ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Edward B. Cottingham, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRITTANY JOHNSON,

APPELLANT

Appellate Case No. 2011-185926

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Whether the trial court reversibly erred by admitting Appellant's video statement to law enforcement where Appellant's uncontradicted testimony at the Jackson v. Denno hearing was that, before police began recording, she indicated to the one officer present that she needed an attorney, yet law enforcement continued with the interrogation after a second officer arrived?

II. Whether the trial court reversibly erred by failing to grant a mistrial for premature jury deliberation where, during trial, the jury sent a note saying, "we are all in agreement that we need to see and hear the video tape again"?

III. Whether the trial court reversibly erred by failing to charge the jury with self-defense where the record contained evidence that, prior to the shooting, several women exited of a parked vehicle and surrounded Appellant in a threatening manner when Appellant walked passed in a parking lot?

IV. Whether the trial court reversibly erred by failing to charge the jury with involuntary manslaughter where the record contained evidence that Appellant was armed in self-defense, a struggle for the gun occurred, and the fatal shot was not intentionally fired?

STATEMENT OF THE CASE

Appellant Brittany Alexis Johnson was indicted on September 25, 2008, by the Horry County grand Jury for murder. R. 1, ll. 15-17; the charge stemmed from the shooting of Monica Burroughs on June 24, 2008. R. 477 (Indictment). Appellant's case proceeded to trial before the Honorable Edward B. Cottingham, and a jury, from February 7 through 11, 2011. Ronald Hazzard (Counsel) represented Appellant, while the State was represented by Scott A. Graustein.

On the third day of deliberations, the jury found Appellant guilty as charged. R. 458, ll. 16-19. The trial court sentenced Appellant to thirty years imprisonment. R. 467, ln. 24—R. 468, ln. 1.

STATEMENT OF THE FACTS

Appellant, a seventeen year old single mother, was romantically involved with Franklin Putty Pyatt (Pyatt). R. 288, ln. 19—R. 289, ln. 4. Yet, Pyatt lived with Monica Burroughs (Burroughs) and he was also involved with her. R. 290, ln. 15—R. 291, ln. 5; R. 339, ln. 25—R. 339, ln. 8. Burroughs confronted Appellant on several occasions between August of 2007 and June 24, 2008. R. 291, ln. 14—R. 305, ln. 15; R. 313, ln. 10—R. 315, ln. 25. On one occasion approximately five weeks prior to the shooting, Appellant testified that she was walking with her child through the fence of the apartment complex where Burroughs lived when Burroughs confronted Appellant by presenting a black handgun in her purse and threatened Appellant to stay away from Pyatt. R. 313, ln. 10—R. 315, ln. 25.

On June 24, 2008, Appellant and her child were both at the home of her friend, Tamika Skipper (Skipper), across the street from the same apartment complex. R. 251, ln. 1—R. 252, ln. 7; R. 253, ll. 4-17. In the early afternoon, Appellant left to go to a "bootlegger's" apartment in the complex to purchase cigars and strawberry cookies. R. 255, ln. 9—R. 256, ln. 24; R. 329, ll. 8-23. According to Skipper's testimony, she went out onto her porch and saw Appellant in the parking lot across the street in the complex walking to the bootlegger's apartment. Skipper also saw a vehicle approximately two parking spaces away from Appellant; she saw the vehicle back up, saw its brake lights come on, and saw four women—including Teresa Cox Dozier (Cox), Liz, Joanne Davis (Davis), and Burroughs—come out of the vehicle and subsequently surround Appellant in a threatening manner. Skipper stated she ran toward Appellant, but that she heard a shot by the time she

was half way there. R. 257, ln. 15—R. 264, ln. 24. Skipper stopped, saw Appellant "[j]ust standing there—stuck," and shouted at Appellant to run. R. 264, ll. 5-14.

