STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenwood County

Honorable Donald B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARK ANTHONY HAILEY, JR.,

APPELLANT.

APPELLATE CASE NO. 2020-001276

INITIAL BRIEF OF APPELLANT

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2.

Did the trial judge err by refusing to charge the jury on the lesser included offense of involuntary manslaughter when there was evidence to support the charge, specifically there was evidence Appellant (1) unintentionally killed the decedent while engaged in an unlawful act not tending to cause death or great bodily harm and (2) lawfully armed himself in self-defense and then accidentally discharged the firearm striking the decedent?

3.

Did the trial judge err by refusing to allow Appellant to question Dr. Amanda Salas on redirect examination concerning her opinion that an intervening cause led to the shooting on the basis that the subject matter of the questioning was not responsive to the state's cross-examination of the expert witness, particularly where this evidence was crucial to counter the state's theory of the case?

STATEMENT OF THE CASE

A Greenwood County Grand Jury indicted Appellant on September 27, 2019 for murder, carjacking, and possession of a weapon during the commission of a violent crime. R. *. On March 4, 2020, a pretrial hearing was held on Appellant's motion for immunity pursuant to the Protection of Persons and Property Act. Tr. 1 (March 4, 2020). Yates Brown represented the state, and Tristan Shaffer represented Appellant. Tr. 1 (March 4, 2020). In the middle of the hearing, Appellant invoked his Fifth Amendment right to remain silent and withdrew his motion. Tr. 109, l. 12 – 110, l. 13 (March 4, 2020).

Appellant's case was called to trial on September 11, 2020 before the Honorable Donald B. Hocker, and a jury. Yates Brown and Anna Sumner represented the state. Tr. 1. Tristan Shaffer and Chelsea McNeill represented Appellant. Tr. 1.

On September 23, 2019, the jury found Appellant guilty of murder and possession of a weapon during the commission of a violent crime. Tr. 1146, l. 18 – 1147, l. 8. It could not reach a unanimous verdict on carjacking and the judge declared a mistrial as to that offense. Tr. 1145, l. 24 – 1146, l. 5; Tr. 1152, ll. 1-2. Appellant was sentenced to thirty-five years for murder and five years concurrent for the weapons offense. Tr. 1165, l. 23 – 1166, l. 1.

This appeal follows.

STATEMENT OF FACTS

The state alleged Appellant shot and killed Marty George as the pair drove down Warner Road, a dark secluded area in Ninety Six. Appellant admitted to shooting George, but maintained he acted in self-defense after George ignored Appellant's repeated pleas to turn the car around, suddenly stopped the vehicle in the middle of the road, pulled a gun, waived it in Appellant's face, and demanded Appellant return whatever he had allegedly stolen from George's bathroom earlier that night. Appellant, in fear for his life, shot George once in the head after George became distracted by a noise or light coming from his phone. Tr. 1010, l. 14 – Tr. 1027, l. 9.

ARGUMENT

1.

The trial judge erred by failing to tailor the self-defense instruction to adequately reflect the facts and theories presented by Appellant, specifically that Appellant was not required to wait until his adversary was on equal terms or until he fired or aimed his weapon, when the charge was supported by the evidence and was crucial to the jury's understanding of the law on self-defense.

Relevant Facts

Appellant requested the trial judge tailor the self-defense instruction to reflect the evidence presented. Specifically, Appellant requested a charge on the concept that a person does not have to wait before acting in self-defense. Initially, defense counsel discussed the language from State v. Rash, 182 S.C. 42, 188 S.E. 435 (1936): "He [the defendant] doesn't have to wait until his assailant gets the drop on him, he has a right to act under the law of self-preservation and prevent his assailant getting the drop on him; if it is apparent, or reasonably apparent his assailant is taking steps to get the drop on him, he must take steps first to prevent such assailant from getting the drop on him." Id. at 42, 188 S.E. at 438; See Tr. 1091, ll. 9-17. When the trial judge asked for clarification as to what Appellant wanted charged, defense counsel stated, "[O]nce a Defendant has a right to act in self-defense he is not required to wait until the adversary and him are on equal terms in order to fire a weapon." Tr. 1091, l. 22 – 1092, l. 3.

In support of his request, Appellant cited to State v. Rash, 182 S.C. 42, 188 S.E 435 (1936), as mentioned, and State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978). Tr. 1092, l. 4 – 1093, l. 2. Counsel quoted the language from Hendrix, which is more concise than the language found in Rash: "Once the appellant's right to fire in self-defense arose he was not

required to wait until his adversary was on equal terms or until he fired or aimed his weapon." Tr. 1092, ll. 18-25; See Hendrix, 270 S.C. at 660-661, 244 S.E.2d at 506. Counsel emphasized that the judge may "like to go into that language [from Hendrix] instead [of the language from Rash] because it is a little bit more concise." Tr. 1092, l. 18 – 1093, l. 2.

