THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY

Court of General Sessions

DeAndrea G. Benjamin, Circuit Court Judge

C/A No. 2010-GS-40-0829

Appellate Case No. 2011-203569

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

v.

Jamaal Hinson,..... Appellant.

FINAL BRIEF OF APPELLANT

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2. Did The Trial Court Err By Refusing To Charge The Elements Of Involuntary Manslaughter To The Jury When Evidence Exists That The Appellant Lawfully Armed Himself In Self-defense In The Event Deadly Force Was Necessary And That He Did Not Intentionally Fire The Single Shot?

STATEMENT OF THE CASE

This appeal arises from multiple errors of law committed by the trial court in the prosecution and conviction of Jamaal Hinson.

The Richland County Grand Jury indicted Mr. Hinson on April 14, 2010 on a single count indictment of murder. (R. p. 760). The Solicitor called Mr. Hinson's case to trial before Judge DeAndrea G. Benjamin on November 14, 2011. (R. p. 1).

Eleanor Duffy Cleary represented Mr. Hinson. (R. p. 1). Senior Assistant Solicitor K. Luck Campbell and Assistant Solicitor Nicole M. Simpson served as prosecutors. (R. p. 1). The State called twenty-one witnesses in support of its case. Mr. Hinson testified, and he was the only witness testifying for the defense. At the close of the State's case, the trial court orally denied Mr. Hinson's motion for directed verdict. (R. p. 512-514).

Over Mr. Hinson's objection, Judge Benjamin only instructed the jury on the elements of murder, self-defense, and accident. (R. p. 673-752).

On November 18, 2011, the jury returned a verdict of guilty on the sole count in the indictment – murder. (R. p. 754-756). After the verdict, Mr. Hinson renewed his motion for directed verdict, and also moved for a new trial. (R. p. 757, l. 7 – p. 758, l. 2). Again, the trial court denied the motions orally. (R. p. 758, ll. 3-5).

Judge Benjamin sentenced Mr. Hinson to forty years imprisonment for murder. (R. p. 759, ll. 21-23; R. p. 762). This appeal followed.

STATEMENT OF THE FACTS

On January 15, 2010, Jamaal Hinson stayed the night at his girlfriend Lauren Banks' house in the Vineyard Crossing subdivision in Blythewood, South Carolina. (R. p. 575, ll. 2-8; p. 592, l. 24 – p. 593, l. 1). The next morning, Mr. Hinson borrowed Ms. Banks' vehicle so he could deliver marijuana to purchasers. (R. p. 575, ll. 14-24). Before Mr. Hinson left, he saw Richard Thomas and Anthony Salley on the same street as Ms. Banks' house. (R. p. 576, ll. 11-14). Mr. Thomas and Mr. Hinson were adversaries – "they didn't like each other at all" – with multiple verbal and physical incidents between them over the preceding year. (R. p. 571, ll. 13-17; p. 616, ll. 8-10). Mr. Hinson did not know Mr. Salley, but knew of him as being a friend of Mr. Thomas. (R. p. 571, l. 24 – p. 572, l. 1; p. 592, ll. 10-14). Mr. Salley's girlfriend Andina Lee acknowledged Mr. Salley did not like Mr. Hinson. (R. p. 126, ll. 17-22). When they saw each other, both Mr. Thomas and Mr. Salley exchanged threats with Mr. Hinson that morning. (R. p. 576, ll. 11-19). Mr. Thomas was known to carry a pistol. (R. p. 577, ll. 8-16; p. 600, ll. 5-7).

While Mr. Hinson was out making deliveries, the brakes failed on his vehicle and he stopped at a gas station to investigate. (R. p. 575, ll. 21-24). At the gas station, he encountered Devan Bailey, who asked Mr. Hinson for a quantity of marijuana. (R. p. 411, ll. 13-22; p. 575, l. 24 – p. 576, l. 1). Mr. Hinson returned to Ms. Banks' house to drop off the malfunctioning vehicle, and waited for Mr. Bailey to pick him up. (R. p. 576; ll. 1-6 and 20-25).

Mr. Bailey arrived in a pickup truck driven by Quinton Emerson, in which Derrick Diamond was also a passenger. (R. p. 413, l. 1). The three men picked up Mr.

Hinson and took him to his house to get his pistol, since Mr. Hinson was scared of what Mr. Thomas might do if they came across him. (R. p. 414, ll. 22-25; p. 577, ll. 1-9; p. 600, ll. 5-7; p. 625, ll. 10-14; p. 626, ll. 21-23). Mr. Hinson wanted to be in a position to defend himself due to Mr. Thomas likely being armed. (R. p. 577, ll. 8-16).