Two occupants of the vehicle with Burroughs on June 24, 2008, also testified. R. 157, ll 3-24. Although their testimony on direct examination differed from Skipper's, they acknowledged their previous statements given to law enforcement, which indicated the gun went off in a struggle, and that Appellant was unlikely aware that she shot Burroughs. For example, Davis, the stepsister of Burroughs, indicated she was in the backseat when the incident began, Cox was in the driver's seat, and Burroughs was in the front passenger seat. R. 154, ll. 4-7; R. 157, ll. 3-24. On cross-examination, she acknowledged her prior statement given to law enforcement the day after the shooting, and affirmed the following events: (a) that "when the gun went off, they were struggling;" (b) "yeah, they were struggling. My sister was trying to take it from her. They were struggling;" (c) when I heard the gun go off, that's when I immediately dropped;" and (d) "but I could see them before I dropped. They was together." R. 182, ll. 7-14; R. 183, ll. 10-14; R. 184, ln. 22—R. 185, ln. 25. Further, although Davis did not initially recall Burroughs ever owning a gun, she acknowledged that she told law enforcement that her "sister had a gun. She had one." R. 186, ll. 4-13.

Teresa Cox Dozier (Cox) also testified at trial, and likewise acknowledged her prior statement given to law enforcement on the afternoon of June 24, 2008. Specifically, Cox did not deny telling police the following: "She must be didn't know she shot her. She probably thought, you know, maybe she shot in the air or something." R. 208, ll. 2-3; R. 209, ll. 10-18.

After Appellant was arrested in Darlington County on July 2, 2008, she was transported to the Conway Police Department Annex. She was booked, and taken to the interrogation room by a Sergeant Shawn Addison (Addison).[1] R. 9, ln. 17—R. 10, ln. 11; R. 333, ll. 1-20. At the Jackson v. Denno[2] hearing, Appellant testified that as she entered the room, she told the officer "I need an attorney for this, don't I?" and, "I need an attorney for this." She continued to testify that the officer's response was that "the judge will take care of that. When you get downtown, he issues a warrant." After that exchange, Appellant told the trial court she "was under the impression that it was okay. It was okay to talk." R. 28, ln. 15—R. 29, ln. 21. The officers subsequently began to record Appellant's interaction with them in the interrogation room. Detective John Glenn King (King) entered, and Addison then Mirandized Appellant with King present and the camera on, after which Appellant gave a video statement. R. 9, ln. 17—R. 17, ln. 14. Appellant confirmed at the Jackson v. Denno hearing that she did not initiate the conversation with law enforcement after she asked for an attorney. R. 35, ln. 23—R. 36, ln. 1.

King also testified at the Jackson v. Denno hearing, and said that he never spoke with Appellant prior to the video camera starting. However, King acknowledged that the video indicated Addison "introduced himself to [Appellant] earlier." King also indicated that he had no knowledge of whether Appellant asked Addison for an attorney. R. 19, ln. 9—R. 20, ln. 13.

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[1] Although the record is initially unclear whether the officer was Sergeant Shaun Patterson, or Shawn Addison, both King and Appellant refer to Sgt. Addison in their testimony to the jury. R. 10, ll. 5-11; R. 100, ll. 15-17; R. 333, ll. 1-20.

[2] 378 U.S. 368, 84 S.Ct. 1774 (1964).

Counsel moved for suppression of Appellant's video statement to law enforcement. Specifically, Counsel asserted that Appellant's testimony regarding the need for the presence of an attorney was uncontradicted, and that once the right to an attorney is implicated, there is to be no further questioning; yet, despite Appellant's invocation of her right to legal counsel, law enforcement continued forward with the interrogation. R. 37, ln. 17—R. 38, ln. 8.

The State conceded, "[y]our Honor, um, it's uncontradicted. We don't have anybody who says she never asked that." R. 40, ll. 21-23. However, the State further argued that Appellant "had forty minutes of tape and . . . could have indicated at any point that she had asked for an attorney but she did [not] during any of that time." R. 40, ln. 21—R. 41, ln. 1.

