

Appellant's testimony

Appellant, who stood at five feet, three inches and weighed one hundred and sixty pounds, got off from work and went straight to his local bar where he shot pool and drank beer. App. 185, ll. 3-20. Michael Johnson arrived at the bar with his friend, Danny Wilkes. App. 185, l. 23 – App. 186, l. 1; App. 207, ll. 6-9. Michael invited Appellant to his home. App. 186, ll. 1-2; App. 207, ll. 4-5. Appellant accompanied Michael and Danny to Michael's home where the two continued drinking and began to use valium. App. 186, ll. 2-6; App. 187, l. 21 – App. 188, l. 3; App. 207, ll. 1-5.

Around 11 p.m., John Talbert, who was six feet, two inches tall and weighed approximately two hundred and fifty pounds, arrived at Michael's house. App. 188, ll. 14-22. In light of Appellant having ingested alcohol and valium virtually all day, Appellant was very intoxicated when Talbert arrived. App. 188, ll. 17-19; App. 206, ll. 12-23. Appellant was leaving as Talbert arrived. App. 189, ll. 3-14. When Appellant saw Talbert, he asked Talbert if he had some items that belonged to him. App. 188, l. 23 – App. 189, l. 1. In response, Talbert punched Appellant in the face. App. 189, ll. 1-2. Appellant got into his car in an effort to leave, but Talbert busted his windshield. App. 190, ll. 9-10. Eventually, Appellant was able to leave in his car, but he had difficulty because Talbert's punch damaged his eye. App. 192, ll. 9-13. Appellant's eye was swollen from the blow, making it difficult for him to see. App. 192, ll. 11-12.

Appellant drove to the end of Michael's driveway, which was down a hill. App. 192, l. 17. He immediately circled back and returned to Michael's home to request Talbert pay for his windshield. App. 192, ll. 17-25; App. 222, ll. 5-17. Appellant got out of his car and hollered for Talbert. App. 914, ll. 21-23; App. 195, ll. 2-6; App. 195, ll. 14-17; App. 221, ll. 20-24. Almost immediately, Appellant heard a gunshot and saw a flame. App. 194, l. 24; App. 195, ll. 20-23; App. 222, ll. 21-23. According to Appellant, the shot was toward him. App. 204, l. 24. Appellant's eye was bleeding and swelling due to Talbert's blow, and Appellant's vision was sharply reduced as a result. App. 194, l. 24 – App. 195, l. 25. In fact, Appellant could barely see. App. 196, ll. 20-23; App. 199, ll. 18-24; App. 201, ll. 14-25. In fear of his life, Appellant went to the trunk of his car from which he retrieved his shotgun. App. 196, ll. 14-16; App. 197, ll. 19-20; App. 198, l. 4 – App. 199, l. 17; App. 200, ll. 3-9. With the shotgun down at his side, he shot back in the general direction of where he saw the flame and heard the gunshot. App. 196, ll. 17-19; App. 197, ll. 17-18; App. 200, ll. 15-17; App. 201, ll. 9-13; App. 224, ll. 5-15; App. 225, ll. 1-2. Appellant shot back because he was trying to get away. App. 200, l. 25 – App. 201, l. 1. Appellant did not see anyone in the general direction to which he shot. App. 201, ll. 14-16; App. 202, ll. 1-6.

As soon as Appellant fired the shot back and secured his ability to leave, he got into his car and fled the danger. App. 202, ll. 7-25. While Appellant was driving the short distance to his home, he threw the shotgun out his car window. App. 205, ll. 12-22; App. 209, ll. 2-3. When Appellant arrived home, he slept on his bedroom floor because he feared retribution from Michael and Talbert for shooting his gun that evening. App. 213, ll. 19-23; App. 214, ll. 8-10; App. 214, ll. 14-20.

When the police arrived at Michael's home, they found him dead. App. 61, ll. 5-18; App. 65, l. 1 – App. 66, l. 1. Law enforcement found a gun and a spent shell casing on the ground beside

Michael. App. 66, ll. 10-19; App. 68, ll. 11-23; App. 69, ll. 10-12. One of the officers also found a live round beside Michael. App. 104, ll. 1-7. The pathologist determined Michael died as a result of a shotgun wound in the left chest. App. 116, ll. 16-24. She described the wound as resulting from a "distant shot." App. 117, ll. 3-14. Five buckshot were found under Michael's skin and two were found in his clothing. App. 116, ll. 23-25. Blood tests revealed alcohol and antianxiety medication in Michael's system. App. 118, ll. 12-22.

