STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY
The Honorable Deandra Jefferson, Circuit Court Judge

On Petition for Writ of Certiorari to the Court of Appeals
Appellate Case No. 2017-000096 (Ct. App. Case No. 2013-002478)
Opinion No. 2016-UP-473 (S.C. Ct. App. Filed November 9, 2016)

THE STATE,

RESPONDENT,

V.

JAMES K. BETHEL,

PETITIONER.

RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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Whether the Court of Appeals erred in affirming the trial judge's ruling that petitioner was not entitled to an involuntary manslaughter charge because some evidence of malice existed in the case?

RESPONDENT'S COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the Court of Appeals erred in finding the trial court did not abuse its discretion in denying Bethel's request for an involuntary manslaughter charge when there was not sufficient evidence to support an involuntary manslaughter jury instruction and any error in not granting Bethel's request for the instruction was harmless?

STATEMENT OF THE CASE

On November 4-8, 2013, Petitioner James Kevin Bethel ("Bethel") was tried by a jury for the murder of GaWayne Franklin and the attempted murder of Kendron Hope. Bethel was tried in the Richland County Court of General Sessions before the Honorable Deandre Jefferson, Circuit Court Judge. Tristan Shaffer represented Bethel. The State was represented by Deputy Solicitor Kathryn Campbell and Assistant Solicitors Jeremiah Shellenberg and Meghan Walker, all of the Fifth Judicial Circuit Solicitor's Office.

On November 8, 2013, Bethel was convicted of one count of murder and one count of attempted murder. (R. p. 797). He was sentenced to fifty years confinement for the murder conviction and thirty years confinement for the attempted murder conviction, both to be served concurrently. (R. pp. 810-811).

Bethel timely filed a notice of appeal. After full briefing, the South Carolina Court of Appeals issued an unpublished opinion affirming Bethel's convictions. State v. Bethel, Op. No. 2016-UP-473 (S.C.Ct.App. filed November 9, 2016). (App. pp. 1-3). Bethel filed a Petition for

Rehearing on November 23, 2016. (App. pp. 4-10). The Court of Appeals denied the petition on December 15, 2016. (App. p. 11). Bethel now seeks review of the South Carolina Court of Appeals' opinion in this Court.

STATEMENT OF FACTS

On August 19, 2012, Bethel shot the victim, GaWayne Franklin, in the back of the head. The bullet went upwards, from left to right, and from front to back. (R. p. 394). The forensic pathologist noted that the bullet obliterated the part of the brain it went through, and the bullet went through the cerebellum and the main part of the brain. (R. p. 394). The victim "would have immediately lost consciousness and that would have caused death." (R. p. 394, ll 20-1; see R. p. 395).

Background

On the early morning of August 19, 2012, the murder victim, GaWayne Franklin, was working as a bouncer at Mr. Lucky's Gentleman's Club in Columbia. (R. p. 145). Franklin was working inside and was unarmed. (R. p. 145).

William Ingram, who was working as the doorman at Mr. Lucky's that night, testified he had a run in with Bethel's group when they came into the club. (R. p. 175). An individual wearing a dark shirt, black pants, and black boots came into the club with a liquor bottle. (R. p. 175). Ingram noted that bringing liquor into the club was only allowed if the manager gave permission, and the manager did allow for the man to bring in the bottle. (R. p. 176). Ingram testified the group caused problems, and there were multiple times that security was ready to kick them out. (R. p. 176).

Inside the Club

On that evening, Bethel visited the club with three other males and two females. (R. pp. 146, 156, 491, 505, 560, 593). David Richardson, one of the victim's friends who was in the club that night, observed Bethel's group doing things that would normally get people kicked out of Mr. Lucky's. (R. p. 147).

Bethel's Group Gets Kicked Out

Eventually, Bethel's group was kicked out of Mr. Lucky's. (R. p. 148). Richardson testified that outside security came in and escorted the group out of the club. (R. p. 148). As the group was being escorted out of the club, the last person nudged the victim. (R. p. 149). The victim then followed the group outside. (R. p. 149). Richardson noted that as he and the victim got outside, there was arguing and a number of people in an excited state. (R. p. 150). One of the guys from Bethel's group intimated that he knew where the victim lived, and the victim responded that "Oh, you know where I live at, I'm right here, you know, if you want to do something, I'm right here, I'm right here." (R. p. 150, ll 10-2). Ingram testified that Bethel's group was led out of the club. Ingram and the victim were among the bouncers who were pushing the group out of the club. (R. p. 177).

Confrontation Outside the Club

After that interaction, the victim and Richardson both jumped off of the side of the balcony in front of the club. (R. p. 150). In doing so, they got down to the same level as Bethel's cousin Ernest, who was wearing a yellow shirt and a yellow hat. (R. pp. 150, 444). Ingram testified Bethel was in the group being kicked out of the club. (R. p. 178). As they were going down the balcony, the group that was being escorted argued with security. (R. p. 178). Ingram testified that Kedron Hope, who was in charge of outside security that night, had to spray

mace at one of the guys in the group so they would continue moving towards the parking lot. (R. p. 178). Ingram noted that at that time, both Bethel and the victim were on the balcony. (R. p. 178).

Clinton Brown, one of the outside security guards at Mr. Lucky's, testified he was in the parking lot area until the disturbance on the balcony occurred. (R. p. 212). When the disturbance started, Brown headed towards the deck area. (R. p. 212). Brown saw Franklin, the victim, when he came out of the club. (R. p. 212).