The trial court first held that Appellant's statement was given freely, voluntarily, and in compliance with Miranda v. Arizona,[3] and that she waived her rights "to remain silent and to have counsel present with her at the interview and interrogation." R. 36, ln. 12—R. 37, ln. 11. After hearing the arguments of Counsel and the State regarding Appellant's invocation of her right to counsel, the court concluded that "[Appellant's] testimony on that issue is simply not plausible in that with Officer King she had ample opportunity to express her desire for her attorney and that's, obviously indicated not only on Mr. king's testimony but on the video itself, and I note your objection for the record." R. 41, ll. 2-7. Over Counsel's repeated objections, the video statement was played on multiple occasions for the jury. R. 101, ll. 15-18; R. 107, ln. 22—R. 108, ln. 12.

[3] 384 U.S. 368, 84 S.Ct. 1774 (1964).

On the second day of trial, the court received a note from the jury stating as follows: "We are all in agreement that we need to see and hear the video tape again. We would like to know if it would be possible to view the tape again before proceeding." R. 137, ll. 1-7; R.* (Court Exhibit #8, Juror Note). Counsel objected because the note indicated improper discussion regarding the elements and facts of the case by the jury, and moved for a mistrial. R. 138, ln. 22—R. 138, ln. 14. Counsel then argued that, if the court did not grant a mistrial, then playing the video again before the jury hears any other evidence would place undue weight on this piece of evidence. R. 138, ln. 15—R. 139, ln. 2.

The trial court held "there's no basis in this note for me to assume they've discussed any issue in the trial." R. 139, ll. 3-5. The court then ordered "additional microphones put up so that the jury will understand the contents of that tape." R. 139, ll. 10-12. The court also brought in additional loud speakers. R. 141, ll. 4-11. When the jury returned to the courtroom, the trial court explained, "[w]e have attempted to amplify the situation by putting up some additional microphones . . . ." R. 148, ll. 3-5. It then instructed the jury as follows:

> Now, I do want to tell you that it is perfectly alright for y'all to agree that the video is improper and ask to see it again but remember my admonitions of yesterday with regards to any issues in the trial of this case. You must not discuss it with each other under any circumstances until I have given you the case for your trial—for your deliberation.

R. 148, ll. 11-16. The video was again played over Counsel's renewed objections. R. 16-20. Out of the presence of the jury, the trial court later stated that it "sat near the jury box and had an opportunity to observe the video from their perspective, and it—the sound was vastly improved." R. 151, ll. 6-8.

The video was also played again to the jury during its deliberations pursuant to another request. Although the trial court explained to the jury that it had "seen it twice," the jury nonetheless wished to see it again. R. 425, ll. 1-16. Accordingly, the trial court accommodated. R. 425, ln. 18—R. 430, ln. 19.

Finally, during the jury charge conference, Counsel's requests included instructions for self-defense and involuntary manslaughter. R. 449, ln. 1-4. Counsel specifically argued that testimonial evidence from Davis, Cox, and Skipper existed in the record supporting the charges, and Appellant was entitled to them. R. 355, ln. 5-11; R. 363, ll. 14-22; R. 364, ll. 1-13. The State argued Appellant was involved in unlawful conduct and thus involuntary manslaughter was inappropriate. R. 362, ln. 13—R. 363, ln. 2. It further argued the evidence did not contradict statements that the Appellant "had the gun out and, in fact, struck." R. 364, ll. 17-19.

The trial court held the evidence was uncontradicted that Appellant went to the vehicle with a loaded gun in her hand. R. 363, ll. 3-10; R. 365, ll. 9-18. The court also held that "[t]he defendant can't go to the scene of a difficulty, then claim self-defense." R. 366, ll. 4-8. As such, over Counsel's objections, the trial court denied both self-defense and involuntary manslaughter jury instructions. R. 366, ln. 8—R. 368, ln. 1; R. 386, ll. 6-11; R. 474 (Court's Exhibit #9, Memorandum of Law).