After retrieving his pistol, Mr. Hinson rode with the three men in the pickup back to Ms. Banks' house, where he went inside to spend time with her. (R. p. 96, ll. 16-18; p. 417, ll. 10-15; p. 577, ll. 21-24). After dropping Mr. Hinson off, the three men in the pickup truck left but Mr. Bailey soon realized he had forgotten to get a cigar to use to smoke the marijuana. (R. p. 179, ll. 5-10; p. 416, ll. 15-16). Mr. Bailey phoned Mr. Hinson seeking a cigar and Mr. Hinson told him to return to the neighborhood, call him upon arriving, and Mr. Hinson would give him a cigar. (R. p. 417, ll. 16-21; p. 577, l. 25 – p. 578, l. 11; p. 629, ll. 1-24). The group in the pickup truck returned to the street in question in the Vineyard Crossing subdivision. Mr. Bailey directed the group where to stop on the street, which was a couple of houses up from Ms. Banks' house because Mr. Bailey thought Mr. Hinson was sitting in a small black car parked in a nearby driveway. (R. p. 417, l. 22 – p. 418, l. 17). In actuality, the black male smoking marijuana in that car was Anthony Salley. (R. p. 117, ll. 21-22).

After receiving the second phone call from Mr. Bailey, Mr. Hinson came out of Ms. Banks' house and saw the pickup parked in front of the house with the small black car in the driveway. (R. p. 578, ll. 11-13; p. 629, l. 23 – p. 630, l. 4). Mr. Bailey and Mr. Salley were standing in the driveway with the small black car, talking, along with Mr. Salley's girlfriend. (R. p. 181, ll. 1-3; p. 579, ll. 1-3). Mr. Hinson began walking from Ms. Banks' house to the house where Mr. Bailey was so that he could give him the cigar;

as soon as Mr. Salley saw Mr. Hinson, Mr. Salley removed his jacket and rushed at Mr. Hinson in a threatening manner. (R. p. 144, ll. 24-25; p. 579, ll. 4-6; p. 631, ll. 13-14; p. 633, ll. 13-16). Mr. Hinson was at the bottom of an incline, and Mr. Salley ran down from the top of the hill towards him. (R. p. 150, ll. 22-26). Mr. Salley was a larger man than Mr. Hinson. (R. p. 658, ll. 14-17). Afraid, Mr. Hinson drew his pistol to scare the advancing Mr. Salley, but Mr. Salley was unfazed, moving closer to the pistol and demanding Mr. Hinson shoot him. (R. p. 579, ll. 7-11 and 21-25; p. 635, ll. 17-20). Mr. Salley was not afraid. (R. p. 196, ll. 12-15).

Mr. Hinson stood frozen. (R. p. 580, ll. 3-4). Sensing advantage, Mr. Salley knocked the gun from Mr. Hinson's hand and then struck Mr. Hinson twice in the face. (R. p. 100, ll. 17-19; p. 119, ll. 9-22; p. 145, ll. 15-21; p. 580, ll. 4-7). Mr. Salley's blows landed with terrific force, and Mr. Hinson's face instantly started to swell. (R. p. 161, l. 20 – p. 162, l. 2).

The two men began fist-fighting, both swinging and punching, which later progressed to them fighting while on the ground. (R. p. 145, l. 21 – p. 146, l. 2; p. 183, ll. 20-24; p. 580, ll. 7-10). While Mr. Hinson and Mr. Salley were fighting, the pistol was lying on the ground where it had fallen after being knocked out of Mr. Hinson's hand. (R. p. 183, ll. 17-21). Thus, neither man had a weapon. (R. p. 101, ll. 10-12). Mr. Bailey was standing beside the fight. (R. p. 146, ll. 15-17). The fight moved towards Mr. Bailey, and he threw an elbow to push the men away from him, causing Mr. Salley to stumble. (R. p. 421, ll. 2-15).

Mr. Hinson made no effort to get the pistol during the fight. (R. p. 661, l. 22 – p. 662, l. 2). In fact, the pistol was not close to where the men were fighting. (R. p. 121, ll.

4-20). Mr. Salley's girlfriend Andina Lee went over to where the gun was lying on the ground and picked up the pistol. (R. p. 101, ll. 21-22; p. 103, ll. 10-11; p. 121, ll. 21-23; p. 417, ll. 17-19). She pointed the gun at Devan Bailey, demanding the fight stop. (R. p. 101, ll. 21-24; p. 146, ll. 6-8). Her intent in grabbing the gun was "just really to scare [Mr. Hinson] . . ." (R. p. 103, ll. 15-16). She gave it her best effort, yelling "get the fuck back" three times and telling Mr. Bailey if he moved she was going to shoot him. (R. p. 123, l. 17 – p. 124, l. 11; p. 147, ll. 14-22). Scared, Mr. Bailey retreated by running up the street. (R. p. 422, ll. 21-24; p. 423, ll. 7-8; p. 424, ll. 7-8).

