STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO CHESTERFIELD COUNTY
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2017-000811

William Outlaw,.....Petitioner,

v.

State of South Carolina,.....Respondent.

BRIEF OF RESPONDENT
PURSUANT TO WHITE V. STATE

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ATTORNEYS FOR RESPONDENT

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In The Supreme Court

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QUESTION PRESENTED

I. Whether the trial court erred by refusing to instruct the jury on involuntary manslaughter where Petitioner testified he intended to shoot his gun in self-defense toward where the victim fired the first shot?

STATEMENT OF THE CASE

Respondent agrees with Petitioner's Statement.

STATEMENT OF THE FACTS

Petitioner's Trial Testimony

Petitioner shot and killed Michael Johnson. Petitioner claimed self-defense. Petitioner had been drinking heavily and taking multiple valium pills. (App. p. 188, ll.18-19; p. 206). He was at his friend's, Michael Johnson ("Victim"), home when another guest, John Talbert, arrived. (App. p. 188, ll. 4-16). Without reason, Talbert punched Petitioner in his eye, causing Petitioner to fall onto his parked car. (App. pp. 188-192). Petitioner got in his car to flee and Talbert broke Petitioner's windshield with his bare fist. (App. p. 190, ll. 9-10; p. 192, ll. 2-6). Petitioner then drove off and "spun around" back into the driveway. (App. p. 192, l. 14 – p. 193, l. 25). Petitioner hollered at Talbert to come out and then Petitioner heard a gunshot and saw a flame come out of a gun barrel. (App. pp. 194-195). Petitioner was forty feet away, could not see because his eye was bleeding and swollen, but testified Victim was shooting at him. (App. p. 196, l. 20 – p. 197, l. 5). Petitioner then ran to his trunk, unlocked the trunk with his keys, opened the trunk lid, found an open shotgun, felt around with his hands for ammunition, found a shell, loaded it into his gun, returned behind his open driver door, and shot the gun from his hip toward where he had seen the flame. (App. pp. 197-202). After shooting, Petitioner drove off in his car, threw his gun out the window while driving down the road, and returned home to sleep. (App. p. 205, ll. 12-22).

ARGUMENT

I. The trial judge did not err in refusing to instruct the jury on involuntary manslaughter where Petitioner testified he intended to shoot his gun in self-defense toward where the victim fired the first shot.

Petitioner argues the evidence presented at trial supported a jury instruction for the lesser offense of involuntary manslaughter. Specifically, that involuntary manslaughter is "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 Bozeman v. State, 307 S.C. 172, 176, 414 S.E.2d 144, 146-147 (1992). Respondent submits Petitioner's argument is without merit, as the evidence presented at trial, viewed in a light most favorable to Petitioner, did not support a charge on involuntary manslaughter. Regardless, even if the court's decision was error, it was harmless because it did not contribute to the jury's verdict. For those reasons, Petitioner's conviction should be affirmed.

Standard of Review

The law to be charged is determined by the evidence presented at trial. State v. Holland, 385 S.C. 159, 165, 682 S.E.2d 898, 901 (Ct. App. 2009). "No instruction should be given by the trial judge, at the request of the appellant, which tenders an issue which is not presented or supported by the evidence." State v. Weaver, 265 S.C. 130, 137, 217 S.E.2d 31, 34 (1975). "Ordinarily, the trial court has the duty to give requested instructions which correctly state the law applicable to the issues and which are supported by the evidence." State v. Peer, 320 S.C. 546, 553, 466 S.E.2d 375, 380 (Ct. App. 1996). The trial court only commits reversible error if it fails to give a requested charge on an issue raised by the evidence. State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 838, 849 (1993).

"A trial judge is required to charge the jury on a lesser-included offense if there is evidence from which it could be inferred the lesser, rather than the greater, offense was committed." State v. Green, 397 S.C. 268, 289, 724 S.E.2d 664, 674 (2012). "The mere contention that the jury might accept the State's evidence in part and reject it in part is insufficient to satisfy the requirement that some evidence tends to show the defendant was guilty only of the lesser offense." State v. Geiger, 370 S.C. 600, 608, 635 S.E.2d 669, 674 (Ct. App. 2006). In reviewing a trial judge's jury instructions, the appellate court must view the jury charge as a whole and in light of the evidence and issues from trial. State v. Simmons, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009). An appellate court will not reverse a trial judge's decision regarding a jury charge absent an abuse of discretion. State v. Santiago, 370 S.C. 153, 159, 634 S.E.2d 23, 26 (Ct. App. 2006).