Brown testified several individuals were coming out with the disturbance, and loud threats were made. (R. p. 213). Brown went up to the balcony. (R. p .213-14). Security proceeded to move the group down the ramp, but the altercation started to push back up the ramp. (R. p. 215-16).

Kedron Hope, the supervisor of outside security on August 19, testified that some individuals were allowed into Mr. Lucky's without going through a full pat down when they were allowed by either management or the bouncers. (R. p. 249). Hope testified that on that day, there were a few times people were brought outside the club, talked to, and were then allowed to return to the inside of the club. (R. p. 249). Hope indicated there was one group that caused most of the problems that morning. (R. p. 250). It consisted of four males, and later two females. (R. p. 250). Those individuals were talked to at some point, but they were allowed to stay in the club. (R. p. 250). Hope also stated that management allowed Bethel to walk into the club with a bottle of liquor. (R. pp. 250-51).

Within an hour of Bethel's entry with the bottle of liquor, he and his group were escorted out of the club. (R. p. 251). Hope, Rodney White, and Brown went up the ramp to meet the group who were being escorted out of the club. (R. p. 251). Hope testified it was actually two

groups leaving at the same time. There was some arguing between the bouncers and a couple of patrons who were upset with the group that was leaving. (R. p. 251). The groups were separated, and Hope was following behind all of them to make sure they got out. (R. p. 251). Some of the group walking down the ramp tried to climb back over the ramp. (R. p. 251). Hope sprayed one of the patrons with pepper spray because he would not go to the parking lot as instructed. (R. p. 252). Hope noted one guy went down to the ground holding his face, but the other ran out. (R. p. 252). Hope sprayed a short guy with dreads who was wearing light colored clothing. (R. p. 252).

Hope testified the guy from the group wearing yellow was already in the parking lot, and he and his group was yelling at the bouncers what they were going to do to them, specifically to Franklin. (R. p. 253). Hope did not recall exactly what each person said, but he did remember Franklin was saying that he was right there. (R. p. 253).

Hope testified Franklin climbed over the front of the balcony to get to the front of the parking lot. (R. p. 253).

While Hope was walking the two gentlemen he sprayed down the ramp to the parking lot, he saw Bethel come behind Franklin and shoot him in the head. (R. p. 254).

> I was walking directly out and was kind of paying attention to the two guys in front of me, but they were in my peripheral, probably from the distance of here to the lawyers' tables there, and as I was proceeding forward, I seen him [Bethel] reach down like into his pants or — and pull something out, and when I seen him pull his hand up and put it to his head, I seen the muzzle flash.

(R. p. 254, ll 14-20). Hope stated Franklin was not armed, and Franklin did not see Bethel come up behind him. (R. p. 255). At that time, Franklin was talking with the gentleman in yellow, telling him to go to his vehicle. (R. p. 255). Franklin dropped instantly. (R. p. 255).

Rodney White, who was also working outside security on the morning of the shooting, testified Bethel's group was escorted out of the club around 3:30 a.m. (R. pp. 430-32). White assisted in escorting the group down the ramp into the parking lot. (R. p. 432). White noted the group started a commotion on the deck, and one of the security officers sprayed mace. (R. pp. 432-33). White indicated Bethel was near him when the mace was sprayed, and White did not smell or feel any mace. (R. pp. 433, 435). White saw the victim go over the balcony, and the victim was confronting the group because they did not seem like they wanted to leave. (R. pp. 433, 435). White then saw Bethel come from behind the victim and shoot him in the head. (R. p. 433). White noted the victim was not even talking to Bethel. (R. pp. 433-34).

The Initial Shooting[1]

Richardson testified the next thing he knew, he heard two gunshots. (R. p. 151). He did not see them. (R. p. 151). Richardson looked over at the victim, and saw that he was hit. (R. p. 151). When Richardson eventually got over to the victim, the victim was not breathing. (R. p. 151). According to Ingram, five to seven seconds after the mace spraying, Bethel shot the victim. (R. p. 179). Ingram also identified Bethel in court.

Brown saw Franklin when he went over the ramp. (R. p. 216). Brown was on the balcony at that time. (R. p. 216). Brown also saw an individual run and jump across the balcony. (R. pp. 216-17). Brown lost visual contact with that individual. (R. p. 217). When he next saw that individual, he saw him right behind Franklin with his arm extended. (R. p. 218). Brown indicated it appeared he had a weapon, and Brown heard it discharge. (R. p. 218). Brown heard two gunshots and saw the reaction to them. (R. p. 218). He attempted to secure the

[1] Two videos of the incidents leading up to the shooting, the shooting, and the early part of the chase were entered into evidence at trial as State's Exhibit 71 and State's Exhibit 157.

scene and prevent people from leaving. (R. pp. 218-219). Brown also identified Bethel as the shooter he saw that night. (R. p. 221).

Edward Simpkins, a manager at Mr. Lucky's that morning, he spoke with Bethel that night in an effort to calm down Bethel's crowd. (R. pp. 39-40). Bethel and his group were leaving, and the victim followed the group out to make sure they were escorted out of the club. (R. p. 40). Frederick Simpkins, another manager of Mr. Lucky's, testified he saw Bethel's group engaged in multiple interactions (at least five) with the bouncers in the club. (R. pp. 298-300). Frederick talked with Bethel that night, including at the time the rest of Bethel's group was being ejected from the club. (R. p. 301). Frederick stated the victim was arguing with another from Bethel's group as they were being ejected from the club. (R. pp. 301-02). Simpkins noted Bethel then started arguing with the victim. (R. p. 302). Frederick also indicated it appeared that Bethel was clutching his left side like he might be carrying a weapon. (R. p. 306).