Mr. Salley eventually stopped fighting back, though he remained conscious. (R. p. 580, ll. 20-25; p. 662, ll. 3-6). Mr. Hinson voluntarily stopped fighting. (R. p. 639, ll. 10-12). As Mr. Hinson got up off the ground, he saw Ms. Lee pointing the pistol but then throw it back on the ground. (R. p. 581, ll. 7-14). Mr. Hinson was shocked that Ms. Lee had the pistol, realizing that she could have shot him at any point during the fist-fight. (R. p. 581, ll. 20-23).

After the fight, Mr. Salley was up off the ground and moving. (R. p. 105, ll. 14-19). The pistol remained on the ground just steps away. (R. p. 106, ll. 12-16). Mr. Hinson picked up the pistol, knowing that if he bypassed the opportunity to retrieve it and instead left it on the ground Ms. Lee could pick it up for a second time and shoot him as he returned to Ms. Banks' house. (R. p. 582, ll. 5-18). Mr. Hinson was afraid of this scenario, particularly of being shot in the back as he retreated. (R. p. 582, ll. 19-21).

Mr. Hinson realized he needed to remove himself from the situation. (R. p. 582, l. 25; p. 583, l. 20 – p. 584, l. 1). As he turned to leave, Mr. Salley was moving and facing Mr. Hinson, and just a couple of steps separated them. (R. p. 129, l. 22 – p. 130, l. 10; R.

p. 584, ll. 3-5). In being so positioned, Mr. Salley startled Mr. Hinson. (R. p. 583, ll. 1-6). Mr. Hinson was holding the pistol by the trigger (as he always does when he handles a firearm) and was moving the gun from his hand to his waistband. (R. p. 641, ll. 22-25; p. 642, ll. 13-18). When Mr. Salley scared Mr. Hinson by being up and moving just a couple of feet away, Mr. Hinson flinched and accidentally pulled the trigger; the gun fired once and the bullet struck Mr. Salley. (R. p. 583, ll. 4-6; p. 584, ll. 3-5). Mr. Hinson did not continue firing because "it was an accident that [Mr. Hinson] shot him the first time." (R. p. 590, ll. 10-14).

ARGUMENT I

Standard Of Review

Impartiality of the juror is addressed to the discretion of the trial judge. *State v. Johnson*, 248 S.C. 153, 163-64, 149 S.E.2d 348, 353 (1966) (quotation omitted).

The Trial Court Erred By Dismissing A Juror When It Is Uncontested The Juror Did Not Intentionally Conceal His Limited Knowledge Of The General Identity Of An After-The-Fact Witness, And Even If The Juror Had Intentionally Failed To Reveal The Knowledge It Was Of Such Limited Value It Would Not Have Supported A Challenge For Cause Nor Been A Material Factor In The Use Of The State's Preemptory Challenges.

On the morning of November 14, 2011, Judge Benjamin began the trial process by first resolving voir dire requests from the lawyers. After bringing the venire into the courtroom, the judge read aloud and individually the name of all anticipated witnesses, including the name "Jarrod Crudup." (R. p. 23-27). Those witnesses present in the courtroom stood when the judge announced their respective names; Mr. Crudup was not present in the courtroom when his name was called. (R. p. 25, l. 8). Judge Benjamin then asked the following questions of the venire:

- "[I]s there anyone related by blood or marriage or has a close personal or social relationship with any of the witnesses that I have called?" (R. p. 27, ll. 20-25).
- "Does any member of the jury panel know of any reason whatsoever why he or she should not serve as a juror in this case with particular emphasis being placed on your ability to be fair and impartial to both the State and the Defendant? If so, please stand." (R. p. 31, ll. 2-7).

Having no reason to respond, Juror 226[1] remained silent in response to these two questions, and he was ultimately placed on the jury panel.

[1] Juror 226 is Guy Rodgers, a single male employed by Richland School District One as a painter. (R. p. 49, ll. 1-12). For ease of reference this brief will refer to him as "Juror 226."

Late in the afternoon on the second day of trial, the State called Jarrod Crudup as a witness regarding Mr. Hinson's actions after he left the scene of the shooting. (R. p. 199-212). Mr. Crudup testified that he "knew of" Mr. Hinson through friends and actually knew Mr. Salley from the neighborhood. (R. p. 201, ll. 12-15). The assistant solicitor asked Mr. Crudup what he had been doing when he saw Mr. Hinson on the day of the incident, and he responded "I had just got home from basketball practice." (R. p. 202, ll. 4-6). Mr. Crudup went on to testify that Mr. Hinson and Devan Bailey came into his house – uninvited – about 2:30 p.m. that afternoon saying they had been in a fight. (R. p. 202, l. 18 – p. 203, l. 24; p. 208, ll. 17-21). Shortly after arriving at Mr. Crudup's house, Mr. Hinson left. (R. p. 204, ll. 4-8).

