STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Newberry County

Frank R. Addy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CLIFTON CURTIS BOOZER,

APPELLANT

APPELLATE CASE NO. 2018-001542

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in failing to instruct the jury on the lesser-included offense of involuntary manslaughter where the evidence indicated Appellant choked the deceased only after the deceased brandished a knife and threatened Appellant, the two struggled over the knife, and Appellant believed the deceased was trying to get a second knife?

STATEMENT OF THE CASE

On July 14, 2017, a Newberry County grand jury indicted Appellant for murder (2017-GS-36-00290). R. 660-661. On August 6-10, 2018, the state, represented by Dale Scott and Taylor Daniel, called the case to trial before the Honorable Frank R. Addy and a jury. R. 1. Charles Verner represented Appellant. R. 1. The jury found Appellant guilty as charged. R. 648, l. 25 – R. 649, l. 5. Judge Addy sentenced Appellant to life imprisonment without the possibility of parole. R. 659, ll. 15-17; R. 662.

On August 20, 2018, Appellant served his notice of appeal. This brief follows.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). "An appellate court will not reverse the trial judge's decision regarding jury charges absent an abuse of discretion." State v. Santiago, 370 S.C. 153, 159, 634 S.E.2d 23, 26 (Ct. App. 2006). An appellate court is bound by a trial court's factual findings unless they are clearly erroneous. Wilson, 345 S.C. at 6, 545 S.E.2d at 829. "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 166-167 (2007). "The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand is an error of law." Id. at 570, 647 S.E.2d at 167.

Generally, the trial court is required to charge only the current and correct law of South Carolina. Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004). "The law to be charged to the jury is determined by the evidence presented at trial." State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). "The trial court is required to charge a jury on a lesser-included offense if there is evidence from which it could be inferred that the defendant committed the lesser, rather than the greater, offense." State v. Sams, 410 S.C. 303, 308, 764 S.E.2d 511, 513 (2014). "In determining whether the evidence requires a charge on a lesser-included offense, the [appellate court] must view the facts in the light most favorable to the defendant." Id. at 308, 764 S.E.2d at 513. "The charge request is properly rejected when there is no evidence tending to show the defendant was guilty of the lesser offense." Id. "It has long been the law in this State that 'to warrant the court in eliminating the offense of manslaughter it should very clearly appear that there is *no evidence whatsoever* tending to reduce the crime from

murder to manslaughter.'" Casey v. State, 305 S.C. 445, 447, 409 S.E.2d 391, 392 (1991) (citing State v. Norris, 253 S.C. 31, 35, 168 S.E.2d 564 (1969)); see also State v. Crosby, 335 S.C. 47, 51, 584 S.E.2d 110, 112 (2003) ("A trial court should refuse a lesser included offense only where there is no evidence the defendant committed the lesser rather than the greater offense.").

ARGUMENT

The trial judge erred in failing to instruct the jury on the lesser-included offense of involuntary manslaughter where the evidence indicated Appellant choked the deceased only after the deceased brandished a knife and threatened Appellant, the two struggled over the knife, and Appellant believed the deceased was trying to get a second knife.

Relevant facts

The only eyewitness to the death of the deceased was Appellant. Immediately after her death, Appellant contacted the authorities to report her death. R. 21, l. 22 – R. 22, l. 23. When the police arrived, Appellant told them "things went too far." R. 34, ll. 22-23. Later that day, during an audio recorded interrogation, Appellant explained what happened that morning. State's Exhibit #60.

Appellant and the deceased were in an on-again, off-again romantic relationship for six years. State's Exhibit #60; R. 413, ll. 19-22; R. 427, ll. 11-13; R. 450, l. 22 – R. 451, l. 2-4; R. 467, ll. 11-13; R. 491, l. 25 – R. 492, l. 2. Shortly before May 3, 2017, Appellant and the deceased broke up. State's Exhibit #60. However, on Monday, May 1, 2017, the deceased and Appellant met at Appellant's sister's house when the deceased's car broke down. State's Exhibit #60; R. 472, l. 4 – R. 473, l. 18; R. 501, l. 9 – R. 502, l. 25; R. 524, l. 22 – R. 526, l. 7.