The Chase

After Bethel shot the victim, he started running. According to White, Hope told Bethel to freeze, and Bethel fired at him. (R. p. 434). Hope returned fire. (R. p. 434). Richardson heard more gunshots. (R. p. 152). When he looked up, he saw one person running and one of the security guards outside was shooting at him. (R. p. 152). He noted the security guard chased after the guy. (R. p. 152).

Brown saw the shooter running away from the scene. He also observed Hope discharging his weapon in an attempt to subdue the subject to try to eliminate the threat. (R. p. 219). Hope testified that in response to the shots fired, he drew his weapon. (R. p. 255). Bethel fired at Hope twice, and Hope returned fire. (R. p. 255). Bethel then ran away from Hope. (R. p. 255). Hope followed.

Hope testified that during the chase, Bethel turned and fired two more rounds at Hope before Bethel started running towards a church that was nearby. (R. p. 256). Hope then fired again, and Bethel fell. (R. p. 256). Hope surmised he shot Bethel. (R. p. 256). Bethel did not stay down; he picked himself up and ran around the side of the church building. (R. p. 257). Hope fired two or three more rounds closer to the building. (R. pp. 257-58). The chase continued around the church building. Hope noted Bethel eventually was able to escape through a fence and head towards an apparent apartment complex nearby. (R. pp. 258-62).

Hope later located a shell casing near where the victim was shot the next day. (R. p. 268).

Law Enforcement Investigation

Bethel was found heavily bleeding with wounds to his back at a condo complex near Mr. Lucky's. (R. pp. 331-34).

Two .380 caliber cartridge casings were found at the scene, and a .380 caliber bullet was recovered from the victim during autopsy. (R. pp. 128-29, 378). The two .380 cartridge casings were fired by the same gun. (R. p. 379). Ten .40 caliber fired cartridge casings found at the scene were tied to Hope's gun. (R. pp. 376-77).

Law enforcement tracked Bethel's path from Mr. Lucky's to where he was found. (See R. pp. 59-83, 86-99). During the investigation, law enforcement located a black t-shirt worn by Bethel that evening, along with tennis shoes and a pair of pants containing $1500.24 along the path that would have been taken by Bethel in his escape from the scene of the shooting. (R. pp. 62, 65, 68).

Bethel gave two statements to law enforcement while he was in the hospital. During the first statement, Bethel claimed he was robbed and shot while at a neighborhood that was

approximately four miles away from Mr. Lucky's. (R. pp. 446-50). When it was explained to Bethel that he was found at a different condo complex, Bethel changed his statement to say that he was shot and robbed at that condo complex. (R. p. 450). Bethel claimed he was not at Mr. Lucky's that morning. (R. p. 450). When law enforcement went back to the hospital to obtain a buccal swab from Bethel, he gave a verbal statement in which he again claimed that he was shot and robbed in a neighborhood that was three to four miles away from Mr. Lucky's. (R. pp. 414-15). Bethel again denied he was at Mr. Lucky's that morning. (R. pp. 414-15).

Defendant's Case

Bethel presented testimony from several witnesses in his defense. Troy Griffin, who was at Mr. Lucky's with Bethel, testified there were two incidents between Franklin and Bethel's group inside the club. (R. pp. 491-94). First, Griffin claimed Franklin pushed him while they were inside the club. (R. pp. 491-92). Griffin noted the bouncers appeared to not want their group inside the club. (R. pp. 493-94). Second, he noted Franklin pushed him and Franklin pushed Bethel's cousin, Ernest later that morning, after the manager had intervened. (R. pp. 494-95). Griffin asserted that the two started seeking information about what was going on. (R. pp. 495-96). Griffin claimed Franklin threatened to beat up members of the group, and he indicated Bethel was trying to calm everything down. (R. pp. 496-97).

Griffin testified the group moved out to the porch at some point. (R. p. 497). Griffin was pepper sprayed near the top of the ramp. (R. p. 497). Before he was sprayed, he saw Bethel was talking with the manager, and Curtis was near Griffin. (R. p. 498). Ernest was talking to Franklin. (R. p. 498). Griffin did not see the shooting. (R. p. 501).

Curtis Long, another of Bethel's friends at Mr. Lucky's that morning, also sensed the bouncers did not want his group at the club. (R. p. 531-32). Long, who admitted that he got

drunk that evening, indicated that at some point that morning, his group was no longer welcome in the club. (R. pp. 531, 533-34). Long was talking with the manager in the hallway, and the two other guys in the group were forced out of the club by the bouncers. (R. pp. 534-35). Long testified there was a lot of commotion between his group and the bouncers, and he further indicated Bethel was trying to talk to the bouncers to find out why the group was being expelled from the club. (R. p. 535). Long stated that when he was maybe halfway down the ramp outside the club, he was sprayed with mace. (R. pp. 535-36). He did not know where Bethel was at that time, but he did believe Griffin was nearby when the mace was sprayed. (R. p. 536). Long also did not see the shooting. (R. p. 536).

