THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

Doyet A. Early, Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2018-001848

Case No. 2016-GS-10-00241-242

The State of South Carolina,

Respondent,

v.

William T. Gule, Jr., Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On February 8, 2016, the Charleston County Grand Jury indicted Appellant William Thomas Gule, Jr., for murder and possession of a weapon during the commission of a violent crime. R. 417 – 420.

On October 8, 2018, Appellant proceeded to trial before the Honorable Doyet A. Early and a jury. R. 1 – 416. Defense Counsel Christopher D. Lizzi represented Appellant, and Assistant Solicitors E. Culver Kidd, IV, and Edward R. Corvey, III, prosecuted the case on behalf of the State.

On October 10, 2018, the jury returned a verdict of guilty for both charges. R. 399, l. 3 – 402, l. 3. The Trial Court imposed concurrent sentences of forty (40) years imprisonment for the murder conviction and five (5) years imprisonment for the possession of a weapon during the commission of a violent crime conviction. R. 414, ll. 18-24.

This direct appeal follows.

RELEVANT FACTS

911 Call

On August 5, 2015, Appellant called the Charleston County Consolidated Dispatch 911 Center and stated the following, in relevant part, to the dispatcher:

> 911 Dispatcher: Ok. Tell me exactly what happened.
>
> Appellant: Me and my baby mother got into an ar—disagreement about me hav—keeping my son today, and we had a st—a little tussle and I ended—accidentally ended up shooting her. I don't know if she is dead….

(State's Exhibit #72: CD – 911 Call). Appellant remained on the call until he could voluntarily surrender to the responding police officers. (State's Exhibit #72: CD – 911 Call).

Detective James Jackson

Detective James Jackson of the City of Charleston Police Department testified that he saw "a small cut on the back of one of [Appellant's] hands like in the area in the base of the thumb." R. 92, ll. 18-20.

SLED Firearms Examiner James Green

At trial, the State called forensic scientist, James Green, who testified that he is a firearms examiner at the South Carolina Law Enforcement Division (SLED). R. 184, ll. 6-23. Mr. Green testified, "the main science we [firearm examiners] study is firearm and toolmark identification." R. 184, ll. 22-23. After providing his training and experience as a firearms examiner, the Trial Court qualified Mr. Green without objection "as an expert in firearm's examination." R. 186, ll. 13-14.

Mr. Green stated that he examined the pistol in this case. R. 188, l. 3 – 190, l. 5. He also explained the general process for examining the functionality of a pistol. R. 189,

ll. 7-16. Mr. Green then testified that the Glock pistol in this case had "*an aftermarket connector on it . . . that was supposed to make the trigger pull lighter*" but added "in my testing it was just normally what I would expect to find out of a Glock." R. 190, ll. 1-5 (emphasis added). Mr. Green also described how the "internal safety mechanisms" on a Glock work. R. 190, l. 16 – 194, l. 20.

Mr. Green testified, "When I tested [the pistol in this case] I had to pull the trigger for each shot." R. 194, ll. 21-24. He also testified that he "shot [the pistol] three times" and that it did not double-fire or misfire. R. 195, ll. 4-8. Specifically, Mr. Green stated, "In that limited shooting I did, it worked as intended." R. 195, ll. 6-8. He then maintained that the "six-and-a half pound trigger pull would be like lifting three-quarters of a gallon of water with one finger." R. 195, ll. 9-14.

On cross-examination, Mr. Green conceded that he did not test-fire the pistol in rapid succession: "So it is not like I am shooting bang, bang, bang. I will shoot, wait a few second, shoot, wait a few seconds, shoot again." R. 202, ll. 19-21. He also admitted that he had seen technical bulletins where Glock pistols had accidental firings. R. 202, l. 22 – 203, l. 5. Mr. Green further admitted that the aftermarket connector rod to reduce trigger-pull had been "properly installed" and that the manufacture listed the trigger-pull on this pistol as five-and-a-half pounds. R. 204, ll. 7-23.

Mr. Green also conceded that, "if the connector is malfunctioning or if it is deformed or has it bent . . . it could affect the way the gun functions, yes, sir." R. 205, ll. 4-9. Mr. Green acknowledged that a gun can be test-fired one day and be fine, but then have an issue the following day because of mechanical issues. R. 206, ll. 3-13.

Detective Thomas Bailey's Testimony

Detective Thomas Bailey of the City of Charleston Police Department testified, "In preparation for the trial I had to check this firearm out of evidence in order for an expert witness for the defense to test fire this gun and examine the gun." R. 229, l. 20 – 230, l. 4. Detective Bailey also testified that he took the gun to the firing range and the following people were present: "defense counsel, the Solicitor's Office, myself, the expert witness for the defense, … the CPD firearms range instructor, [and] the lead instructor[.]" R. 230, ll. 5-9. Detective Bailey maintained the gun was test fired "about 30" times, and he did not see any misfires or malfunctions. R. 230, ll. 1-16.