The trial court first instructed the jury regarding the law, and then permitted closing arguments, during which the State repeatedly referenced language from Appellant's video statement. R. 418, ln. 9—448, ln. 11; R. 419, ln. 23—R. 420, ln. 17; R. 420, ln. 22—R. 421, ln. 2; R. 421, ll. 14-25.

The jury found Appellant guilty of murder on the third day of deliberations. 492, ll. 16-19. In the sentencing phase, the trial court told Appellant "[t]here was no way in the world that [Counsel] could get around your video sworn statement where you said, 'I pulled the trigger.' Quote, unquote." R. 460, 19-21. Appellant was sentenced to thirty years imprisonment. R. 467, ln. 24—R. 468, ln. 1.

This appeal follows.

ARGUMENT

I. The trial court reversibly erred by admitting Appellant's video statement to law enforcement where Appellant's uncontradicted testimony at the Jackson v. Denno hearing was that, before police began recording, she indicated to the one officer present that she needed an attorney, yet law enforcement continued with the interrogation after a second officer arrived.

The trial court reversibly erred by failing to suppress Appellant's video statement, which was taken in violation of Appellant's right to have counsel present during custodial interrogation. "In order to introduce into evidence a confession arising from custodial interrogation, the State must prove by a preponderance of the evidence that the statement was made freely and voluntarily, and taken in compliance with Miranda v. Arizona, 384 U.S. 368, 84 S.Ct. 1774, 16 L.Ed.2d 694 (1964)." State v. Moses, 390 S.C. 502, 512, 702 S.E.2d 395, 400 (Ct. App. 2010). "[T]he Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent." Rhode Island v. Innis, 446 U.S. 291, 300-01, 100 S.Ct. 1682, 1689 (1980); State v. Howard, 296 S.C. 481, 488, 374 S.E.2d 284, 288 (1988).

"Miranda . . . declared that an accused has a Fifth and Fourteenth Amendment right to have counsel present during custodial interrogation." Edwards v. Arizona, 451 U.S. 477, 482, 101 S.Ct. 1880, 1883 (1981); see also U.S. Const. amend. V; State v. Wannamaker, 346 S.C. 495, 499, 552 S.E.2d 284, 286 (2001). Furthermore, "when an accused has invoked the right to have his counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." Edwards, 451 U.S. at 484, 101 S.Ct. at 1884-85. Thus, "[o]nce an accused requests counsel, police interrogation must cease unless the accused himself 'initiates further communication,

exchanges, or conversations with the police.'" State v. Kennedy, 333 S.C. 426, 431, 510 S.E.2d 714, 716 (1998) (holding defendant's statement, "I think I need a lawyer," constituted an unambiguous invocation of the right to counsel); see also Edwards, 451 U.S. at 484-85, 101 S.Ct. at 1885.

In the case at bar, Appellant gave her statement to police while she was in custody, after she invoked her right to counsel, and after law enforcement reinitiated the interrogation in violation of Miranda and Edwards. First, Appellant was unquestionably in police custody when Addison brought her into the interrogation room on July 2, 2008. She was already arrested by United States Marshals in Darlington earlier that day, and then transported by officers from Conway to the Conway Police Department Annex where she was booked.

Second, it is uncontradicted that Appellant invoked her right to counsel when she was brought into the interrogation room by Addison. The test of whether a person invoked the right to counsel is "whether the accused's statement 'can reasonably be construed to be an expression of a desire for the assistance of an attorney.'" Kennedy, 333 S.C. at 430, 510 S.E.2d at 715. (quoting McNeil v. Wisconsin, 501 U.S. 171, 178, 111 S.Ct. 2204, 2209 (1991)). As the Kennedy Court explained, no ambiguity or equivocation exists "[i]f the desire for counsel is presented 'sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.'" Kennedy, 333 S.C. at 430, 510 S.E.2d at 715 (quoting Davis v. United States, 512 U.S. 452, 459, 114 S.Ct. 2350, 2355 (1994)).