Bethel testified he went to Mr. Lucky's with his cousin Ernest and his friends Griffin and Long. (R. p. 560). Bethel learned that his son's mother was a dancer at the club that morning. (R. pp. 560-61). Bethel testified he paid for everyone to get into the club, and he got a private dance in the back room. (R. pp. 561-62). Bethel also purchased a bottle of Ciroc. (R. p. 563). Bethel indicated he saw Franklin say something to Ernest and Griffin. (R. p. 563). Bethel also noted the manager later asked Bethel if he could speak with the two to calm them down a bit. (R. p. 563). Bethel stated he talked with them and told them to calm down. (R. p. 563).

Bethel saw Franklin get into it with Ernest and Griffin more in the club. (R. p. 564). Bethel also testified that while he entered the club unarmed, he learned Long had brought one of Bethel's guns into the club from the truck. (R. pp. 564-65). Bethel indicated he got the gun (a .380 LCP Ruger) from Long in the bathroom, and he put it in his back pocket. (R. p. 565). At some point, Bethel went outside and retrieved a bottle of vodka from the truck. (R. p. 566). He was allowed back into the club with the manager's permission. (R. p. 568).

Bethel indicated Ernest was hyped up in the club, and he attempted to calm him down at times. (See R. pp. 568-69). After a conversation with a dancer, Bethel became concerned about possibly being robbed. (R. pp. 570-72). He noted he talked with the manager that night. (R. pp. 569, 572). During one of those conversations in the hallway, Bethel observed Ernest and the rest of his group arguing. (R. p. 572). Bethel asserted he attempted to ask one of the bouncers what was going on, and the bouncer started talking trash in response. (R. p. 573). According to Bethel, the bouncers were trying to force Griffin and Ernest out of the club, and in doing so, they were talking trash and making threats against them. (R. p. 573-74). Bethel attempted to calm those in his group down, and he was encouraging them to leave. (R. pp. 574-75).

Bethel testified that his group was maced once they were outside on the ramp. (R. p. 577). When the mace was sprayed, Ernest was in the parking lot, and Bethel was near Long and Griffin. (R. pp. 576-77). Franklin and another big guy jumped down from the ramp and went towards Ernest. (R. pp. 578-79). Bethel testified mace was sprayed on the ramp in front of them, and Bethel was hit in the eyes. (R. p. 581). Bethel tried to rub his eyes, which made his vision worse. (R. p. 581). Bethel panicked and he pulled the gun out of his back pocket. (R. p. 581). Bethel indicated he walked towards his cousin's and the other voices in the parking lot. (R. p. 581). He claimed he heard a gunshot. The gunshot scared him, and as soon as he heard it, he tensed up and shot his gun. (R. pp. 581-82). Bethel believed there were approximately five seconds between the time in which he was sprayed with mace and when he fired his gun. (R. pp. 582-583).

After Bethel fired his gun, he ran away from the gunshots. (R. p. 583). He was shot while running away, and the shot knocked Bethel off of his feet. (R. p. 583). Bethel then got up and tried to run again. (R. p. 584). He was shot again at that time. (R. p. 584). Bethel dropped

his gun at some point during this period. (R. p. 584). Bethel also testified he was not firing at the security guard, and he was only trying to get away from the person that was shooting at him. (R. p. 584).

Bethel ran around the church building, and at one point he was trapped between a building and a tall barbed wire fence. (R. pp. 584-86). He claimed he kicked off his pants at the instruction of the guy shooting at him. (R. pp. 585-87). After kicking off his pants and shoes, he eventually was able to climb the barb wire fence and run towards an apartment building. (R. pp. 586-88). During cross-examination Bethel denied he shot the victim in self-defense. (R. p. 624).

ARGUMENT

BETHEL'S REQUEST FOR CERTIORARI SHOULD BE DENIED BECAUSE THE COURT OF APPEALS DID NOT ERR IN AFFIRMING BETHEL'S CONVICTION. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING BETHEL'S REQUEST FOR AN INVOLUNTARY MANSLAUGHTER JURY INSTRUCTION. THE INSTRUCTION WAS NOT WARRANTED BY THE FACTS PRESENTED AT TRIAL, AND ANY ERROR IN NOT INSTRUCTING THE JURY ON INVOLUNTARY MANSLAUGHTER WAS HARMLESS.

Bethel contends the Court of Appeals erred in finding the trial court did not err in denying his request for an involuntary manslaughter jury instruction at trial. Certiorari should be denied because the Court of Appeals properly found the trial court did not err in denying the request. The Court of Appeals ruled as follows:

> The trial court did not err in refusing to instruct the jury on involuntary manslaughter. See State v. Stanko, 402 S.C. 252, 264, 741 S.E.2d 708, 714 (2013) ("[An appellate court] will not reverse a trial court's decision regarding a jury instruction absent an abuse of discretion."); State v. Lemire, 406 S.C. 558, 565, 753 S.E.2d 247, 251 (Ct. App. 2013) ("An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." (quoting Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000))); State v. Brown, 362 S.C. 258, 261-62, 607 S.E.2d 93, 95 (Ct. App. 2004) ("The law to be charged to the jury is determined by the evidence presented at trial." (quoting State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993))); State v. Crosby, 355 S.C. 47, 51, 584 S.E.2d 110, 112 (2003) ("A trial court should refuse to charge a lesser-included offense . . . where there is no evidence the defendant committed the lesser rather

> than the greater offense."); State v. Brayboy, 387 S.C. 174, 180, 691 S.E.2d 482, 485 (Ct. App. 2010) ("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. Burriss, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999) ("[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." (emphasis added)); State v. Gibson, 390 S.C. 347, 357, 701 S.E.2d 766, 771 (Ct. App. 2010) ("[F]or the purposes of involuntary manslaughter, the inquiries associated with whether or not to instruct on the defense of self-defense are not applicable.").