Dale Hanna's Testimony

Defense Counsel objected to Assistant Solicitor Kidd calling the firearms expert hired by the defense, Dale Hanna, to testify during the State's case-in-chief. R. 251, l. 9 – 252, l. 13. Assistant Solicitor Kidd maintained,

> I just want to ask [Dale Hanna] about firing the weapon and that there were no double fires, no misfires . . . although his Glock certification has lapsed . . . he is amply qualified to be a firearm's expert. Although I don't plan on . . . qualifying him [as an expert.]"

R. 252, ll. 19-24. Defense Counsel argued that the State never listed Mr. Hanna as a State's witness and that "they are calling him to try to bolster their own firearm's expert testimony or to repair it." R. 253, ll. 5-8. Defense Counsel also noted that Mr. Hanna's Glock certification had lapsed, which "is why we elected not to call him as an expert in the case." R. 253, ll. 9-13. Assistant Solicitor Kidd reiterated that he was not calling Mr. Hanna to present opinion evidence ("No opinion whatsoever"). R. 253, ll. 21-22. The Trial Court ruled, "I am going to allow it." R. 253, l. 25.

Dale Hanna testified as to his extensive training and experience with firearms. R. 254, l. 16 – 255, l. 2. He also testified that he test-fired the pistol in this case ("I think we fired something like 23 rounds total."). R. 255, ll. 3-18. Mr. Hanna further stated that he shot in fast and slow succession. R. 255, ll. 19-21. After refreshing his recollection, Mr. Hanna corrected his earlier testimony and noted he discharged "[t]hirty-four rounds". R. 256, ll. 4-12.

Mr. Hanna further stated that the pistol did not jam, double-fire, triple-fire, fire four times in a row, or have any malfunctions. R. 257, ll. 13-24. Assistant Solicitor Kidd asked, "And just to be clear, I didn't arrange for you to be there for that test firing, did I?" and Mr. Hanna replied, "No, Sir." Assistant Solicitor Kidd then asked, "Who did that" and Mr. Hanna responded, "The defense. Mr. Lizzi did." R. 257, ll. 10-14.

On cross-examination, Defense Counsel asked Mr. Hanna, "There have been reported accounts of accidental firings in Glocks?" and he replied, "To my knowledge it would be more negligent fires." R. 260, ll. 13-17.

On re-direct, Assistant Solicitor Kidd inquired for Mr. Hanna's opinion, "Have you ever heard of a gun firing - - or a Glock firing four times accidentally?" and he responded, "No, sir." R. 261, ll. 8-10.

Motion for Mistrial

After several witnesses testified, Assistant Solicitor Kidd told the Trial Court, "Your Honor, and I want to make sure this is on the record. I have been told by my bosses to bring something up with regard to me calling the defense expert witness yesterday[.]" R. 343, ll. 2-5. The Trial Court interjected, "You didn't call him as an expert". R. 343, l. 6. Assistant Solicitor Kidd explained,

> I think there is case law that prevents me from calling [an] expert witness that were retained by the defense without undue hardship under … State v. Jones. I believe he was a fact witness. I believe it is not applicable. But I do want to make the court aware of it.

R. 343, ll. 9-16.

Defense Counsel noted, "At the time that the witness was called, Dale Hanna, the expert for the defense, we objected." R. 345, ll. 10-12. Defense Counsel then moved for a mistrial and argued the following:

> [T]he State did not set forth any compelling reason why they would have a substantial hardship to call that witness. And the State had its own witness . . . The fact that their witness did not testify as they hoped he would testify would not be a compelling . . . reason for the State. . . . The fact that this witness's testimony was so crucial in the State's case as to proof of the functioning of the weapon we would make a motion for a mistrial at this time[.]

R. 344, ll. 13-23.

In response, the State attempted to distinguish Dale Hanna's testimony from *State v. Jones*, 383 S.C. 535, 681 S.E.2d 580 (2009) by maintaining (1) the State did "not elicit any opinion testimony whatsoever from the witness", (2) "the exact same testimony was already in evidence through Detective Bailey who was present", (3) and "nothing that this witness testified about was protected or privileged in any way." R. 344, l. 24 – 345, l. 8.

The Trial Court noted, "Well, the question wouldn't be coming up but for the fact that the defense had engaged him to I guess conduct a test on the gun." R. 345, ll. 15-17. The Trial Court opined, "It is not akin to that expert taking that gun by himself, doing certain things, and rendering an opinion to the defense counsel that he can either use or not use." R. 345, l. 24 – 346, l. 1. The Trial Court found Dale Hanna "certainly did not offer any opinions and only testified about what he did at a test where everyone was

present." R. 346, ll. 8-11.

Assistant Solicitor Kidd stated, "I do have a very articulable and real undue hardship" because "Jaime Green, my expert, had collapsed lungs and was literally out of the office for three months prior to trial." R. 346, ll. 12-15. He also maintained, "I was unable to meet with him, talk with him, unable to run tests with him with the firearm." R. 346, ll. 15-17. Assistant Solicitor Kidd further noted that, if the Trial Court believed there was an error, a curative instruction would cure any prejudice. R. 347, ll. 18-21.