Thereafter, on the morning of May 3, Appellant went to her home in order for the two to reconcile. State's Exhibit #60; R. 227, ll. 1-7; R. 234, ll. 3-14. After the two talked and worked out their differences, they reconciled by having sex. State's Exhibit #60. However, immediately following their lovemaking, the deceased turned into a different person. State's Exhibit #60. She began threatening Appellant. State's Exhibit #60. She spat on him and dared him to hit her. State's Exhibit #60. The deceased then grabbed a knife, which she used to threaten Appellant.

State's Exhibit #60. While Appellant and the deceased struggled over the knife, both fell down on the couch. State's Exhibit #60. It was then that the deceased was cut with the knife. State's Exhibit #60. When the deceased saw her blood, she panicked and began swinging at Appellant. State's Exhibit #60.

During the ensuing chaos and confusion, the deceased fell on the floor. State's Exhibit #60. Appellant believed the deceased was looking for another knife. State's Exhibit #60. Therefore, Appellant began choking the deceased in order to get her to stop. State's Exhibit #60. Unfortunately, Appellant choked her for too long and she ultimately died. R. 281, ll. 14-18.

Thus, there was no question that Appellant killed the deceased. The issue before the jury was whether Appellant committed murder, committed a lesser offense, such as voluntary manslaughter or involuntary manslaughter, or whether Appellant acted in self-defense.

During the charge conference, defense counsel requested a jury instruction on involuntary manslaughter. R. 543, ll. 5-7. Counsel argued that

> if the jury finds that he was defending himself, which would be a lawful activity, even in an argument or confrontation between girlfriend and boyfriend, if the jury found that he was defending himself or that he was trying to stop the fight lawfully, then he was reckless to the degree of fore he used to stop her from getting agitated and confrontational, ... the jury could very well find that if ... somebody was just trying to subdue somebody, but they used reckless force in regard - - they used force indifferent towards the safety, which would be the reckless, likely to cause harm-type behavior, the jury could say well, we understand him trying to calm her down, but we think that force was indifferent or reckless to her personal safety and led to her [death], but he did not have the intent before to kill her.

R. 543, l. 11 – R. 544, l. 3.

The state countered, arguing that Appellant's statement indicated "he intended to kill her, albeit in self-defense." R. 544, ll. 12-13. Citing State v. Sams, 410 S.C. 303, 764 S.E.2d 511

(2014), the state argued that self-defense and involuntary manslaughter were mutually exclusive in "this particular situation." R. 544, ll. 13-16.

To defeat this argument, defense counsel noted that in Sams, the Supreme Court recognized "authority for [the] proposition that self-defense charge and involuntary manslaughter charge are not mutually exclusive as long as there's evidence to support both charges." R. 546, ll. 20-24. Noting that the "quintessential situation where both involuntary manslaughter and self-defense have been justified in all circumstances where there is evidence of negligent handling of a weapon, gun, or evidence that the victim and defendant were engaged in a struggle over a weapon," defense counsel explained the evidence showed Appellant and the deceased were struggling over a knife. R. 546, l. 24 – R. 547, l. 6.

The trial judge viewed a struggle over a knife as "a little different" from "negligently handling a firearm." R. 547, ll. 13-15. The judge indicated he was not inclined to instruct the jury on the lesser-included offense of involuntary manslaughter. R.548, ll. 8-13. When the judge's instruction failed to include involuntary manslaughter, defense counsel renewed his request for the instruction, which was denied again by the judge. R. 646, l. 25 – R. 647, l. 2.

Discussion

A jury charge to a lesser-included offense is required when the evidence warrants such an instruction. State v. Geiger, 370 S.C. 600, 606, 635 S.E.2d 669, 673 (Ct. App. 2006). South Carolina law mandates a jury instruction on a lesser-included offense when there is any evidence from which it could be inferred that the lesser, rather than the greater, offense was committed. State v. Watson, 349 S.C. 372, 375, 563 S.E.2d 336, 337 (2002); see also State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241, 241 (1996). In other words, the evidence must allow "a rational inference" that the defendant committed the lesser offense. Geiger, 370 S.C. at 607, 635 S.E.2d

at 673. In determining whether such a rational inference exists the court must examine the totality of evidence. Id. As this Court explained in State v. Patterson, 337 S.C. 215, 233, 522 S.E.2d 845, 854 (Ct. App. 1999), "[i]n order to justify a charge of a lesser included offense, the evidence must be capable of sustaining either the greater or the lesser offense, depending on the jury's view of the facts."