Mr. Crudup did not witness the fight between Mr. Salley and Mr. Hinson and never saw a gun or heard a gunshot, but nevertheless told law enforcement the extent of his knowledge when he was interviewed. (R. p. 205, l. 22 – p. 206, l. 1; p. 208, ll. 4-23). Mr. Crudup chose photos of Mr. Hinson and Mr. Bailey in a law enforcement photo array as being reflective of the individuals who had come into his house on the day of the incident, and further identified Mr. Hinson sitting at counsel table at trial. (R. p. 208, ll. 24 – p. 211, l. 22). Mr. Hinson's counsel did not ask Mr. Crudup a single question on cross-examination, as the defense consistently acknowledged Mr. Hinson's actions after the single gunshot including going to Mr. Crudup's house and ultimately leaving the state. (R. p. 211, l. 24 – p. 212, l. 1).

The next morning, on the third day of the trial and before the jury was in the courtroom, the first sentence of the transcript of the proceedings reflects Judge Benjamin stating on the record "Juror 226 wants to talk to me. I have no idea why . . . " (R. p. 322,

ll. 19-21). Judge Benjamin and her law clerk stepped into the hallway to speak with Juror 226, leaving counsel in the courtroom. (R. p. 322, l. 22 – p. 323, l. 5). Upon returning to the courtroom, Judge Benjamin initially stated "I'm going to bring in Juror 226 and let him explain it to you all," (R. p. 323, ll. 6-7), but immediately upon bringing the juror into the courtroom Judge Benjamin herself announced:

> He has informed me that he does not recognize the name. He did not recognize the name of the - - some of the witnesses because he doesn't know them, but he wanted to let us know that he works - - he plays basketball at North Springs and Killian, and he has seen them there before. He wanted to know if that was a problem.

(R. p. 323, ll. 8-17).

After she made this announcement, the judge asked Juror 226 if her summary reflected what he had told her in the hallway and he agreed with a simple "yes, ma'am." (R. p. 323, ll. 18-20).

Thereafter, Judge Benjamin and the juror had the following exchange in the presence of counsel:

> The Court: And the fact that you have seen some of the people before, you don't know their name, but you have seen them at the gym, would that affect your ability to be fair and impartial in this trial?
>
> Juror 226: No, ma'am.

(R. p. 323, l. 21 – p. 324, l. 1).

The senior assistant solicitor inquired "which witnesses?", leading to the following exchange where the juror was finally given the opportunity to speak for himself in open court:

> The Court: Which witnesses?
>
> Juror 226: The one with the - -

The Court: He doesn't know their names.

Juror 226: The one with the dreads.

The Court: Any of the other ones? Anybody else?

Juror 226: *No. That's the only one I know, the one that came up.* I played with *him* not too long ago at the gym.

The Court: Okay. All right. And the fact that you played with him at the gym, does that affect your ability to be fair and impartial?

Juror 226: No. *I don't even know him.*

(R. p. 324, ll. 2-18) (emphases added).

At no point did Judge Benjamin challenge the juror's statements in the open court inquiry before all counsel as being less than what he told her in the hallway after voluntarily bringing the matter to her attention in the first instance. At no point did Judge Benjamin question the juror about his knowledge other than as stated above, and at no point did she offer either counsel the ability to question the juror.

After having been twice asked whether he could continue to be fair and impartial and answering both times in the affirmative without hesitation, (R. p. 323, l. 21 – p. 324, l. 18), the juror then left the courtroom.

Immediately, the prosecution pounced with an argument that ultimately led to the juror's dismissal. Ms. Campbell stated:

> Your Honor, we do have a concern. And I understand he didn't mean to do that or anything, but that would have been one of the witnesses that is friends with the Defendant. Apparently, he has some type of at least social - - or some type of communication with him playing basketball. It is not his fault or anything like that, but we would be concerned that he does have affiliation with the Defendant in this case or someone closely affiliated with the Defendant, and that would be a grave concern to us.

(R. p. 324, l. 23 – p. 325, l. 8).

A close review of the transcript shows that the State misrepresented the juror's statements – he never indicated even communicating with Mr. Crudup, much less a social relationship with him. In fact, the only person in the courtroom who even identified Mr. Crudup as the witness the juror recognized was Ms. Campbell – Juror 226 never used the witness's name because Juror 226 did not know the witness's name. (R. p. 325, ll. 10-14).

After hearing the argument of Mr. Hinson's counsel that the juror's revelation did not rise to the level of disqualification, (R. p. 325, l. 15 – p. 326, l. 5), Ms. Campbell continued on:

> The information, if we had it, we would have used - - opted to use a strike on him. We did have enough . . . It is of grave concern to the State, and we just feel like had we had this information - - and we're not blaming the juror - - of course it would have been a consideration of use of strikes, and it would have been a neutral reason for us to strike him.

(R. p. 326, ll. 6-18).