Defense Counsel argued, "Your Honor, the fact that the prosecutor went at length in inquiring as to witness's skills, knowledge, professional abilities, and went at length as to disguise almost the qualification of an expert, the same questioning that would go to an expert witness[.]" R. 348, ll. 2-5. Defense Counsel also noted, "[The State] subpoenaed this witness a week before they knew their witness deficiencies and had him under subpoena and not listed on their witness list . . . and basically surprised at trial[.]" R. 348, ll. 9-13. Defense Counsel further argued, "I believe that a curative instruction would not suffice especially when he has testified as to such a crucial crux in this case." R. 348, ll. 15-18.

The Trial Court ruled as follows:

> [W]hat [Dale Hanna] testified to is certainly not any invasion of the attorney-client or work-product situation . . . What he was doing is conducting a test that everybody was there to see . . . It is not like he went out there by himself and did some stuff and issued a report to you and then they are trying to get into that report that was issued to you. . . . It does give me some concern, however. And I applaud the State for bringing it to the court's attention . . . these decisions cited here in State v. Jones talk about prosecutorial discovery of the expert's findings and opinion. And I don't see any case dealing with what we have here factually. . . . I am going to deny the motion for a

> mistrial and find that there has been no prosecutorial misconduct or that the way this witness was used does not violate the holdings in State v. Jones.

R. 348, l. 19 – 349, l. 19.

Decedent's Sister Patricia Pye's Testimony

At trial, the State sought to admit testimony from the Decedent's sister, Patricia Pye, regarding alleged threats and bruises made by Appellant. R. 262, ll. 15-19. The Trial Court held an *in-camera* hearing for the State to proffer this testimony. R. 262, l. 24 – 271, l. 2. Ms. Pye admitted that she never saw Appellant assault her sister. R. 263, l. 24 – 264, l. 1. Ms. Pye maintained that she saw marks on her sister's "neck that looked like fingerprints had been on her neck, like he - - somebody had placed their fingers on her neck. And I seen marks on her arm that looked like somebody grabbed her." R. 264, ll. 2-7. Ms. Pye also claimed that the Decedent told her that "her and [Appellant] had got into a struggle. But she did not go any further in detail." R. 264, ll. 8-10.

Ms. Pye further stated that she overheard a phone call between Appellant and the Decedent approximately three-to-four days prior to the shooting where Appellant allegedly said, "he told her that if he could not have her that nobody else would and he would see to it." R. 264, ll. 11-25. Ms. Pye also explained that she purportedly saw text messages between the Decedent and Appellant:

> I seen text messages from [Appellant] where he called her fat and ugly and degraded her and telling her he didn't want her, telling her he had another woman, that he didn't want anything to do with her, that she wasn't going to ever make a good wife. He constantly belitted her, and he constantly told her he had other women, that they were better than her.

R. 265, ll. 1-9.

Furthermore, Ms. Pye maintained the text messages were a "constant thing" and occurred "[e]verytime they broke up." R. 265, ll. 10-14. Ms. Pye also claimed there was a text message from *about one year prior to the shooting* where Appellant "had told [the Decedent] he was going to choke her out and put her against the wall." R. 265, ll. 17-23 (emphasis added). Ms. Pye further stated Appellant had moved out of the home one month before the shooting and "didn't have a key". R. 267, ll. 20-22. Ms. Pye admitted that the Decedent never called the police on Appellant. R. 267, l. 25 – 268, l. 6.

Defense Counsel argued that Patricia Pye's testimony should be excluded, citing Rules 403 and 404(b) of the South Carolina Rules of Evidence. R. 268, l. 16 – 269, l. 7. Defense Counsel noted that she "never saw [Appellant] put his hands on her" and that Decedent did not explain specifically how the bruises occurred. R. 268, ll. 17-20. Defense Counsel also challenged the testimony regarding the alleged text messages and overheard phone call. R. 268, l. 20 – 269, l. 7.

In response, the Trial Court found, "I think the testimony that this lady has proffered certainly would be relevant as to whether or not there is or is - - was or was not an accident or some type of mistake." R. 269, ll. 15-19. The Court further held, "I think the probative value when we are dealing with a case being defended on the legal theory of accident or mistake . . . the prejudicial value would not outweigh the probative value." R. 269, l. 24 – 270, l. 4. The Trial Court ultimately ruled, "I am going to respectfully allow it. And I think you have protected yourself on the record." R. 270, ll. 5-6.

Defense Counsel further argued "the acts that were so remote as to being a year out that how could elicit" when the Trial Court interjected, "Well, from what she - - just from her testimony was that it was an ongoing, toxic relationship . . . I do have a little

trouble being a year out. I may preclude that testimony . . . Well, considering the totality of the circumstances, the magnitude of what all is going on here, I am going to allow that testimony." R. 270, l. 9 – 271, l. 2.

The relevant portions of Ms. Pye's testimony before the jury were consistent with her proffered testimony. R. 274, l. 11 – 275, l. 8; R. 276, ll. 8-14; R. 276, l. 23 – 278, l. 4. Ms. Pye also testified that there were occasions where Appellant spent the night at the Decedent's house numerous times ***after*** he allegedly moved out of the residence. R. 280, l. 15 – 281, l. 8 (emphasis added). Notably, Ms. Pye admitted on cross-examination the Decedent and Appellant obtained their Concealed Weapons Permits together, and they would fire guns together. R. 288, l. 24 – 289, l. 2.