South Carolina law provides for two alternative definitions of involuntary manslaughter. "Involuntary manslaughter is (1) the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others." State v. Brayboy, 387 S.C. 174, 180, 691 S.E.2d 482, 485 (Ct. App. 2010) (citing State v. Wharton, 381 S.C. 209, 216, 672 S.E.2d 786, 789 (2009)); see also State v. Burris, 334 S.C. 256, 264-265, 513 S.E.2d 104, 109 (1999); State v. Sams, 410 S.C. 303, 309, 764 S.E.2d 511, 514 (2014) (citing State v. Tucker, 324 S.C. 155, 170, 478 S.E.2d 260, 268 (1996)). According to the statute, a person "may be convicted" of involuntary manslaughter "only upon a showing of criminal negligence," which the statute defines as "the reckless disregard of the safety of others." S.C. Code Ann. § 16-3-60. Further defining involuntary manslaughter, this Court has held that "[r]ecklessness is a state of mind in which the actor is aware of his or her conduct, yet consciously disregards a risk which his or her conduct is creating." State v. Pittman, 373 S.C. 527, 571, 647 S.E.2d 144, 167 (2008).

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 v. State, 305 S.C. 445, 447, 409 S.E.2d 391, 392 (1991).

Unintentional killing

As both definitions of involuntary manslaughter require the killing to be unintentional, an examination of that aspect applies to both and presents an ideal place to start the analysis. The *very* definition of "recklessness," which forms the crux of involuntary manslaughter, makes clear that the actor is aware of his conduct. See Pittman, 373 S.C. at 571, 647 S.E.2d at 167 (holding that recklessness is a state of mind in which the actor is aware of his or her conduct). In fact, the actor is even aware of the *risks* his conduct poses. See id. Nevertheless, the actor disregards those risks and engages in the conduct. Thus, a defendant may be found guilty of involuntary manslaughter even where there is some evidence that a killing was intentional, so long as there is also any evidence that the killing was unintentional. See also State v. Crosby, 335 S.C. 47, 53, 584 S.E.2d 110, 112 (2003).

Appellant acknowledges this Court has held that if a defendant fires a gun intentionally, the defendant is not entitled to a charge of involuntary manslaughter. See e.g., Sullivan v. State, 407 S.C. 241, 245, 754 S.E.2d 885, 887 (Ct. App. 2014) (stating that "[w]hen the victim was killed by a gunshot, and no evidence is presented showing the defendant fired the gun unintentionally, the defendant is not entitled to a charge of involuntary manslaughter"); State v. Morris, 307 S.C. 480, 484, 415 S.E.2d 819, 821-822 (Ct. App. 1991) (holding a jury charge on involuntary manslaughter was not required where "there was no evidence that Morris involuntarily pulled his gun and shot Burkhalter"). Appellant respectfully submits these cases have been wrongly decided as the focus must be on the killing, not the conduct. The definition of involuntary manslaughter is the "unintentional killing" of another. The adjective "unintentional" modifies the noun "killing." Thus, the question must be whether the killing was intentional, not whether the act that resulted in the killing was intentional. See State v. Sams, 410 S.C. 303, 317, 764 S.E.2d 511, 518 (2014) (Pleicones, J. dissenting) (explaining the courts err when the focus is "on whether the defendant

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

Comparing the definitions of involuntary manslaughter with accident is helpful. "For a homicide to be excusable on the ground of accident, it must be shown the killing was unintentional, the defendant was acting lawfully, and due care was exercised in the handling of a weapon." State v. Burriss, 334 S.C. 256, 259, 513 S.E.2d 104, 106 (1999) (citing State v. Goodson, 312 S.C. 278, 440 S.E.2d 370 (1994)). In order for accident to apply, the act, which caused the death, must have been unintentional. See Goodson, 312 S.C. at 280-281, 440 S.E.2d at 372 (explaining that a "[h]omicide is excusable on the ground of accident when it appears that the defendant was acting lawfully in self-defense and the victim was shot by accident through the unintentional discharge of a gun"); State v. MsCaskill, 300 S.C. 256, 259, 387 S.E.2d 268, 270 (1990) (relating that accident occurs through the unintentional discharge of a gun or the like). The distinction between accident and involuntary manslaughter is whether the actor intended to commit the act which caused the death. In an accident, the act must have been unintentional, but in cases of voluntary manslaughter, the act must have been intentional.