The defense again protested, stating "[h]e certainly couldn't be struck for cause because he played basketball with somebody" but the judge responded "[y]es, but if [Ms. Campbell] had known it she said she would have struck him." (R. p. 328, ll. 11-14). Emboldened by the judge's approval of her hindsight argument of how she would have used her strikes differently,[2] the State closed the deal by impugning the juror with a veiled reference to the juror possibly being affiliated with an organized street gang and claiming the juror should be dismissed "in fairness to everyone." (R. p. 328, ll. 15-23).

[2] Ms. Campbell later vacillated in her hindsight position, stating "of course *it would have been a consideration* of use of strikes . . ." and "if we had that information and knew, *it would have been a consideration* on our strikes." (R. p. 326, ll. 15-16) (emphases added).

After a break, Judge Benjamin returned to the bench and announced she was removing the juror "in an abundance of caution," which "standard" she referenced twice in announcing her decision. (R. p. 329, ll. 6-18).

Defense counsel again repeated her objection that the juror did not know any witness and had said he could be fair and impartial. (R. p. 329, l. 19 – p. 330, l. 10). The State responded by stating "[h]e said he knew witnesses, then he changed it to one witness." (R. p. 330, ll. 16-17). In actuality, a close review of the transcript shows that while the juror agreed with the judge's summary of the hallway exchange, he never specifically stated he knew of multiple witnesses.

After alerting the lawyers to the ruling dismissing the juror, Judge Benjamin brought Juror 226 back into the courtroom (still without the jury present) to announce her ruling to him:

> The Court: I appreciate you being honest and bringing it to our attention. And everybody understands that you didn't intentionally do this, that you just did not put the names with the faces. And that happens all the time.
>
> Juror 226: Yes, ma'am. I mean, they are kids, and I don't socialize with them kids. I mean, I play ball, but I don't have one-on-one conversation with them.

(R. p. 332, 4-11).

To recap, the judge herself acknowledged both the juror's honesty in affirmatively bringing the matter forward and the unintentional nature of the concealment, and the State three times acknowledged the juror's lack of complicity. However, the judge removed the juror "in an abundance of caution" based on the State's fantastical claim of

"this person is affiliated or is in contact with friends of [Mr. Hinson]."[3] (R. p. 327, ll. 6-7). Binding and recent appellant precedent confirms Judge Benjamin made a reversible error of law.

In *State v. Woods*, the Supreme Court confirmed that the removal of a juror after the swearing of the jury is not a matter to be undertaken lightly:

> When a juror conceals information inquired into during voir dire, a new trial is required only when the court finds the juror intentionally concealed the information, and that the information concealed would have supported a challenge for cause or would have been a material factor in the use of the preemptory challenges. Where a juror, without justification, fails to disclose a relationship, it may be inferred, nothing to the contrary appearing, that the juror is not impartial. On the other hand, where the failure to disclose is innocent, no such inference may be drawn.

345 S.C. 583, 587-88, 550 S.E.2d 282, 284 (2001) (citations omitted). Thus, the Supreme Court announced a two part test for removal: (1) the juror must have intentionally concealed the revealed information and (2) the intentionally-concealed information would have either (a) supported a challenge for cause or (b) been a material factor in the use of the preemptory challenges.

> Intentional concealment occurs when the question presented to the jury on *voir dire* is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable. Unintentional concealment, on the other hand, occurs where the question posed is ambiguous or incomprehensible to the average juror, or where the subject of the inquiry is insignificant or so far removed in time that the juror's failure to respond is reasonable under the circumstances.

Id. at 588, 284.

[3] Mr. Crudup did not testify he was friends with Mr. Hinson – in response to the question "Do you know [Mr. Hinson]?" he responded "I know of him." (R. p. 201, ll. 12-15). At best, the State can show (due to the juror's own admission) that Juror 226 played basketball with someone who merely knew of Mr. Hinson and who testified on behalf of the prosecution including both out of court and in court identifications of Mr. Hinson.

Typically, "whether a juror's failure to respond is intentional is a fact intensive determination which must be made on a case by case basis." *Id.* There was no case-specific, fact-intensive determination here because it is uncontested the juror did not intentionally conceal the information; both Judge Benjamin and the State repeatedly and affirmatively acknowledged there was no intentional concealment:

- Ms. Campbell:"And I understand he didn't mean to do that or anything." (R. p. 324, ll. 24-25).
- Ms. Campbell:"It is not his fault or anything like that . . . " (R. p. 325, ll. 4-5).
- Ms. Campbell:"we just feel like had we had this information - - and we're not blaming the juror . . . " (R. p. 326; ll. 13-15).
- The Court: "I appreciate you being honest and bringing it to our attention. And everybody understands that you didn't intentionally do this, that you just did not put the names with the faces. And that happens all the time." (R. p. 332, ll. 3-7).