Decedent's Friend Lisa Villeponteaux's Testimony

During an *in-camera* hearing, Lisa Villeponteaux maintained that she saw bruising on the Decedent "[p]robably months before" the shooting. R. 291, l. 24 – 292, l. 8. She also stated that the Decedent told her the bruises came from "pushing and shoving" type arguments. R. 292, ll. 9-18. The State questioned Ms. Villeponteaux regarding alleged Facebook messenger posts between her and the Decedent. R. 292, l. 19 – 296, l. 13. Ms. Villeponteaux admitted that she never saw Appellant hit or threaten the Decedent. R. 291, ll. 22-23; R. 296, ll. 17-19.

Defense Counsel argued, "The only thing that I would have a problem with it would be the bruises[.]" R. 296, ll. 23-24. The Trial Court asked Ms. Villeponteaux, "Did she [the Decedent] ever tell you who caused the bruises?" and Ms. Villeponteaux replied, "No, sir." R. 297, ll. 2-4. The Trial Court then ruled, "All right. I am going to allow all the testimony based on my prior reasoning except for the bruising." R. 297, ll.

5-8.

Requested Jury Instructions

At the close of evidence, Defense Counsel "request[ed] a charge of involuntary manslaughter." R. 362, ll. 13-14. In response, Assistant Solicitor Kidd stated, "I don't believe there to be any evidence on the record of involuntary [manslaughter] for sure." R. 362, ll. 17-18. The Trial Court interjected:

> I don't see where there is any record of any evidence of that [involuntary manslaughter]. I mean it is either strictly the defense of accident or - - and then they [the jury] have got to decide if it is not an accident whether or not it is with malice aforethought. And it seems to me it is all or none.

R. 362, ll. 19-24.

After Defense Counsel also requested a jury instruction for voluntary manslaughter, Assistant Solicitor Kidd noted, "The only evidence in the record is the 911 call in which the [Appellant] said we got into a tussle and I accidentally shot her." R. 362, l. 25 – 363, l. 8. Assistant Solicitor Kidd reluctantly admitted, "the only injury on [Appellant] is a miniscule scratch on his hand." R. 364, ll. 1-11. The Trial Court ultimately held, "I think it is either a murder case or the defense of accident will apply." R. 364, ll. 16-17. The Trial Court subsequently acknowledged that Defense Counsel's requests for the lesser-included offenses of voluntary and involuntary manslaughter were preserved for appellate review. R. 396, l. 22 – 397, l. 3.

ARGUMENTS

I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST TO CHARGE THE JURY ON THE LESSER-INCLUDED OFFENSE OF INVOLUNTARY MANSLAUGHTER.

"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). "If there is ***any evidence*** to warrant a jury instruction, a trial court must, ***upon request***, give the instruction." *State v. Smith*, 391 S.C. 408, 412, 706 S.E.2d 12, 14 (2011) (emphasis added). Notably, "a trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence" presented at trial. *Hill*, 315 S.C. at 262, 433 S.E.2d at 849.

In determining whether the evidence requires a charge on a lesser included offense, the court views the facts in a light most favorable to the defendant. *See State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 **(**2001**)**. "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) (emphasis added); *See State v. Burriss*, 334 S.C. 256, 513 S.E.2d 104 (1999); *Cf. Tate v. State*, 351 S.C. 418, 426, 570 S.E.2d 522, 527 (2002) (finding "[m]alice is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong.").

Furthermore, "[i]n determining the issues to be submitted to the jury . . . all of the testimony, ***both for the State and the defense***, must be considered[.]" *Knoten*, 347 S.C. at 309, 555 S.E.2d at 398 (quoting *State v. Moore*, 245 S.C. 416, 420-21, 140 S.E.2d 779,

781 (1965) ("[t]he fact that the defendant interposed the defense of alibi did not deprive him of the benefit of the reasonable inferences to be drawn from the testimony relative to the degree of the offense committed, for the burden of establishing the offense charged rested upon the State.") (emphasis added)). Our Supreme Court reiterated this rule in *Knoten* by holding, "[b]ecause there was evidence - *in this case introduced by the State* - supporting a conviction for the lesser included offense of voluntary manslaughter, we reverse [Knoten's] conviction[.]" *Id.* (emphasis added).

Involuntary Manslaughter

In *State v. Scott*, our Supreme Court noted that involuntary manslaughter is "the unintentional killing of another without malice while engaged in either (1) the commission of some unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm, or (2) the doing of a lawful act with a reckless disregard for the safety of others." *Scott*, 414 S.C. 482, 487, 779 S.E.2d 529, 531 (2015) (quoting *State v. Sams*, 410 S.C. 303, 309, 764 S.E.2d 511, 514 (2014)). Involuntary manslaughter mandates a showing of criminal negligence, defined as "the reckless disregard of the safety of others." S.C. Code Ann. § 16-3-60 (2015). Notably, "[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 (2007).