State v. Bethel, Op. No. 2016-UP-473 (S.C.Ct.App. filed November 9, 2016).

Contrary to Bethel's assertions, the Court of Appeals correctly found the trial court did not abuse its discretion in denying Bethel's request for an involuntary manslaughter jury instruction. The trial court correctly determined there was not sufficient evidence to warrant in involuntary manslaughter jury charge.

Discussion at the Pre-Trial Hearing

During the jury charge conference, Bethel requested an instruction on involuntary manslaughter based upon State v. White.[2] (R. p. 664). The trial court initially indicated that it did not find the charge was warranted.

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

(R. p. 664, ll 15-20). After some discussion about whether a voluntary manslaughter charge was warranted, the trial court further explained why an involuntary manslaughter instruction was not warranted.

> But involuntary manslaughter has to be proven by the defendant unintentionally killing the victim without malice but while engaged in an unlawful activity not

[2] It is unclear what case Bethel is citing to in making this reference.

naturally tending to cause death or great bodily harm or that the defendant unintentionally killed the victim without malice while engaged in a lawful activity with reckless disregard for the safety of others. I just don't think that the facts in this case support involuntary manslaughter, but I think arguably it could support voluntary manslaughter.

(R. p. 665, ll 14-22).

Bethel responded by asserting his argument in support of the charge was based upon the belief that Bethel was lawfully armed in self-defense, and there was evidence he was negligently handling the firearm while lawfully armed. (R. p. 665). The trial court rejected this argument.

> Lawfully armed in self-defense means you have the license and you have the ability and the right to have a weapon where you had it. I don't think having a gun in a nightclub without a concealed weapon permit — even if he had one, he still shouldn't have had it in a club. You 9 keep it in your car in the glove box; right? You keep it in your house. I don't think you can bring it into a club and say that you were lawfully armed in self-defense.
>
> It's a funny way the case law is written because it's a— it's a weird kind of a dichotomy the way it's written because it's — it almost implies that whenever you're acting in self-defense you're lawfully doing it, but at the same time- we have a whole set of statutes that deal with firearms and your ability to carry them. And so I don't know that you can honestly in good faith say that you were lawfully armed in a nightclub without a concealed weapon permit and you weren't law enforcement.
>
> I'd have to — I have to roll that one over in my mind a little bit, but I don't — I don't think it would pass muster. But involuntary manslaughter is really about circumstances where there's negligence and there's an utter lack of malice or a failure of proof of malice, and this case is not — certainly does not factually support it.

(R. pp. 666, l 4 – 667, l 1).

The next morning, the trial court reiterated why it did not find an involuntary manslaughter charge was warranted.

> However, I will not be instructing involuntary manslaughter as it is not supported by the facts presented in this case.
>
> In order to establish involuntary manslaughter, it would have to be established that the defendant unintentionally killed the victim without malice but

while engaged in an unlawful activity not naturally tending to cause death or great bodily harm. Clearly the evidence in the record is that malice did exist. **There is evidence that he was engaged in an unlawful activity. However, there is no evidence that that unlawful activity would not naturally tend to cause death or great bodily injury or that the defendant unintentionally killed the victim without malice while engaged in a lawful activity with reckless disregard for the safety of others.**

There is his testimony that he unintentionally killed the victim. However, there is evidence of malice and there is evidence that there is — there is evidence that he was engaged in an unlawful activity, that being the possession of an unlicensed handgun in the parking lot of a — of an establishment.

(R. pp. 673, l 21 – 674, l 16)(emphasis added).

The trial court instructed the jury on self-defense, accident, and voluntary manslaughter, but did not instruct the jury regarding involuntary manslaughter. (R. pp. 761-84). Bethel renewed his objection to the trial court not giving the instruction after the jury instructions were given. (R. p. 785).

Standard of Review

"'An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion.'" State v. Williams, 367 S.C. 192, 195, 624 S.E.2d 443, 445 (Ct.App.2005) (quoting Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)). Furthermore, "[t]o warrant reversal, a trial court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." State v. Patterson, 367 S.C. 219, 232, 625 S.E.2d 239, 245 (Ct. App. 2006). "The law to be charged must be determined from the evidence presented at trial." Id. If there is any evidence to support the requested charge, the trial court should grant the request. Williams, at 195, 624 S.E.2d at 445. The evidence must be reviewed in the light most favorable to appellant. State v. Cottrell, 376 S.C. 260, 262, 657 S.E.2d 451, 452 (2008).

The presence of evidence to sustain a conviction for the crime of a lesser degree determines whether it should be submitted to the jury. State v. Rucker, 319 S.C. 95, 98, 459 S.E.2d 858, 860 (Ct. App. 1995) (citing State v. Funchess, 267 S.C. 427, 229 S.E.2d 331 (1976)); State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981). Due process requires that a lesser included offense be charged when the evidence warrants it but only if the evidence would permit a jury rationally to find the defendant guilty of the lesser offense. State v. Patterson, 337 S.C. 215, 233, 522 S.E.2d 845, 854 (Ct. App. 1999). It is not error to refuse to charge the lesser included offense unless there is evidence tending to show that the defendant was guilty only of the lesser offense. State v. Geiger, 370 S.C. 600, 607, 635 S.E.2d 669, 673 (Ct. App. 2006) (citing State v. Tyndall, 336 S.C. 8, 518 S.E.2d 278 (Ct. App. 1999); State v. Thompson, 278 S.C. 1, 292 S.E.2d 581 (1982); State v. Mickle, 273 S.C. 71, 254 S.E.2d 295 (1979).