Pursuant to *Woods* it was improper to draw any inference that Juror 226 was not impartial and thus subject to removal. Judge Benjamin compounded this mistake by ignoring the juror's repeated statements that he could be fair and impartial.

Almost one year to the day after deciding *Woods*, the Supreme Court had the opportunity to put the test in place. In *State v. Stone*, 350 S.C. 442, 567 S.E.2d 244 (2002), the prosecution called the defendant's aunt as a witness. A juror recognized the aunt once the aunt took the witness stand, although the juror had not recognized the aunt's name when it was announced at the beginning of voir dire. The juror stated she "had lived down the street from [the aunt] five or six years earlier, and they were casual acquaintances only. [The juror] indicated her acquaintance would not affect her ability to be fair and impartial." *Id.* at 448, 247. Nevertheless, the trial court removed the juror

and replaced her with an alternate, and an undivided Supreme Court found the removal was in error:

> It is patent here that [the juror's] failure to disclose her acquaintance with [the aunt] was innocent. Moreover, we find her scant acquaintance would neither have supported a challenge for cause nor would it have been a material factor in the state's exercise of its preemptory challenge. [The juror] clearly indicated her former acquaintance with a witness whose name she did not even know, would not have affected her in any way. Accordingly, we hold the trial court abused its discretion in removing her.

Id. at 448-449, 247-248.

The facts of *Stone* are strikingly similar to the plight of Juror 226, in that (1) both jurors did not recognize the name of a witness during voir dire because of the lack of personal knowledge of the identity of the respective witness; (2) both jurors recognized the respective witness only once the witness took the stand; (3) both jurors affirmatively brought their recognition of the respective witness to the trial court's attention; and (4) both jurors indicated they could continue to be fair and impartial after their respective revelations.

In fact, the instant case is even more egregious as Juror 226 was not even a casual acquaintance/neighbor of Mr. Crudup, but rather played recreational basketball at the same location as Mr. Crudup – "I mean, they are kids, and I don't socialize with them kids. I mean, I play ball, but I don't have one-on-one conversation with them." (R. p. 332, 4-11).

This Court recently relied on the two part *Woods* test in *State v. Burgess*, 391 S.C. 15, 703 S.E.2d 512 (2010). In that homicide case, immediately after jury selection, a juror let the trial court know that he "recognized a lady in the audience," which lady turned out to be the wife of one of the decedents and the sister of a man the juror

supervised at work. *Id.* at 17-18, 513. The trial judge asked the juror if he could still be a fair and impartial juror, and the juror answered in the affirmative on two separate occasions in rapid succession. *Id.* at 18, 514. The judge refused a defense request to remove the juror.

In affirming the trial judge's refusal to remove the juror, this Court stated "[f]irst, the fact that a juror has some relationship with the victim does not automatically require the trial judge to remove the juror." *Id.* In the instant case, any "relationship" was not with the victim but with an after-the-fact witness, and "[t]here is no rule of the common law, nor is there a statute, disqualifying a juror on account of his relationship to a witness, either by affinity or consanguinity, within any degree." *State v. Hilton*, 69 S.E. 1077, 1078 (1910).

This Court further noted "the juror did not conceal any information requested during voir dire" and the judge acted within his discretion. *Burgess*, 391 S.C. at 18-19, 703 S.E.2d at 514. The Court then analyzed *Stone*, where the Supreme Court "held the removal of the juror was error because neither of the criteria listed in *Woods* existed." *Id.* at 19, 514.

In its analysis, this Court noted the Supreme Court stated both that "it is patent here that the juror's failure to disclose her acquaintance with the witness was innocent," and continued on to say "her scant acquaintance would neither have supported a challenge for cause nor would it have been a material factor in the state's exercise of its preemptory challenges." *Id.* (citing *Stone*, 350 S.C. at 448, 567 S.E.2d at 247-248). Importantly, this Court confirmed *Stone* as being an "and" test, stating "*either* of those

findings [in *Stone*] would have *independently rendered* the trial judge's removal of the Stone juror erroneous." *Id.* (emphases added).

This Court concluded its analysis with language that mandates reversal in the instant case:

> When a party contends a juror should be removed for failure to disclose information during voir dire, *Stone* requires the trial judge to consider the two criteria from *Woods*. If the judge finds both of the *Woods* criteria exist, the judge must remove the juror. However, if *either* of the criteria is absent, the judge *may not* remove the juror on that basis. Here, we need only look to the absence of the first criterion to affirm.

Id. at 19-20, 514 (emphases added).

In *Burgess*, as in *Stone*, the juror's failure to disclose was innocent and thus removal of the juror, if it had occurred, "would have been error." *Id.* at 20, 514.