Our Supreme Court has found that an involuntary manslaughter charge was appropriate in numerous shooting-death cases where there was evidence of an accidental trigger-pull / negligent handling of a firearm. *See, e.g., State v. Mekler*, 379 S.C. 12, 15-16, 664 S.E.2d 477, 479 (2008) (explaining an involuntary manslaughter instruction was

warranted when testimony supported defendant's assertion that she unintentionally shot victim while acting in reckless disregard for the safety of others by negligently handling a loaded shotgun); *State v. Light*, 378 S.C. 641, 648-49, 664 S.E.2d 465, 468-69 (2008) (holding an involuntary manslaughter instruction was warranted when defendant testified he was struggling with his girlfriend to take possession of a loaded shotgun when the gun unintentionally discharged); *State v. Crosby*, 355 S.C. 47, 53, 584 S.E.2d 110, 112-13 (2003) (finding defendant's contradictory statements that he pulled the trigger and did not intend to pull the trigger were sufficient to warrant a jury instruction on involuntary manslaughter).[1]

Our Supreme Court has also held that the proper moment for analyzing whether a defendant's activity was lawful for purposes of charging involuntary manslaughter is at the time of the killing. *See Burriss*, 334 S.C. 256, 513 S.E.2d 104 (finding "the pivotal issue is whether Appellant engaged in lawful activity at the time of the killing."). The *Burriss* Court noted there is a difference between a person being lawfully *armed* in self-defense and *acting* in self-defense. *Id*. at 265, 513 S.E.2d at 109, n. 10; *See Brayboy*, 387 S.C. at 180, 691 S.E.2d at 486 (citing *Light*, 378 S.C. at 648, 664 S.E.2d at 468, n. 6

[1] Additional cases where our appellate courts have found that a defendant's negligent handling of a loaded firearm supported a charge for involuntary manslaughter are as follows: *State v. Causer*, 87 S.C. 516, 517, 70 S.E. 161, 161 (1911) (defendant took a hunting rifle away from decedent, who had been pointing the gun at two little boys, and defendant was walking away with the gun when, "in some unexplained way it went off, killing the [decedent], who had walked up behind"); *State v. Tucker*, 86 S.C. 211, 212, 68 S.E. 523, 524 (1910) (defendant was "rubbing [a] pistol" while sitting next to his half-brother, and "without knowing that [the pistol] was loaded or that his brother was in front of him, [defendant] pulled the trigger without meaning to do so"); *State v. Revels*, 86 S.C. 213, 214-215, 68 S.E. 523, 523 (1910) (a decedent grabbed and pulled on the defendant's cocked gun when it fired, fatally shooting decedent in the knee); *State v. Gilliam*, 66 S.C. 419, 421, 45 S.E. 6, 7 (1903) (defendant and his decedent wife were "in a playful tussle" for the possession of a pistol when the gun unintentionally fired).

(finding "that at the point of the analysis of determining whether one is armed in self-defense, the Court is concerned only with whether [the defendant] had a right to be armed for purposes of determining whether he was engaged in a lawful act, i.e. was lawfully armed, and not whether he actually acted in self-defense when the shooting occurred.") (internal citations omitted).

The concurring opinion in *State v. Goodson*, 312 S.C. 278, 440 S.E.2d 370 (1994) addressed the meaning of lawfully armed in self-defense, citing *State v. McCaskill*, 300 S.C. 256, 387 S.E.2d 268 (1990) (finding a person armed in self-defense is in lawful possession of a weapon). In *McCaskill*, the defendant was in lawful possession of the gun because she was within the confines of her own home. *See* S.C. Code Ann. § 16-23-20 (provides, in pertinent part: "It is unlawful for anyone to carry about the person any handgun, whether concealed or not, ***except as follows***, unless otherwise specifically prohibited by law: . . . (8) a person in his home or upon his real property or a person who has the permission of the owner or the person in legal possession or the person in legal control of the home or real property; … (10) … moving one's residence . . . (12) a person who is granted a permit under provision of law by the State Law Enforcement Division to carry a handgun about his person, under conditions set forth in the permit, and while transferring the handgun between the permittee's person and a location specified in item (9)") (emphasis added).

Furthermore, "a self-defense charge and an involuntary manslaughter charge ***are not mutually exclusive***, as long as there is any evidence to support both charges." *Mekler*, 379 S.C. at 16, 664 S.E.2d at 479 (emphasis added) (citing *Casey v. State*, 305 S.C. 445, 409 S.E.2d 391 (1991) (finding error by trial court in not charging involuntary

manslaughter, even though the trial court charged murder, voluntary manslaughter, accident, and self-defense); *Crosby,* 355 S.C. 47, 584 S.E.2d 110 (finding it improper to hold that any evidence of an intentional shooting negates evidence from which any other inference may be drawn); *Light*, 378 S.C. 641, 664 S.E.2d 465.

Discussion

In this case, the Trial Court erred in failing to charge the jury on the lesser-included offense of involuntary manslaughter. The 911 recording admitted into evidence by the State coupled with the Trial Court's decision to charge the defense of accident entitled Appellant to an involuntary manslaughter charge pursuant to the "any evidence" standard. *See Knoten,* 347 S.C. at 309, 555 S.E.2d at 398; *Burriss*¸ 344 S.C. at 259, 513 S.E.2d at 106. Specifically, the State introduced the following evidence by publishing the 911 call to the jury: "Me [Appellant] and my baby mother got into an ar—disagreement about me hav—keeping my son today, and we had a st—a little ***tussle*** and I ended—***accidentally*** ended up shooting her. I don't know if she is dead…." (State's Exhibit #72: CD – 911 Call) (emphasis added).