Here, there was no question that Appellant intended to restrain the deceased by choking her. His act was intentional. However, the evidence in the record, primarily from his audio recorded statement to police, indicated Appellant had no intent to kill the deceased.

Involuntary manslaughter - first definition

In addition to the requirement that the killing be unintentional, under the first definition, the defendant must be engaged in an unlawful activity not naturally tending to cause death or great bodily harm. The Supreme Court held Chatman was entitled to a charge on involuntary manslaughter where the facts presented fit under the first definition. State v. Chatman, 336 S.C.

149, 152, 519 S.E.2d 100, 101 (1999). In Chatman, the Court held Chatman "was engaged in an assault and battery" because he held the person in a chokehold. Id. However, the Court concluded "the battery was not such that naturally tends to cause death or great bodily harm." Id. More specifically, the Court explained that a "face-to-face 'choke hold'" was not an action that would naturally tend to cause death or serious bodily harm. Id. According to the Court, Chatman "was not attempting to strangle [the victim] with his hands." Id. at 153, 519 S.E.2d at 101-102. The Court noted that the choke hold used by Chatman, "[was] not the traditional strangulation type situation. [Chatman] was not attempting to strangle [the victim] by placing his hands around [the victim's] neck." Id., 336 S.C. at 153, 519 S.E.2d at 102. Thus, Chatman's "actions were not the kind which would naturally tend to cause serious bodily injury or death." Id.

Likewise, the jury could have determined Appellant was engaged in an unlawful activity – an assault and battery – not naturally tending to cause death or great bodily harm. Although Appellant told the police that he used both hands to choke the deceased, unlike Chatman, Appellant's actions were to restrain the deceased and not to cause her death, like Chatman. Appellant explained that he and the deceased were engaged in a heated argument during which the deceased brandished a knife. The deceased threatened Appellant repeatedly. The two struggled over the knife resulting in the deceased being cut. Only when Appellant believed the deceased was going for a second knife did he put his hands on her neck. Thus, Appellant was entitled to an involuntary manslaughter instruction because his actions fit within the first definition.

Involuntary manslaughter - second definition

The second definition of involuntary manslaughter requires the killing be unintentional and that the defendant be engaged in a lawful activity with reckless disregard for the safety of others. Analyzing the second definition of involuntary manslaughter, the Supreme Court held the trial judge

erred in failing to instruct the jury regarding involuntary manslaughter where the evidence supported the claim that the defendant was acting lawfully when he fired a gun killing another. State v. Burris, 334 S.C. 256, 265, 513 S.E.2d 104, 109 (1999). The Court explained that a court must analyze the principles of self-defense for the purpose of determining whether a person was engaged in a lawful act when a request for an instruction on involuntary manslaughter is made. Id. "[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." Id. at 262, 513 S.E.2d at 108; see also State v. Crosby, 335 S.C. 47, 52, 584 S.E.2d 110, 112 (2003).

The jury could have found Appellant was engaged in a lawful activity – self-defense – with reckless disregard for the safety of others. Appellant explained the deceased attacked him with a knife and verbally threatened him. Additionally, Appellant and the deceased struggled over a knife. When the deceased attempted to grab a second knife, Appellant put his hands on her neck in an act of self-defense. As Appellant told the first officer on the scene, it simply went "too far." Appellant's act of putting his hands on the deceased's neck was in reckless disregard for the safety of others. Appellant went "too far" by applying too much pressure and holding her for too long. Thus, the trial judge erred in failing to instruct the jury on involuntary manslaughter where Appellant's conduct fit within the second definition.

CONCLUSION

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

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of January, 2020.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

January 29, 2020

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