Request to charge

At the conclusion of the evidence presentation, trial counsel requested the judge instruct the jury on involuntary manslaughter. App. 246, ll. 10-12. Trial counsel explained that "involuntary manslaughter is where statutorily ... someone who is acting lawfully but - - and killing another unintentional, but it's the result of the reckless disregard of the safety of other[s]." App. 246, ll. 12-16. In other words, a person is guilty of involuntary manslaughter when the person "is acting lawfully and intentionally kills somebody as a result of their reckless disregard for the safety of others." App. 246, ll. 17-19. Trial counsel argued Appellant was acting lawfully because he "had a right under the circumstances to arm himself in self-defense." App. 246, ll. 20-21. Appellant did not intend to shoot anybody; rather, he fired a shot so that he could escape. App. 247, ll. 8-9. Defense counsel explained the evidence demonstrated the lighting was "questionable" as was Appellant's "sight and vision." App. 247, ll. 9-11. Further, Appellant "fire[d] from the hip as instinctive reaction and to escape." App. 247, ll. 11-12.

As defense counsel explained, Appellant "was acting lawfully under the circumstances," did not intend to shoot anybody, and "one could reasonably conclude or infer that he was acting in a reckless disregard safety of others." App. 247, ll. 13-18. In support of his position, trial counsel

cited State v. Cabrera-Pena, 361 S.C. 372, 605 S.E.2d 522 (2004), and explained how the cases were similar. App. 248, l. 10 – App. 249, l. 6.

In opposing Appellant's request, the state cited State v. Craig, 267 S.C. 262, 227 S.E.2d 306 (1976). App. 249, ll. 14-15; App. 249, ll. 19-22. The state's main argument was that Appellant "never indicated it was an accidental shooting." App. 249, ll. 17-18. For the state, it was enough that Appellant "intended to pull the trigger" to preclude an involuntary manslaughter charge. App. 249, ll. 18-19.

With no explanation, the judge denied Appellant's request for a jury instruction on involuntary manslaughter: "I'm going to charge murder. I'm going to charge voluntary manslaughter. I'm going to charge self-defense." App. 252, ll. 5-7.

Jury charge & verdict

Thereafter, the judge instructed the jury concerning murder, voluntary manslaughter, and self-defense. App. 295, l. 23 – App. 304, l. 15. After deliberating for approximately one hour, the jury requested to be recharged on murder and voluntary manslaughter. App. 309, l. 21 – App. 310, l. 6. Initially, the judge played the recording of the charge he had provided earlier. App. 311, ll. 10-12. When it became clear that some of the jurors had been unable to hear the recording in full, the judge re-read the instructions to the jurors. App. 312, l. 8 – App. 323, l. 5. Approximately one hour later, the jury returned with its verdict. App. 323, ll. 7-8; App. 323, ll. 16-17.

Motion for new trial & order

In his motion for new trial, Appellant argued he was denied due process of law by the trial judge's refusal to grant his request to charge the jury on the lesser-included offense of involuntary manslaughter. App. 342. Defense counsel provided the trial judge a memorandum in support of his request for a new trial. App. 382-386. Counsel, citing State v. Crosby, 355 S.C. 47, 584 S.E.2d 110

(2003), argued the judge erred in failing to charge the jury with involuntary manslaughter, particularly if the judge relied upon the state's argument that the intentional firing of a gun precludes an instruction on involuntary manslaughter. App. 382-386. According to counsel, "a defendant may be entitled to an involuntary manslaughter charge, even if he intentionally fired a gun, when there is other evidence in the record from which reasonable inferences may be drawn that the defendant acted in reckless disregard of the safety of others." App. 383.

In his memorandum, counsel recounted the evidence supportive of an involuntary manslaughter instruction:

> [Appellant] testified that he was drinking heavily and taking valiums. A much larger John Talbert violently struck [Appellant] in the left eye, [a]ffecting his vision in both eyes. A gun was fired by the victim. [Appellant] panicked and blindly retrieved his gun from the darkness of his car trunk and fired it from the hip in the darkness of the night. It could be said that he, too, closed his eyes and pulled the trigger; that he, too, didn't even know that he pulled the trigger, due to his mental state (alcohol, drugs, and gun fire), and that he, like Crosby, acted in reckless disregard for the safety of others.

App. 385. Further, counsel explained the "[r]easonable inferences to be drawn from the evidence ... to support a jury verdict of involuntary manslaughter, based upon the reckless disregard for the safety of others" included undisputed evidence of Appellant's "drunken condition" and "drug usage," Appellant "being attacked by John Talbert," Appellant's "obscured vision," Appellant "not aiming the gun," the discharge of the gun "from the hip," Appellant's "testimony that he did not intend the result," Appellant and the deceased were friends, the deceased not being a part of the altercation between Appellant and Talbert, and Appellant's "impaired state of mind causing him to over-react to initial gun fire by his friend." App. 385. "All of these are inferences from which a jury could have reasonably concluded that [Appellant] acted with reckless disregard and, therefore, found him guilty of involuntary manslaughter." App. 386.

Judge Burch denied Appellant's motion for a new trial. App. 420-421. The judge concluded "the facts in this case are distinguishable from Crosby in that [Appellant] in the present case testified that he went to his vehicle, armed himself, and intentionally fired in the direction of the victim in self-defense." App. 420. Without explaining how the two incongruous matters were related, the judge included in his analysis regarding why he declined Appellant's request for an instruction on the lesser-included offense of involuntary manslaughter that the jury rejected Appellant's defense of self-defense. App. 420.