Assistant Solicitor Kidd acknowledged, "The only evidence in the record is the 911 call in which the [Appellant] said we got into a tussle and I accidentally shot her", and he grudgingly admitted, "the only injury on [Appellant] is a miniscule scratch on his hand." R. 362, l. 25 – 364, l. 11. Detective James Jackson testified that he saw "a small cut on the back of one of [Appellant's] hands like in the area in the base of the thumb." R. 92, ll. 18-20. Defense Counsel asked Dale Hanna on cross-examination, "There have been reported accounts of accidental firings in Glocks?" and he replied, "To my knowledge it would be more negligent fires." R. 260, ll. 13-17.

The Decedent's sister, Patricia Pye, testified that there were numerous occasions where Appellant spent the night at the Decedent's house after he allegedly moved out of the residence. R. 280, l. 15 – 281, l. 8. Notably, Ms. Pye admitted on cross-examination the Decedent and Appellant obtained their Concealed Weapons Permits together, and they would fire guns together. R. 288, l. 24 – 289, l. 2.

In a light most favorable to Appellant, the State's evidence created an issue of fact for the jury to determine whether the shooting was unintentional and reckless. *Id.*, 347 S.C. at 302, 555 S.E.2d at 394. Notably, the Trial Court's decision to charge the jury on the defense of accident proves that the Trial Court found some evidence Appellant acted lawfully. *See State v. Chatman*, 336 S.C. 149, 153, 519 S.E.2d 100, 102 (1999) (finding "[a] homicide will be excusable on the ground of accident when (1) the killing was unintentional, (2) the defendant was acting lawfully, and (3) due care was exercised in the handling of the weapon."); *see also Wigington v. State*, 413 S.C. 578, 776 S.E.2d 407 (Ct. App. 2015); *Burriss*, 334 S.C. 256, 265, 513 S.E.2d 109 n. 10 (noting "there is a difference being lawfully *armed* in self-defense and *acting* in self-defense.") (emphasis in original); S.C. Code Ann. § 16-23-20(8)(10)(12); S.C. Code Ann. § 16-23-410 (permitting a person to point or present at firearm at another person in self-defense).

This Court noted in *Wigington v. State*, 413 S.C. 578, 776 S.E.2d 407, "The distinction between involuntary manslaughter's second definition and accident is essentially the manner in which the defendant handles the weapon." *Compare Chatman*, 336 S.C. at 153, 519 S.E.2d at 102 (setting forth the elements of the defense of accident) *with State v. Smith*, 391 S.C. 408, 414, 706 S.E.2d 14, 15 (2011) (defining involuntary manslaughter under the second definition as "the unintentional killing of another without

malice, while engaged in a lawful activity with reckless disregard for the safety of others").

The Trial Court's decision to allow the charge of accident illustrates an implicit finding that there was some evidence of lawful activity (i.e., evidence of Appellant being lawfully armed). *See Burriss*, 344 S.C. at 259, 513 S.E.2d at 106 (finding that 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 the weapon.). The State also failed to prove there is no evidence in the record that Appellant was in lawful possession of the weapon based on the accident charge. *See* S.C. Code Ann. § 16-23-20(8)(10)(12); S.C. Code Ann. § 16-23-410. Therefore, Appellant was entitled to have a jury instruction for involuntary manslaughter submitted to the jury.

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II. THE TRIAL COURT ERRED IN ALLOWING THE DECEDENT'S SISTER TO TESTIFY ABOUT BRUISES AND THREATS ALLEGEDLY MADE BY APPELLANT BECAUSE THESE PRIOR BAD ACTS WERE NOT PROVEN BY CLEAR AND CONVINCING EVIDENCE, WERE TOO REMOTE, AND ITS PROBATIVE VALUE WAS SUBSTANTIALLY OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE.

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show . . . the absence of mistake or accident . . . ." Rule 404(b), SCRE; *see also State v. Pagan*, 369 S.C. 201, 211, 631 S.E.2d 262, 267 (2006); *State v. Lyle*, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923). "As a threshold matter, the trial court must determine whether the proffered evidence is relevant as required under Rule 401, SCRE." *State v. Cope*, 405 S.C. 317, 337, 748 S.E.2d 194, 204 (2013). "To be admissible, the bad act must logically relate to the crime with which the defendant has been charged." *State v. Fletcher*, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008). "If the trial court finds the evidence is relevant, it must then determine whether the bad act evidence fits within an exception in Rule 404(b)[, SCRE]." *Cope*, 405 S.C. at 337, 748 S.E.2d at 204.