Involuntary manslaughter is the killing of another without malice and unintentionally while engaged in either: (1) an unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm; or (2) a lawful act with reckless disregard for the safety of others. State v. Reese, 370 S.C. 31, 36, 633 S.E.2d 898, 900 (2006). To constitute involuntary manslaughter, there must be a finding of criminal negligence. State v. Wigginton, 375 S.C. 25, 35, 649 S.E.2d 185, 190 (Ct. App. 2007) (citing State v. Crosby, 355 S.C. 47, 51-2, 584 S.E.2d 110, 112 (2003)). Criminal negligence for involuntary manslaughter is statutorily defined as "the reckless disregard of the safety of others." S.C. Code Ann. § 16-3-60 (2007). "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." State v. Pittman, 373 S.C. 527, 571, 647 S.E.2d 144, 167 (2007).

"A trial court should refuse to charge a lesser-included offense only where there is no evidence the defendant committed the lesser rather than the greater offense." Crosby, 355 S.C. at 51, 584 S.E.2d at 112.

A. There was not sufficient evidence to warrant an involuntary manslaughter charge.

Bethel was not entitled to an involuntary manslaughter jury instruction because the facts of his case did not fit within the statutory requirements that warrant such an instruction. Bethel contends he was entitled to an involuntary manslaughter charge because there was evidence he was lawfully armed in self-defense, and evidence he acted recklessly. The trial court did not abuse its discretion because there was no such evidence presented at trial.

During trial, Bethel testified he did not take a gun into the club, but his friend Long did. (R. p. 565). Bethel indicated he took the gun from Long in the restroom, and Bethel placed the gun in his back pocket. (R. p. 565).

Bethel testified that as they were leaving the club, people from both sides were indicating they wanted to fight. (R. p. 580). He turned around to see where his female cousins were to make sure they were following him into the parking lot area. (R. p. 580). Bethel noted they were scared to come down the ramp. (R. p. 580). Bethel then testified that when he turned around, there was mace. (R. p. 580). He noted the mace was coming up the ramp. (R. pp. 580-81). Then Bethel stated, "I tried to rub my eyes and that's when — I guess it was on my hands and it got worse, and I kind of like, you know, panicked. I couldn't see, and that's when I grabbed my gun out of my back pocket." (R. p. 581, ll 9-12). When asked why he grabbed his gun, Bethel testified he was scared, he could not see anything, and he did not know what was going on. (R. p. 581). He further indicated he kept the gun in his hand while he was trying to regain his eyesight. (R. p. 581). Bethel asserted he continued to make his way down the ramp.

> I was going towards my cousin and them voices, all the yelling and stuff. I was walking towards the voices. And as soon as I — I don't know where exactly I was, but I heard a gunshot, and like it scared me. It caught me off guard, and as soon as I heard that, that's when I tensed up and I shot the gun.

(R. p. 581, l 22 – 582, l 2).

Bethel noted he had the gun at his side when he was walking down, and he heard the gunshot five seconds after he was maced. (R. p. 582-83).

During cross-examination, Bethel testified that after he was sprayed with mace, he could not see. (R. p. 622).

> I was trying to open my eyes, but I couldn't open my eyes. My eyes was burning, and I grabbed my gun out of my back pocket. As you can see on the video, I'm walking with my head down like this, and when I hear a gunshot you see me just flinch real fast which you can see that on the video. I was not facing him when the gun had shot him in the head. I wasn't facing him.

(R. p. 622, ll 14-20). He further testified he walked past the victim, then flinched and turned around. (R. p. 623). He claimed he flinched trying to block. (R. p. 624). Bethel admitted he did not shoot in self-defense. "I didn't intend — I didn't intend to shoot nobody. I didn't try to shoot nobody. I was — I couldn't see. I'd just got maced, and I heard a gunshot and I flinched. I didn't — it wasn't no self-defense. I wasn't trying to save myself or nobody." (R. p. 624, ll 19-23).

There is no evidence Bethel was lawfully armed in self-defense. By Bethel's own account, he armed himself on the ramp not because of some threat made by an individual, but instead because he could not see because he had pepper spray in his eyes.

"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." State v. Brayboy, 387 S.C. 174, 180, 691 S.E.2d 482, 485 (Ct. App. 2010) (quoting State v. Crosby, 355 S.C. 47, 52, 584 S.E.2d 110, 112 (2003). "The negligent handling of a loaded gun will support a charge of

involuntary manslaughter." Brayboy, 387 S.C. at 180, 691 S.E.2d at 485, quoting State v. Mekler, 379 S.C. 12, 15, 664 S.E.2d 477, 478 (2008).