Discussion

"The law to be charged to the jury is determined by the evidence presented at trial." State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). In determining whether the evidence requires a charge on a lesser included offense, a court must view the facts in a light most favorable to the defendant. See State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). "The trial court is required to charge a jury on a lesser-included offense if there is evidence from which it could be inferred that the defendant committed the lesser, rather than the greater, offense." State v. Sams, 410 S.C. 303, 308, 764 S.E.2d 511, 513 (2014). "The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand is an error of law." State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 166 (2007). "It has long been the law in this State that 'to warrant the court in eliminating the offense of manslaughter it should very clearly appear that there is *no evidence whatsoever* tending to reduce the crime from murder to manslaughter.'" Casey v. State, 305 S.C. 445, 447,409 S.E.2d 391, 392 (1991)(citing State v. Norris, 253 S.C. 31, 35, 168 S.E.2d 564 (1969)); see also State v. Crosby, 335 S.C. 47, 51, 584 S.E.2d 110, 112 (2003)("A trial court should refuse a lesser included offense only where there is no evidence the defendant committed the lesser rather than the greater offense.").

South Carolina law provides for two alternative definitions of involuntary manslaughter. "Involuntary manslaughter is (1) the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others." State v. Brayboy, 387 S.C. 174, 180, 691 S.E.2d 482, 485 (Ct. App. 2010)(citing State v. Wharton, 381 S.C. 209, 216, 672 S.E.2d 786, 789 (2009)); see also State v. Burris, 334 S.C. 256, 264-265, 513 S.E.2d 104, 109 (1999). Further defining involuntary manslaughter, this Court has held that "[r]ecklessness is a state of mind in which the actor is aware of his or her conduct, yet consciously disregards a risk which his or her conduct is creating." State v. Pittman, 373 S.C. 527, 571, 647 S.E.2d 144, 167 (2008). According to the statute, a person "may be convicted" of involuntary manslaughter "only upon a showing of criminal negligence," which the statute defines as "the reckless disregard of the safety of others." S.C. Code Ann. § 16-3-60. In light of trial counsel's request concerning on the second definition, this brief will address only the second definition.

Without question "a person can be acting lawfully ... 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. Immediately prior to Appellant retrieving his gun from the trunk of his car, the deceased had fired a shot. Appellant was well within his rights to arm himself in self-defense to repel any attack. Thus, it was clear Appellant satisfied the requirement of involuntary manslaughter that he be engaged in lawful activity.

There also seemed to be little dispute that the evidence demonstrated Appellant was acting with reckless disregard for the safety of others. By Appellant's own admission, he could barely see due to the injury he suffered earlier in the evening at the hands of Talbert and due to the low lighting

conditions in the yard. Appellant shot blindly in the direction from which he heard gunfire and saw a flame. His conduct of firing blindly constituted recklessness.

The only real contention appeared to be whether Appellant's conduct resulted in an unintentional killing. The trial judge erred by focusing on whether Appellant intended to commit the act – shooting – which led to the deceased's death. Instead, the judge should have focused on whether the killing was intentional. The *very* definition of "recklessness," which forms the crux of involuntary manslaughter, makes clear that the actor is aware of his conduct. In fact, the actor is even aware of the risks his conduct poses. Nevertheless, the actor disregards those risks and engages in the conduct. Thus, a defendant may be found guilty of involuntary manslaughter even where there is some evidence that a killing was intentional, so long as there is also any evidence that the killing was unintentional. See Crosby, 355 S.C. at 53, S.E.2d at 112.

Appellant acknowledges this Court and the Court of Appeals have held that if a defendant fires a gun intentionally, the defendant is not entitled to a charge of involuntary manslaughter. See e.g., Sullivan v. State, 407 S.C. 241, 245, 754 S.E.2d 885, 887 (Ct. App. 2014)(stating that "[w]hen the victim was killed by a gunshot, and no evidence is presented showing the defendant fired the gun unintentionally, the defendant is not entitled to a charge of involuntary manslaughter"). Appellant respectfully submits these cases have been wrongly decided as the focus must be on the killing, not the conduct. The definition of involuntary manslaughter is the "unintentional killing" of another. The adjective "unintentional" modifies the noun "killing." Thus, the question must be whether the killing was intentionally, not whether the act that resulted in the killing was intentional. See State v. Sams, 410 S.C. 303, 317, 764 S.E.2d 511, 518 (2014)(Pleicones, J. dissenting)(explaining the courts err when the focus is "on whether the defendant intended to

commit the act which led to the victim's death rather than on whether he intended the consequence of his intentional act, that is, the victim's death."

CONCLUSION

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

Respectfully submitted,

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT.

This 29th day of November, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the Brief of Appellant pursuant to White v. State, in this case has been served on Valerie Giovanoli, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. William Outlaw #308544, at Trenton Correctional Institution, 84 Greenhouse Road, Trenton, SC 29847, this 29th day of November, 2017.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 29th day
of November, 2017.

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