Discussion

"Where a defendant intentionally arms himself and shoots [...] he is not entitled to an involuntary manslaughter charge." Douglas v. State, 332 S.C. 67, 74, 504 S.E.2d 307, 310 (1998) (citing State v. Pickens, 320 S.C. 528, 466 S.E.2d 364 (1996) (holding evidence did not support a charge of involuntary manslaughter where defendant admitted he shot the gun and acted lawfully but recklessly in defending himself)); State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994) (holding that a defendant who acted intentionally in wielding a knife in self-defense was not entitled to an involuntary manslaughter charge); State v. Morris, 307 S.C. 480, 415 S.E.2d 819 (Ct.App.1991) (finding an involuntary manslaughter charge not warranted because evidence showed an intentional shooting); State v. Craig, 267 S.C. 262, 227 S.E.2d 306 (1976), (no error in the refusal to charge involuntary manslaughter when the defendant admitted intentionally firing the gun, but claimed he only meant to shoot over the victim's head).

In this case, Petitioner testified he shot toward where Victim shot at him and where Petitioner had seen the flame from Victim's gun barrel. (App. p. 194, l. 23 – p. 195, l. 1; p. 195, l. 21 – p. 197, l. 3; p. 200, ll. 6-9; p. 201, ll. 14-16; p. 202, ll. 4-6; p. 202, ll. 21-25; p. 214, ll. 11-13). The trial judge instructed the jury on murder, voluntary manslaughter, and self-defense. Based on Petitioner's own testimony, he was meeting *deadly force* with *deadly force.* Petitioner now argues the use of deadly force was a "reckless disregard for the safety of others." However, there is "no evidence to support [Petitioner's] allegation of mere criminal negligence in the use of a dangerous instrumentality."[1] Bozeman, 307 S.C. at 177, 414 S.E.2d at 147.

Furthermore, in this fact pattern, the two charges, self-defense and involuntary manslaughter, are incompatible. The lawful activity in which Petitioner claims he was engaged was self-defense, specifically, arming himself with a deadly weapon and firing a shot toward the victim. In order to meet the relevant definition of involuntary manslaughter, the jury would necessarily have to find Petitioner was lawfully acting in self-defense – a finding which would warrant acquittal, not a conviction for involuntary manslaughter. Contrary to Petitioner's assertion, Respondent submits the existing case law has been correctly decided. To hold otherwise, would entitle every claim of self-defense, regardless of the facts, to an instruction on the lesser-included offense of involuntary manslaughter.

Petitioner argues the intentional shooting of a gun does not equate to an intentional killing as required by the second definition of involuntary manslaughter. This argument is inherently flawed. It removes all objectivity from the test of whether a killing is intentional and

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[1] The assertion Appellant did not aim his gun holds little water where Appellant fired a shotgun shell loaded with buckshot.

replaces it with the subjective state of mind of the shooter – who will invariably claim the killing was unintentional when being tried for murder. It is the very essence of shooting a firearm, in self-defense nonetheless, from which one can objectively infer intent. "Generally, where the nature of the defendant's attack on the victim is such that it only supports the inference that he intended to kill or seriously injure the victim, the fact that the defendant denies an intention to kill is not sufficient to require an instruction for a lesser degree of the offense charged because the statements of [the] defendant are so unreasonable and inconsistent with physical facts and the conduct of the defendant that they do not support a finding of recklessness." State v. Lowe, 318 S.W.3d 812, 820 (Mo.Ct.App.2010). Even viewing the evidence in a light most favorable to Petitioner, there was no evidence of recklessness where Petitioner intentionally fired his shotgun back toward Victim and Petitioner was not entitled to an involuntary manslaughter charge.