Bethel's reliance upon State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999), is misplaced because Burriss is inapplicable in this case. In Burriss, the South Carolina Supreme Court held that a person could 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. 334 S.C. at 265, 513 S.E.2d at 109. In Burriss, the defendant was threatened and then attacked by the victim and another male. Id. at 258, 513 S.E.2d at 106. After being pushed to the ground, the defendant drew a gun and fired two shots at the ground. Id. at 258-59, 513 S.E.2d at 106. Both men backed away. Id. at 259, 513 S.E.2d at 106. As the defendant attempted to get off the ground, one of the attackers moved to attack the defendant again. Id. The defendant picked up his gun, and it went off, killing the victim. Id. The Supreme Court found that the defendant was lawfully armed in self-defense. Id. at 269, 513 S.E.2d at 109. Since there was evidence that the firing of the gun was not intentional, the defendant in Burriss was entitled to an involuntary manslaughter charge. Id.

This case is distinguishable from Burriss in several respects. First, in Bethel's case, there were no threats made against him by either the victim or any other individual.[3] Second, by all accounts, there was no evidence that Bethel was actually attacked by anyone. Bethel's testimony reflected that he armed himself not because he was threatened or under attack. It was because his friend improperly brought the gun into the club. Further, Bethel did not brandish the weapon

[3] Bethel cannot rely upon the alleged robbery plot as support for his claim that he was lawfully armed in self-defense. Bethel did not indicate that he armed himself because he believed he was in the process of being robbed. Further, Bethel never claimed that he fired a shot based upon a fear that he was being robbed. To the contrary, he claimed that he heard a gunshot, and that his body tensed up when he heard that shot. (R. p. 582).

because he was under attack or was in fear that he was under attack. By Bethel's testimony, he pulled the gun out of his pocket because he could not see. Altogether, there was no evidence that he could lawfully arm himself in self-defense.

Bethel's improperly relies upon the fact that he received a self-defense jury instruction. Respondent would note from the outset that "there is a difference between being 'armed in self-defense' and 'acting in self-defense.'" State v. Gibson, 390 S.C. 347, 357, 701 S.E.2d 766, 771 (Ct. App. 2010) (citing State v. Light, 378 S.C. 641, 649, n. 6, 664 S.E.2d 465, 469, n. 6 (2008); Burriss, 334 S.C. at 265, n. 10, 513 S.E.2d at 109 n. 10 (1999); Crosby, 355 S.C. at 52, 584 S.E.2d at 112 (2003)(stating "[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"). For the purposes of involuntary manslaughter, the inquiries associated with whether or not to instruct on the defense of self-defense are not applicable. Gibson, 390 S.C. at 357, 701 S.E.2d at 771 (citing Light, 378 S.C. at 648–49, 664 S.E.2d at 468–69). Rather, the court is "concerned only with whether [the defendant] had a right to be armed for purposes of determining whether he 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." Id. at 649 n. 6, 664 S.E.2d at 469 n. 6.

The trial court's grant of the self-defense jury instruction as it related to the murder charge was improper.

> In order to establish self-defense in South Carolina, the following four elements must be present: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, a reasonably prudent person of ordinary firmness and courage would have entertained the same belief that he was actually in imminent danger and the circumstances were such as

> would warrant a person of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or loss of his own life; and (4) the defendant had no other probable means of avoiding the danger.

State v. Wigington, 375 S.C. 25, 31, 649 S.E.2d 185, 188 (S.C. Ct. App. 2007) (citing State v. Bryant, 336 S.C. 340, 344, 520 S.E.2d 319, 321 (1999)). Here, there was no evidence presented that Bethel was in actual imminent danger of losing his life or sustaining serious bodily injury. Again, there was no testimony or evidence presented indicating Bethel was threatened by the victim or anyone else just prior to the shooting. By most accounts and the video, the victim was not involved in a confrontation with Bethel. The victim had his back to Bethel. Further, there was no testimony or evidence to support a finding that a reasonable person would have thought it was necessary to shoot the victim in the back of the head to save himself from serious bodily harm or loss of life. There was no evidence that the victim had a weapon on the morning of the shooting, and there was no evidence that the victim was threatening Bethel when he was shot. Finally, there was no evidence to support a finding the defendant had no other probable means of avoiding the danger. Even Bethel admitted that he was not shooting his gun in self-defense. (R. p. 624). Since the self-defense charge was improper, Bethel cannot rely upon the fact a self-defense charge was given as support for his contention involuntary manslaughter should have been charged.

The Court of Appeals properly relied upon its opinion in State v. Gibson, 390 S.C. 347, 701 S.E.2d 766 (Ct.App.2010), in finding the trial court did not err in denying the request for an involuntary manslaughter instruction. As already noted, in Gibson, the Court of Appeals stated

> the inquiries associated with whether or not to instruct on the defense of self-defense are not applicable. [State v.]Light, 378 S.C. [641,][at] 648–49, 664 S.E.2d [465][at] 468–69. Rather, the court is "concerned only with whether [the defendant] had a right to be armed for purposes of determining whether he 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." Id. at 649 n. 6, 664 S.E.2d at 469 n. 6.

Gibson, 390 S.C. at 357, 701 S.E.2d at 771. Here, there was no evidence that Bethel was lawfully armed in self-defense. Again, there was no testimony or evidence presented that indicated he was threatened by the victim or anyone else just prior to the shooting. The victim was not involved in a confrontation with Bethel. The victim had his back to Bethel. Bethel's testimony reflected he armed himself not because he was threatened or under attack. It was because his friend improperly brought the gun into the club. Further, as already noted above, Bethel did not brandish the weapon because he was under attack or was in fear that he was under attack. By Bethel's testimony, he pulled the gun out of his pocket because he could not see. Altogether, there was no evidence that he lawfully armed himself in self-defense. Thus, there was no evidence to support a finding that Bethel was acting lawfully with reckless disregard for the safety of others.