In contrast to *Woods* and *Stone*, where the prosecution sought the removal of the juror, in *Burgess* the defense sought the removal. In all three of these recent cases, however, both the Supreme Court and this Court have made it plain that removal of a juror is only proper under two separate and distinct showings which do not apply in the instant case as explicitly acknowledged by both the State and the trial court. Accordingly, the conviction should be reversed and the matter remanded for a new trial.

ARGUMENT II

Standard Of Review

The facts on appeal must be viewed in the light most favorable to the appellant. *State v. Burriss*, 334 S.C. 256, 258, 513 S.E.2d 104, 105 (1999). "If there is any evidence warranting a charge on involuntary manslaughter, then the charge must be given." *State v. Reese*, 370 S.C. 31, 36, 633 S.E.2d 898, 900 (2006); *see State v. Crosby*, 355 S.C. 47, 51, 584 S.E.2d 110, 112 (2003) ("[a] trial court should refuse to charge the lesser-included offense only where there is no evidence the [appellant] committed the lesser rather than the greater offense"). This tenet of law is true even when the evidence provided by appellant himself is conflicting. *State v. Knoten*, 347 S.C. 296, 555 S.E.2d 391 (2001).

The Trial Court Erred By Refusing To Charge The Elements Of Involuntary Manslaughter To The Jury When Evidence Exists That The Appellant Lawfully Armed Himself In Self-Defense In Case Deadly Force Was Necessary And That He Did Not Intentionally Fire The Single Shot.

After the conclusion of the evidence, the defense sought for the judge to charge the jury with instructions including the elements on involuntary manslaughter. (R. p. 706, l. 23 – p. 718, l. 16; p. 720, l. 24 – p. 722, l. 15; p. 723, l. 16 – p. 726, l. 19; p. 729, ll. 4-19). This crime is defined as:

(1) The unintentional killing of another,

(2) Without malice,

(3) While engaged in *either*

(a) an unlawful activity not naturally tending to cause death or great bodily harm *or*

(b) a lawful activity with reckless disregard for the safety of others.

State v. Mekler, 379 S.C. 12, 15, 664 S.E.2d 477, 478 (2008). For more than forty years, South Carolina appellate courts have recognized that the negligent handling of a loaded firearm will support a charge of involuntary manslaughter. *See State v. White*, 253 S.C. 475, 171 S.E.2d, 712 (1969).

The key issue in the instant case is whether Mr. Hinson was engaging in a lawful activity when the gun went off. At trial he consistently argued he lawfully armed himself in self-defense and the gun went off accidentally. (R. p. 577, ll. 1-16; p. 583, ll. 1-6; p. 584, ll. 3-5; p. 600, ll. 5-7; p. 625, ll. 10-14; p. 626, ll. 21-23; p. 641, ll. 22-25; p. 642, ll. 13-18).

The law on involuntary manslaughter in the context of engaging in a lawful activity has developed in several cases over the past twenty or so years beginning with *State v. McCaskill*, 300 S.C. 256, 387 S.E.2d 268 (1990).

In *McCaskill*, the appellant maintained her right to possess the firearm in self-defense was separate and distinct from the issue of whether she was entitled to use the gun in self-defense, arguing "she was lawfully entitled to arm herself in self-defense in case deadly force was necessary, but that the lethal charge was fired accidentally." *Id.* at 258, 269. The Supreme Court agreed, stating "[w]here a defendant claims that he armed himself in self-defense, while also claiming that the actual shooting was accidental, this combination of events can 'place the shooting in the context of self-defense.'". *Id.* at 258, 269 (quotation omitted). "[A] homicide is excused when caused by the discharge of a gun . . . where the accused is *lawfully* acting in self-defense and the victim meets death by accident, through the unintentional discharge of a gun or the like . . . " *Id.* at 259, 270 (emphasis in original) (quotation omitted). "Because the defense of accident is not

applicable unless the defendant was acting *lawfully*, it is necessary to instruct the jury as to what constitutes a lawful enterprise." *Id.* (emphasis in original).

The Supreme Court expanded the holding of *McCaskill* four years later in *State v. Goodson*, 312 S.C. 278, 440 S.E.2d 370 (1994). In that case the Court specifically "reject[ed] the State's claim that because Goodson unlawfully possessed a firearm, the defense of accident is precluded. Rather, the burden rests upon the State to prove beyond a reasonable doubt that the unlawful act in which the accused was engaged was at least the proximate cause of the homicide." *Id.* at 281, 372.

"Read together, *McCaskill* and *Goodson* stand for the proposition that 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. Burriss*, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999). After a detailed analysis of the facts, the *Burriss* Court determined a charge of accident was warranted, "and for the same reasons" there was evidence in the record supporting the appellant's claim "he was acting lawfully when the gun fired." *Id.* at 264-265, 109. "Although *Goodson* only specifically dealt with whether unlawful possession of a weapon would preclude an accident defense, it would be incongruous not to apply this same reasoning in the context of involuntary manslaughter." *Id.* at 265, 109 (citation omitted).