Harmless Error

Errors are considered to be harmless when they could not reasonably have affected the result of the trial. State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003). "It is a rule of practically universal application in appellate procedure that an accused cannot avail himself of error as a ground for reversal where the error has not been prejudicial to him." State v. Hariott, 210 S.C. 290, 298, 42 S.E.2d 285, 288 (1947). When a review of the entire record establishes an error is harmless beyond a reasonable doubt, an appellate court should not reverse a conviction. State v. Thompson, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003).

Any error with respect to a jury instruction is subject to a harmless error analysis. See State v. Middleton, 407 S.C. 312, 317 n. 2, 755 S.E.2d 432, 435 n. 2 (2014) (holding a trial court's refusal to give a jury charge on a lesser-included offense that is supported by the evidence is subject to harmless error analysis). "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.' " Id. (quoting State v. Kerr, 330 S.C. 132, 144–45, 498 S.E.2d 212, 218 (Ct.App.1998)). "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. (citation omitted). "Thus, whether or not the error was harmless is a fact-intensive inquiry." Id.

In Middleton, the appellant intentionally drove up to a stopped vehicle and shot at the two occupants at least five times. Id. at 314–15, 755 S.E.2d at 433–34. Neither passenger was struck due to the quick thinking of one, who jumped into the driver's seat and ran appellant off the road. Id. One passenger did sustain minor lacerations from the broken glass. Id. The appellant was charged with two counts of attempted murder and one count of possession of a weapon during the commission of a violent crime. Id. The trial court instructed the jury on the lesser included offense of assault and battery in the first degree as to the injured occupant, but refused to do the same as to the uninjured occupant. Id. at 315-16, 755 S.E.2d 434. Our Supreme Court found "[t]he trial judge misconstrued the statutory definition of assault and battery in the first degree as requiring an injury to the victim." Id. at 315–16, 755 S.E.2d at 434–435. However, the Court determined that harmless error because "the only conclusion established by the evidence is that Appellant was guilty of attempted murder." Id. at 319, 755 S.E.2d at 436.

In the present case, even assuming the trial court erred in declining to instruct the jury on the lesser included offense of involuntary manslaughter, any error was entirely harmless and did not contribute to the jury's verdict. Petitioner testified he purposefully shot toward Victim's gunshot in self-defense. Therefore, the evidence presented in this case can only lead to the conclusion that Petitioner was either lawfully acting in self-defense (warranting acquittal) or he

was not (equating to murder or voluntary manslaughter). See State v. Battle, 408 S.C. 109, 122, 757 S.E.2d 737, 743-44 (Ct. App. 2014), reh'g denied (May 22, 2014), cert. denied (Nov. 20, 2014) (the trial court's erroneous refusal to instruct the jury on the lesser included offense was not harmless beyond a reasonable doubt because "u[n]like Middleton, the evidence does not support one clear cut conclusion" due to conflicting evidence."). The jury could not find Petitioner was "engaged in a *lawful activity* with reckless disregard for the safety of others" without finding he was acting in self-defense. Brayboy, 387 S.C. at 180, 691 S.E.2d at 485. (Emphasis added). Petitioner's conviction should be affirmed.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court affirm Petitioner's conviction for voluntary manslaughter.

Respectfully submitted,

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By: _____
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January 5, 2018.

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The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

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State of South Carolina,.....Respondent.

CERTIFICATE OF SERVICE

I, Valerie Garcia Giovanoli, certify that I have today served the within **Brief of Respondent** upon Petitioner by depositing a copy of the same in the Inter-Agency mail, via Agency Mailroom, addressed to:

Susan B. Hackett, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served. This 5th day of January, 2018.

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RECEIVED
JAN 05 2018
S.C. SUPREME COURT

January 5, 2018

The Honorable Daniel E. Shearouse
Clerk of Court — SC Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: **William Outlaw v. State of South Carolina**
Appellate Case No. 2017-000811
Lower Court Case No. 2012-CP-13-0113

Dear Mr. Shearouse:

Attached are the original and Fifteen (15) copies of the **Brief of Respondent** in the above referenced case for filing in your office.

Sincerely,

Valerie Garcia Giovanoli
Assistant Attorney General
SC Bar #102524

VGG/jacc

cc: Susan B. Hackett, Esquire
Trisha Allen, Director – Victim Advocacy Division (without enclosure)