To be admissible, alleged prior bad acts that are not the subject of conviction must be proved by clear and convincing evidence. *See State v. Cutro*, 332 S.C. 100, 504 S.E.2d 324 (1998). "In view of [case law] and the language of Rule 404(b), courts have considered temporal remoteness in determining whether admission is proper, but there exists no set time limit beyond which a prior bad act is simply, per se, too remote." *State v. Scott*, 405 S.C. 489, 504, 748 S.E.2d 236, 244-45 (Ct. App. 2013)

"Even if prior bad act evidence . . . falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant." *Cope*, 405 S.C. at 337-38, 748 S.E.2d at 204-05; *See* Rule 403, SCRE

("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."). Unfair prejudice means "an undue tendency to suggest [a] decision on an improper basis, commonly, though not necessarily, an emotional one." *State v. Alexander*, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991) (citation and quotation marks omitted). "The determination of the prejudicial effect of the evidence must be based on the entire record and the result will generally turn on the facts of each case." *Fletcher*, 379 S.C. at 24, 664 S.E.2d at 483.

Whether the improper introduction of this evidence is harmless requires the reviewing court to look at the other evidence admitted at trial to determine whether the defendant's "guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached." *State v. Parker*, 315 S.C. 230, 234, 433 S.E.2d 831, 833 (1993) (evidence of unrelated prior bad act is not reversible error where its admission was harmless beyond reasonable doubt).

Discussion

In this case, the Trial Court erred in allowing the Decedent's sister, Patricia Pye, to testify about bruises and threats allegedly made by Appellant because these prior bad acts were not proven by clear and convincing evidence and its probative value was substantially outweighed by the danger of unfair prejudice. *See Cutro*, 332 S.C. 100, 504 S.E.2d 324; Rule 403, SCRE. Specifically, the alleged prior bad acts were not the subject of a conviction, and some of the improper propensity evidence was not relevant and too remote. *See Scott*, 405 S.C. at 504, 748 S.E.2d at 244-45; Rule 401, SCRE.

During the *in-camera* hearing, Ms. Pye admitted that she never saw Appellant assault her sister. R. 263, l. 24 – 264, l. 1. Ms. Pye also admitted that the Decedent never called the police on Appellant. R. 267, l. 25 – 268, l. 6. Ms. Pye further maintained that there was a text message from *about one year prior to the shooting* where Appellant "had told [the Decedent] he was going to choke her out and put her against the wall." R. 265, ll. 17-23 (emphasis added). Ms. Pye also explained that she purportedly saw text messages between the Decedent and Appellant:

> I seen text messages from [Appellant] where he called her fat and ugly and degraded her and telling her he didn't want her, telling her he had another woman, that he didn't want anything to do with her, that she wasn't going to ever make a good wife. He constantly belitted her, and he constantly told her he had other women, that they were better than her.

R. 265, ll. 1-9. The relevant portions of Ms. Pye's testimony before the jury were consistent with her proffered testimony. R. 274, l. 11 – 278, l. 4.

Notably, Appellant's guilt was not conclusively proven by competent evidence because the Trial Court charged the jury on the defense of accident and should have also charged the jury on involuntary manslaughter. *Cf. Parker*, 315 S.C. at 234, 433 S.E.2d at 833. In other words, there were multiple issues of fact for the jury to consider during deliberation. Therefore, the Trial Court erred in failing to suppress Ms. Pye's testimony regarding improper propensity evidence. *See* Rules 401, 403, and 404(b), SCRE.

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III. THE TRIAL COURT ERRED IN REFUSING TO GRANT A MISTRIAL BECAUSE THE STATE CALLED AN EXPERT RETAINED BY THE DEFENSE IN THEIR CASE-IN-CHIEF WHO WAS SUBPOENAED BUT NOT ON THE STATE'S WITNESS LIST IN VIOLATION OF APPELLANT'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

In determining whether to grant a mistrial, our Supreme Court has noted that "[t]he less than lucid test is . . . whether the mistrial was dictated by manifest necessity or the ends of public justice, the latter being defined as the public's interest in a fair trial designated to end in just judgment." *State v. Prince,* 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983).

In *State v. Jones*, 383 S.C. 535, 681 S.E.2d 580 (2009), the State informed the defense that it intended to introduce "barefoot insole impression" evidence. *Id.* at 540, 681 S.E.2d at 582. In response, the defense retained a renowned expert on this evidence. *Id.* Although the defense did not intend to call the expert at trial, the State subpoenaed the expert to testify. *Id.* The defense filed pre-trial motions seeking to quash the State's subpoena and to suppress this evidence. *Id.* The trial court denied both motions, and the jury ultimately convicted the defendant of two counts of murder. *Id.*

On appeal, Jones argued that the State's subpoena violated the work-product doctrine, attorney-client privilege, and his Sixth Amendment right to effective assistance of counsel. *Id.* at 540, 681 S.E.2d at 582-83. The State responded that the trial court did not abuse its discretion in permitting the subpoena given the expert only testified during a pre-trial, *in camera* hearing; the State did not question the expert regarding any matters produced by attorney-client privilege or work-product doctrine; and it would be fundamentally unfair to the State for the defendant to challenge the scientific reliability of "barefoot insole impression" evidence while withholding non-privileged testimony from

one of the two renowned experts who the State initially attempted to retain. *Id.* at 541, 681 S.E.2d at 583.