Altogether, there was not sufficient evidence in the record to support an involuntary manslaughter jury instruction. The trial court did not err in denying the request for the instruction, and the Court of Appeals correctly affirmed the trial court's denial of the request for an involuntary manslaughter instruction. This Court should not grant certiorari upon this issue.

B. Any error by the trial court in not granting Bethel's request for an involuntary manslaughter jury instruction was harmless.

If this Court finds the Court of Appeals erred in affirming the trial court's ruling to not instruct the jury on involuntary manslaughter, Bethel is still not entitled to relief. Certiorari should not be granted because any error by the trial court in not granting the request for an involuntary manslaughter jury instruction was harmless.

> When considering whether an error with respect to a jury instruction was harmless, we must "determine beyond a reasonable doubt that the error

> complained of did not contribute to the verdict." State v. Kerr, 330 S.C. 132, 144–45, 498 S.E.2d 212, 218 (Ct.App.1998) (citation omitted). "In making a harmless error analysis, our inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered." Id. Thus, whether or not the error was harmless is a fact-intensive inquiry. State v. Jefferies, 316 S.C. 13, 22, 446 S.E.2d 427, 432 (1994) ("We must review the facts the jury heard and weigh those facts against the erroneous jury charge to determine what effect, if any, it had on the verdict.") (citation omitted).

State v. Middleton, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (Ct.App.2014).

Any error in not granting the charge was harmless. There was overwhelming evidence that Bethel was guilty of murder. "'Murder' is the killing of any person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10.

There was overwhelming evidence that Bethel was guilty of the murder of GaWayne Franklin. First, there was overwhelming evidence that Bethel killed Franklin. Several eyewitnesses to the shooting testified that the victim was arguing with Bethel's cousin when the shooting happened. (R. pp. 150-51, 253-54; see R. pp. 166-67, 301-02). Those witnesses indicated Bethel walked up behind the victim and shot the victim in the back of the head. (R. pp. 179; 217-18, 230-31, 254, 433-34). Their testimony was corroborated by video of the shooting. (State's Exhibits 71, 157; R. pp. 443-44). Bethel admitted that he shot the victim. (R. p. 624). There was also overwhelming evidence that the shooting of Franklin was done with malice. As noted by the solicitor during closing argument, the video reflects Bethel did start arguing with Franklin while his group was being escorted out of the club. (See State's Exhibits 71 at 20:39-49 (time stamp 3:34:50-3:35:00); State's Exhibit 157, Cam 4, (at 3:34:50-3:35:00)). Further, Bethel shot the victim using a pistol. (See State's Exhibit 71 at 21:53 (time stamp 3:36:00); State's Exhibit 157, Cam 8, (at 3:36:00)). Malice can be inferred from the use of a deadly weapon. See State v. Belcher, 385 S.C. 597, 612, n. 9, 685 S.E.2d 802, 810 n. 9 (2009). While he claimed the

shooting was not intentional, that assertion was belied by the video, which reflected that he ran behind the victim and shot him in the back of the head. Finally, Bethel immediately fled from the scene after the shooting. (R. p. 255; State's Exhibit 71, at 21:55 (time stamp 3:36:02); State's Exhibit 157, Cam 8, (3:36:02)). Flight from prosecution is admissible as guilt. State v. Thompson, 278 S.C. 1, 292 S.E.2d 581 (1982), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (evidence of flight admissible to show guilty knowledge, intent, and that defendant sought to avoid apprehension).

Altogether, there was overwhelming evidence Bethel was guilty of the murder of GaWayne Franklin. Since the result at trial would not have been different had the trial court granted the involuntary manslaughter jury instruction, Bethel was not prejudiced by the denial of his request for an involuntary manslaughter instruction. Thus, Respondent submits any error by the trial court was harmless. Bethel is not entitled to relief upon this claim. The Court of Appeals' opinion should be affirmed. Certiorari should not be granted.

CONCLUSION

Petitioner has failed to show that there is a special and important reason for this Court to grant his Petition. It raises no novel question of law. There is no conflict between the Court of Appeals' opinion and any prior decision of this Court. The Court of Appeals was correct in its findings. As a result, Bethel's Petition for a Writ of Certiorari should be dismissed.

Respectfully submitted,

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March 8, 2017

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY
The Honorable Deandra Jefferson, Circuit Court Judge

On Petition for Writ of Certiorari to the Court of Appeals
Appellate Case No. 2017-000096 (Ct. App. Case No. 2013-002478)
Opinion No. 2016-UP-473 (S.C. Ct. App. Filed November 9, 2016)

THE STATE,

RESPONDENT,

V.

JAMES K BETHEL,

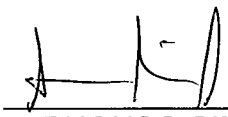
PETITIONER

PROOF OF SERVICE

I, Alphonso Simon, Jr., counsel for the Respondent, certify that I have served the Return to Petition for Writ of Certiorari on Petitioner by depositing two (2) copies of the same via U.S. mail, first class, postage prepaid to his attorney of record, David Alexander, Esq , South Carolina Commission on Indigent Defense, Division of Appellate Defense, 1330 Lady Street, Ste. #401, Columbia, SC 29201

I further certify that all parties required by Rule to be served have been served.

This 8th day of March, 2017.



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