Here, Appellant testified that she told Addison, "I need an attorney for this, don't I?" and, "I need an attorney for this." R. 28, ln. 21—R. 29, ln. 3. As in Kennedy, Appellant's statement is sufficiently clear that a police officer would reasonably construe

it as an expression of a desire for the assistance of an attorney. Accordingly, Appellant's statement constitutes an invocation of her right to counsel. See Kennedy, 333 S.C. at 430, 510 S.E.2d at 715-16. As a result, Appellant's Fifth and Fourteenth Amendment rights were violated when police continued to go forward with interrogation at their initiative after Appellant invoked her right to counsel. As conceded by the State, it is uncontradicted that Appellant invoked her right to counsel; it is also uncontradicted that the police reinitiated the interrogation after Appellant invoked. R. 19, ln. 9—R. 20, ln. 13; R. 35, ln. 23—R. 36, ln. 1; R. 40, ll. 21-23. Consequently, the only evidence in the record pertaining to the critical time of invocation of the right to counsel, and reinitiation of the interrogation all shows that Appellant's statement was taken after invocation of her right, and reinitiation by police.

Furthermore, the trial court's rationale supporting its finding that Appellant waived her right to counsel—that Appellant's testimony was implausible because "she had ample opportunity to express her desire for her attorney and that's, obviously indicated not only on Mr. King's testimony but on the video itself"—is belied by standing case law. R. 41, ll. 2-7. As stated by the Edwards Court, "when an accused has invoked the right to have his counsel present during custodial interrogation, a valid waiver of that right *cannot* be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." Edwards, 451 U.S. at 484, 101 S.Ct. at 1884-85 (emphasis added). Thus, contrary to the trial court's ruling, the fact that Appellant responded to further police-initiated custodial interrogation cannot establish a waiver of her right to counsel even if Appellant was advised of her rights. Accordingly, the trial court reversibly erred by finding Appellant waived her right to counsel, and subsequently admitting Appellant's video statement into evidence.

Finally, Appellant was prejudiced by the improper admission of the video statement. The jury specifically focused on the video statement both during the trial and later during its deliberations. On the first occasion, the jury sent a note to the trial court specifically saying, "We are all in agreement that we need to see and hear the video tape again. We would like to know if it would be possible to view the tape again before proceeding." R. 137, ll. 1-7; R. 473 (Court Exhibit #8, Juror Note). Further, the trial court emphasized the evidence when, upon its own initiative, had additional microphones and more loud speakers brought into the courtroom to "amplify the situation . . . ." R. 148, ll. 3-5. In this way, the trial court itself amplified the prejudice to Appellant by placing added weight and emphasis on Appellant's improperly admitted video statement.

On the second occasion, the jury again asked to hear the Appellant's video statement during its deliberations, which the trial court accommodated. R. 425, ln. 18—R430. 459, ln. 19. Therefore, it is undeniable that the jury placed significant importance on Appellant's video statement. This was compounded by the State's repeated use of Appellant's statement throughout the trial, including closing argument. R. 418, ln. 9—448, ln. 11; R. 419, ln. 23—R. 420, ln. 17; R. 420, ln. 22—R. 421, ln. 2; R. 421, ll. 14-25. Under such circumstances, it is likely that the outcome of the trial would have been different if the trial court suppressed Appellant's video statement. This understanding is confirmed by the trial court's own words to Appellant: "There was no way in the world that [Counsel] could get around your video sworn statement where you said, 'I pulled the trigger.' Quote, unquote." R. 460, 19-21.

Accordingly, Appellant's conviction should be reversed, and her case remanded for a new trial. Edwards, 451 U.S. at 480, 101 S.Ct. at 1882-83.

II. The trial court reversibly erred by failing to grant a mistrial for premature jury deliberation where, during trial, the jury sent a note saying, "we are all in agreement that we need to see and hear the video tape again."