The Supreme Court described Burriss as being entitled to an involuntary manslaughter charge because "the evidence supported a finding that he was lawfully armed in self-defense at the time the fatal shot occurred and there was evidence he handled the loaded gun in a negligent manner." *State v. Light*, 378 S.C. 641, 647-648, 664 S.E.2d 465, 468 (2008).

In *Light*, the Supreme Court noted this Court had correctly found the petitioner was lawfully armed in self-defense because he took the loaded gun from the decedent who had been threatening him with it. *Id.* at 648, 468-469. This is true because "[a]t this point in the analysis, we are concerned only with whether petitioner had a right to be armed for purposes of determining whether he was engaged in a lawful act, *i.e.* was lawfully armed, and not whether he actually acted in self-defense when the shooting occurred." *Id.* at 649, 469 n.6.

Light thus "makes it clear the question is not whether one is **acting** in self-defense at the time of the shooting, but whether the defendant is **lawfully armed** at the time of the shooting. Therefore, whether a defendant is entitled to a self-defense charge is of no consequence." *State v. Brayboy*, 387 S.C. 174, 182, 691 S.E.2d 482, 487 (Ct. App. 2010) (emphasis in original).

Here, the Court improperly failed to give the involuntary manslaughter instruction even though the judge stated "I did not rule as to the elements of self-defense or the elements of the accident because the State did not object to the instruction," (R. p. 742, ll. 18-21), before announcing her ruling disallowing an involuntary manslaughter charge because "*all* of the evidence in this case indicates [Mr. Hinson] was acting unlawfully at the time of the killing, and that as a result he is precluded from any instruction as to involuntary manslaughter." (R. p. 743, ll. 18-22) (emphasis added). She elaborated:

> Without any testimony that [Mr. Salley] actually pointed a gun at [Mr. Hinson] or [Mr. Hinson] saw [Mr. Salley] with a gun during or around the time of the altercation clearly means that [Mr. Hinson] would not have been justified in arming himself with a deadly weapon at the time the gun discharged, especially since [Mr. Hinson] testified that he won the fight [with Mr. Salley] and that [Mr. Salley] was on the ground when he got up.

(R. p. 744, l. 25 – p. 745, l. 8).

Judge Benjamin made this pronouncement despite acknowledging "I am not ruling on the self-defense because y'all agreed to it . . . which kind of put me in a curious situation as to involuntary manslaughter." (R. p. 747, ll. 10-15).

The judge's recitation of what the facts in the instant case "clearly mean" was incorrect, particularly so since she appears to be focused on whether Mr. Hinson could be "acting" in self-defense. In any event, whether or not Mr. Salley had a gun is not determinative. *See, e.g., McCaskill*, 300 S.C. at 256-258, 387 S.E.2d at 268-269 (no evidence decedent was armed).

In fact, Mr. Salley's actions or lack thereof are not required for the charge. While the gun was resting on the ground not near the fight between Mr. Hinson and Mr. Salley, Mr. Salley's girlfriend went over and scooped up the gun, pointing it at Mr. Hinson's close friend and telling him that if he moved she would shoot him while repeatedly using expletives. When she later threw the gun to the ground – leaving it free for the momentarily defeated but ambulatory Mr. Salley to pick up in revenge or for herself to pick up for a second time and carry through with her previous threats – Mr. Hinson was entitled to retrieve the weapon so that it could not be used against him. In other words, "[he] was lawfully entitled to arm [himself] in self-defense *in case deadly force was necessary*, but that the lethal charge was fired accidentally." *McCaskill*, 300 S.C. at 258, 387 S.E.2d at 269 (emphasis added). As a result, his possession of the gun was lawful, and when it accidentally discharged due to his negligently holding it by the trigger he was entitled to a charge of involuntary manslaughter. The judge completely ignored the reasoning that Mr. Hinson was entitled to arm himself vis a vis Andina Lee and her

threatening behavior, and her focus on whether or not Mr. Salley had a weapon was wrong.

Ultimately, "the jury should have been allowed to determine how the shooting occurred," *Mekler*, 379 S.C. at 17, 664 S.E.2d at 479, and to not charge the finder of fact with the elements of involuntary manslaughter was reversible error.

CONCLUSION

Judge Benjamin erred by dismissing a juror when she herself recognized the juror had not intentionally concealed his limited knowledge of the general identity of an after the fact witness. Further, Judge Benjamin erred by failing to charge the jury with the elements of involuntary manslaughter when evidence in the record supported the charge.

As a result of either or both of these errors of law, this Court should reverse Mr. Hinson's conviction and remand the case to the Richland County Court of General Sessions for a new trial.

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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR.

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
DeAndrea G. Benjamin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMAAL HINSON,

APPELLANT

Appellate Case No. 2011-203569

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 18th day of June, 2013.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 18th day of June, 2013.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 2, 2013.