Our Supreme Court affirmed the trial court's ruling in *Jones*:

> [T]here were only two available expert witnesses on the "barefoot insole impression" evidence. The trial judge recognized this anomaly and properly limited the State to only eliciting non-protected information . . . Moreover, the State only called [the expert] during an *in camera* hearing for the benefit of the trial judge's ruling on the admissibility of the "barefoot insole impression" evidence. Because [the expert] did not testify during the trial, the State's decision to call [the expert] as a witness could not have affected the jury's assessment of the evidence . . . Additionally, the State's questioning of [the expert] was confined to general testimony regarding his expertise and his opinion regarding the scientific reliability of the evidence. Significantly, the State did not question [the expert] concerning the specifics of the crime scene evidence . . . Based on the foregoing, we hold the trial judge's decision denying [the defendant's] motion to quash the State's subpoena of [the expert] did not constitute reversible error.

Id. at 546-47, 681 S.E.2d at 586.

Discussion

In this case, the Trial Court erred in refusing to grant a mistrial because the State called an expert retained by the defense in their case-in-chief who was subpoenaed but not on the State's witness list in violation of Appellant's Sixth Amendment right to effective assistance of counsel. *See* U.S. Const. Amend. VI; *Jones*, 383 S.C. 535, 681 S.E.2d 580. The State's presentation of the retained defense witness in this case is distinct from the witness in *State v. Jones*. *Id.* Specifically, (1) unlike in *Jones* where there were only two available "barefoot insole impression" experts, there were numerous firearm examiners available for the State to consult; (2) the witness's testimony was not limited to an *in-camera* hearing; (3) the witness testified about specific, cumulative, and

critical crime scene evidence to bolster's the State's case; and (4) the witness testified to opinion evidence on re-direct. R. 253, ll. 5-13; R. 344, l. 13 – 345, l. 17; R. 348, ll. 2-18. *See Id.*

Cumulative Testimony

The State's expert witness, James Green, testified at trial that he examined the pistol in this case. R. 188, l. 3 – 190, l. 5. He also testified, "***When I tested*** [the pistol in this case] I had to pull the trigger for each shot." R. 194, ll. 21-24 (emphasis added). He further testified that he "shot [the pistol] three times" and that it did not double fire or misfire. R. 195, ll. 4-8. Mr. Green noted, "In that limited shooting I did, it worked as intended." R. 195, ll. 6-8.

Detective Thomas Bailey testified, "In preparation for the trial I had to check this firearm out of evidence in order for an expert witness for the defense to test fire this gun and examine the gun." R. 229, l. 20 – 230, l. 4. Detective Bailey also stated that he took the gun to the firing range and the following people were present: "defense counsel, the Solicitor's Office, myself, the expert witness for the defense, … the CPD firearms range instructor, [and] the lead instructor[.]" R. 230, ll. 5-9. Detective Bailey further noted the gun was test fired "about 30" times, and he did not see any misfires or malfunctions. R. 230, ll. 1-16.

Dale Hanna testified as to his extensive training and experience with firearms. R. 254, l. 16 – 255, l. 2. Mr. Hanna also testified that he test-fired "[t]hirty-four rounds". R. 256, ll. 4-12. Mr. Hanna further stated that the pistol did not jam, double-fire, triple-fire, fire four times in a row, or have any malfunctions. R. 257, ll. 13-24. Assistant Solicitor Kidd even asked Mr. Hanna, "And just to be clear, I didn't arrange for you to be there for

that test firing, did I?" and he replied, "No, Sir." Assistant Solicitor Kidd then asked him, "Who did that" and he responded, "The defense. Mr. Lizzi did." R. 257, ll. 10-14.

Improper Opinion Testimony

On re-direct, Assistant Solicitor Kidd inquired, "Have you ever heard of a gun firing - - or a Glock firing four times accidentally?" and Mr. Hanna responded, "No, sir." R. 261, ll. 8-10.

Mistrial Denied

Trial Court denied the motion for a mistrial and did not give a curative instruction to the jury. R. 348, l. 19 – 349, l. 19. Therefore, the Trial Court erred refusing to grant a mistrial because the State denied Appellant of his Sixth Amendment right to effective assistance of counsel. *See* U.S. Const. Amend. VI; *Jones*, 383 S.C. 535, 681 S.E.2d 580.

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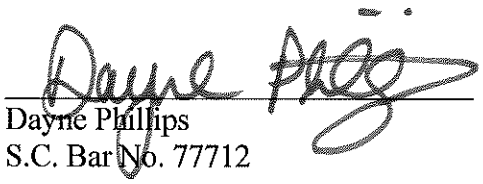
CONCLUSION

Based on the foregoing reasons, Appellant William Gule respectfully requests that this Court reverse the circuit court and remand to the Charleston County Court of General Sessions for a new trial.

Respectfully submitted,



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May 28, 2020

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

Doyet A. Early, Circuit Court Judge

Appellate Case No. 2018-001848

Case No. 2016-GS-10-00241-242

The State of South Carolina,

Respondent,

v.

William T. Gule, Jr.,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned Counsel certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR.

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