The trial court reversibly erred by failing to grant a mistrial where the jury sent a note indicating it prematurely deliberated regarding Appellant's video statement. "A jury should not begin discussing the case, nor deciding the issues, until all the evidence has been introduced, the arguments of counsel complete, and the applicable law charged." State v. Joyner, 289 S.C. 436, 437, 346 S.E.2d 711, 712 (1986). As explained by the Supreme Court, "the reason for this rule is apparent":

> The human mind is constituted such that when a juror declares himself, touching any controversy, he is apt to stand by his utterances to the other jurors in defiance of evidence. A fair trial is more likely if each juror keeps his own counsel until the appropriate time for deliberation.

State v. McGuire, 272 S.C. 547, 552, 253 S.E.2d 103, 105 (1979); see also Joyner, 289 S.C. at 437, 346 S.E.2d at 712. Additionally, instructions by the trial court "which invite jurors to engage in premature deliberations constitute reversible error." State v. Aldret, 333 S.C. 307, 311, 509 S.E.2d 811, 813 (1999).

In the case at bar, the jury's note indicated it engaged in deliberations regarding Appellant's video statement during the trial. The jury note included the following:

> We are all in agreement that we need to see and hear the video tape again. We would like to know if it would be possible to view the tape again before proceeding.

R. 137, ll. 1-7; R. 473 (Court Exhibit #8, Juror Note). The fact that the jury stated they were "all in agreement" that they *needed* to see and hear Appellant's video statement to law enforcement again indicated deliberation. In other words, this agreement constitutes deliberation regarding a critical piece of the State's evidence in its case against Appellant.

Additionally, Appellant was prejudiced by the trial court's grant of the jury's request to see and hear the video at that time. First, as explained above, Appellant's video statement to police was taken in violation of her Fifth and Fourteenth Amendment rights, and should have been suppressed pursuant to Edwards and its progeny. See § I, supra. Thus, the jury was permitted to hear an improper confession of Appellant again.

Second, the trial court not only permitted the jury to see and hear the video again, but it also placed additional microphones and speakers in the courtroom in an overt attempt to "to amplify the situation . . . ." R. 148, ll. 3-5. In this way, the trial court improperly added weight and emphasis to the tainted video statement.

Finally, the trial court also gave the jury confusing instructions regarding premature deliberations. Specifically, the court provided the following instructions to the jury immediately before replaying Appellant's amplified video statement:

> Now, I do want to tell you that *it is perfectly alright for y'all to agree that the video is improper and ask to see it again but* remember my admonitions of yesterday with regards to any issues in the trial of this case. *You must not discuss it with each other under any circumstances until I have given you the case for your trial—for your deliberation.*

R. 148, ll. 11-16. These instructions by the trial court are confusing on the specific issue of premature jury deliberations, and invited the jury to discuss the case. Joyner, 289 S.C. at 438, 346 S.E.2d at 712 (reversing where "[t]he challenged instructions invited the jury to discuss the case, which is tantamount to deliberation, prior to its completion and is reversible error."). Therefore, a mistrial is necessary not only due to the prejudice to Appellant, but also due to the trial court's inconsistent instruction to the jury regarding premature deliberations. See, e.g. McGuire, 272 S.C. at 551-52, 253 S.E.2d at 105

("Inconsistent statements on the part of the judge, relative to the jury discussing the case before deliberations began, will not likely occur upon a new trial.").

III. The trial court reversibly erred by failing to charge the jury with self-defense where the record contained evidence that, prior to the shooting, several women exited a parked vehicle and surrounded Appellant in a threatening manner when Appellant walked passed in a parking lot.

The trial court reversibly erred by refusing to charge the jury with the law of self-defense. "If there is any evidence in the record from which it could be reasonably inferred that the defendant acted in self-defense, the defendant is entitled to instructions on the defense, and the trial judge's refusal to do so is reversible error." State v. Light, 378 S.C. 641, 650, 664 S.E.2d 465, 469 (2008).

The four elements of self-defense are as follows: (1) the defendant was without fault in bringing on the difficulty; (2) the defendant was in actual imminent danger of losing his life or sustaining serious bodily injury, or he actually believed he was in imminent danger of the same; (3) if the defense is based on the defendant's belief of imminent danger, then it must be shown that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that the circumstances 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 life; and (4) the defendant had no other probable means of escape. Id. 378 S.C. at 649, 664 S.E.2d at 469.

Additionally, a defendant has the right to act upon appearances, and does not have to wait for another to get the drop on him before acting in self-defense. See, e.g., State v. Nichols, 325 S.C. 111, 117, 481 S.E.2d 118, 121 (1997) (citing State v. Jackson, 227 S.C. 271, 87 S.E.2d 681 (1955), and State v. Rash, 182 S.C. 42, 188 S.E.2d 435 (1936)). Finally, the last element of self-defense is further understood to mean the following: "that it is one's duty to avoid taking human life where it is possible to prevent it even to the extent of

retreating from his adversary unless by doing so the danger of being killed or suffering serious bodily harm is increased or it is reasonably apparent that such danger would be increased." Jackson, 227 S.C. at 279, 87 S.E.2d at 685.

In the present case, evidence of self-defense was presented through the testimony of Skipper. First, Skipper stated Appellant went across the street to buy cigars and strawberry cookies from a bootlegger that lived doors down from Burroughs' apartment, which was across the street from Skipper's home. According to Skipper's testimony, she saw a vehicle approximately two parking spaces away from Appellant. The vehicle backed up, hit the brakes, and four women exited—including Cox, Liz, Davis, and Burroughs. The women then surrounded Appellant in a threatening manner. R. 257, ln. 15—R. 264, ln. 24.

Under these circumstances as testified to by Skipper, Appellant did not bring on the difficulty; she was walking across the street to purchase items. Also, Appellant was in actual imminent danger of losing her life or sustaining serious bodily injury, or reasonably believed she was in imminent danger of the same; Appellant was just surrounded in a threatening manner by four women who leapt from a vehicle near her, and one of the women—Burroughs—previously threatened Appellant with a gun five weeks before this incident. Moreover, a reasonably prudent person of ordinary firmness and courage would have entertained the belief that the circumstances would warrant striking a fatal blow in order to save herself from serious bodily harm or loss of life; as indicated above, not only was Appellant suddenly surrounded by four women, but also Appellant was aware that at least one owned a gun and previously threatened her with it. Finally, Appellant had no other probable means of escape because she was surrounded. Therefore, under the testimony

provided by Skipper, evidence is present in the record supporting the instruction of self-defense.

Additionally, the State's argument that there is no evidence indicating Appellant did not strike first is of no moment. Simply stated, Appellant had the right to act upon appearances, and did not have to wait for another, such as Burroughs, to get the drop on her before acting in self-defense. See, e.g., Nichols, 325 S.C. at 117, 481 S.E.2d at 121; Jackson, 227 S.C. at 271, 87 S.E.2d at 681; Rash, 182 S.C. at 42, 188 S.E.2d at 435. Therefore, Appellant was entitled to the jury instruction on self-defense, and the trial court reversibly erred by refusing to do so. See Light, 378 S.C. at 650, 664 S.E.2d at 469 ("If there is any evidence in the record from which it could be reasonably inferred that the defendant acted in self-defense, the defendant is entitled to instructions on the defense, and the trial judge's refusal to do so is reversible error.").

IV. The trial court reversibly erred by failing to charge the jury with involuntary manslaughter where the record contained evidence that Appellant was armed in self-defense, a struggle for the gun occurred, and the fatal shot was not intentionally fired.

The trial court also reversibly erred by refusing to charge the jury with involuntary manslaughter. The law to be charged is determined from the evidence presented at trial. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). Reversible error is committed if the trial court 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 848, 849 (1993). Moreover, when determining whether the evidence requires a charge on a lesser included offense, the court views the facts in the light most favorable to the defendant. See Knoten, 347 S.C. at 302, 555 S.E.2d at 394 (providing a court must view the facts in the light most favorable to a defendant when determining if evidence required a charge on the lesser included offense of involuntary manslaughter).

"Importantly, our courts have long emphasized that to warrant a court's eliminating the offense of manslaughter, it should very clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter." State v. Brayboy, 387 S.C. 174, 180, 691 S.E.2d 482, 486 (Ct. App. 2010); see also State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000); State v. Burriss, 334 S.C. 256, 265, 513 S.E.2d 104, 109 (1999); Casey v. State, 305 S.C. 445, 447, 409 S.E.2d 391, 392 (1991). Thus, a request to charge a lesser-included offense is properly refused only when there is no evidence that the defendant committed the lesser rather than the greater offense. Casey, 305 S.C. at 447, 409 S.E.2d at 392.

Involuntary manslaughter is 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. Crosby, 355 S.C. 47, 51-2, 584 S.E.2d 110, 112 (2003); see also Light, 378 S.C. 641, 648, 664 S.E.2d 465, 468 (2008); Burriss, 334 S.C. 256, 265, 513 S.E.2d 104, 109 (1999). Further, evidence of a struggle over a weapon between a defendant and victim supports submission of an involuntary manslaughter charge. Tisdale v. State, 378 S.C. 122, 125, 662 S.E.2d 410, 412 (2008); Casey, 305 S.C. at 447, 409 S.E.2d at 392.

In the case at bar, evidence is present in the record supporting the charge of involuntary manslaughter. First, the testimony of both Davis and Cox indicate Appellant did not intend to shoot. Davis acknowledged her prior statement given to law enforcement the day after the shooting, and affirmed: (a) that "when the gun went off, they were struggling;" (b) "yeah, they were struggling. My sister was trying to take it from her. They were struggling;" (c) "when I heard the gun go off, that's when I immediately dropped;" and (d) "but I could see them before I dropped. They was together." R. 182, ll. 7-14; R. 183, ll. 10-14; R. 184, ln. 22—R. 185, ln. 25. Additionally, Cox testified and did not deny telling police that "[Appellant] must be didn't know she shot her. She probably thought, you know, maybe she shot in the air or something." R. 208, ll. 2-3; R. 209, ll. 10-18. This testimony, taken in the light most favorable to Appellant, indicates that there was a struggle over the gun, and the shooting was unintentional with reckless disregard for the safety of others.

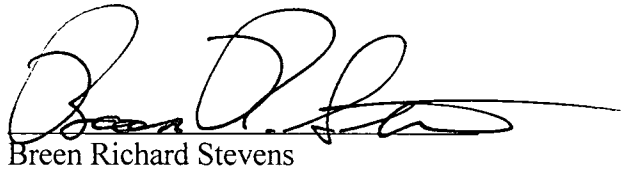
Second, Appellant was engaged in lawful activity, as she was armed in self-defense. See § III, supra. "A person can be acting lawfully, even if he is in unlawful

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. As such, it is irrelevant whether Appellant was old enough to possess a handgun; what is relevant is that Appellant was entitled to arm herself in self-defense at the time the shot went off. Further, as previously discussed, testimony from Davis and Cox on cross-examination indicated the gun went off during a struggle between Burroughs and Appellant. Accordingly, the trial court reversibly erred by refusing to charge the jury with the lesser-included offense of involuntary manslaughter.

CONCLUSION

For the foregoing reasons, Appellant Brittany A. Johnson respectfully requests reversal of her conviction, and remand for a new trial.

Respectfully submitted,



Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

This 7th day of January, 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Edward B. Cottingham, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRITTANY JOHNSON,

APPELLANT

Appellate Case No. 2011-185926

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 7th day of January, 2013.

Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 7th day of January, 2013.

(L.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2022.