The state's only objection to the charge was the timing of the request. Appellant made the request after the deputy solicitor had finished his closing argument. Tr. 1093, ll. 11-15. The judge found Appellant had not "waived his right" to request additional instructions even if the timing of the request may have been "unfair" to the solicitor. Tr. 1094, ll. 4-15.

After defense counsel completed his closing argument and the deputy solicitor argued in reply, the judge denied Appellant's request to charge. Tr. 1122, ll. 7-11. The judge did not provide any reasoning for his refusal to charge the additional language.

The trial judge charged the jury on self-defense as follows:

> [T]he Defendant has raised the defense of self-defense. Self-defense is a complete defense and, if it is established, you must find the Defendant not guilty. The State has the burden of disproving self-defense by proof beyond a reasonable doubt. If you have a reasonable doubt of the Defendant's guilt after considering all the evidence, including the evidence of self-defense, then you must find the Defendant not guilty. On the other hand, if you have no reasonable doubt of the Defendant's guilt after considering all the evidence, including the evidence of self-defense then you must find the Defendant guilty. The elements of self-defense are as follows, and, again, the Defendant has no burden to prove self-defense, but the burden is on the State to disprove self-defense beyond a reasonable doubt.
>
> And there are four elements. The first is without fault. First, the Defendant must be without fault in bringing on the difficulty. If the Defendant's conduct was the type which was reasonably calculated to and did provoke a deadly assault, the Defendant would be at fault in bringing on the difficulty and would not be entitled to an acquittal based on self-defense. The second element is imminent danger. The second element of self-defense is that the Defendant was actually in imminent danger of death or serious bodily injury or that the Defendant actually believed he was in imminent danger of death or serious bodily injury. The third element is reasonableness. If the Defendant was actually in imminent danger it must be shown that the circumstances would have warranted a

> person of ordinary firmness and courage to strike the fatal blow to prevent death or serious bodily injury. If the Defendant believed he was in imminent danger of death or serious bodily injury it must be shown that a reasonably prudent person of ordinary firmness and courage would have had the same belief. In deciding whether the Defendant actually was, or believed he was, in imminent danger of death or serious body injury you should consider all the facts and circumstances surrounding the case and the crimes including the physical condition and characteristics of the Defendant and the deceased. And the last element of self-defense is no other way to avoid the danger. The final elements of self-defense is that the Defendant had no other probable way to avoid the danger of death or serious bodily injury than to act as the Defendant did in this particular instance. An individual [h]as no duty to retreat if by doing so the danger of being killed or suffering serious bodily injury would increase.

Tr. 1133, l. 11 – 1135, l. 8.

Appellant renewed his request to charge after the judge finished instructing the jury. Tr. 1139, ll. 6-7.

Standard of Review

"A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." State v. Williams, 400 S.C. 308, 314, 733 S.E.2d 605, 608 (Ct. App. 2012) (quoting State v. Mattison, 388 S.C. 469, 478, 697 S.E.2d 578, 583 (2010)) (internal quotation marks omitted). "The law to be charged must be determined from the evidence presented at trial." Id. (quoting State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 512 (2000)) (internal quotation marks omitted); See Mattison, 388 S.C. at 478, 697 S.E.2d at 583 (stating appellate courts should "consider the court's jury charge as a whole in light of the evidence and issues presented at trial").

"When reviewing the circuit court's refusal to deliver a requested jury instruction, appellate courts must consider the evidence in a light most favorable to the defendant." Id. at 314, 733 S.E.2d at 608-609 (citing Cole, 338 S.C. at 101, 525 S.E.2d at 512-513). "If there is any evidence in the record from which it could reasonably be inferred that the defendant acted

in self-defense, the defendant is entitled to instructions on the defense, and the [circuit court's] refusal to do so is reversible error." Id. at 314, 733 S.E.2d at 609 (quoting State v. Day, 341 S.C. 410, 416-417, 535 S.E.2d 431, 434 (2000)) (alteration in original).

Discussion

The trial judge erred by refusing to tailor the self-defense instruction to adequately reflect the facts and theories presented by Appellant as required pursuant to State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989). Specifically, the judge erred by failing to charge the jury that Appellant was not required to wait until his adversary was on equal terms or until he fired or aimed his weapon before he acted. This charge was supported by the evidence and was crucial to the jury's understanding of the law on self-defense.

In State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984), our Supreme Court suggested a standard self-defense instruction. However, in State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989), the Court made clear that it did not intend Davis to be the exclusive self-defense charge. State v. Burkhart, 350 S.C. 252, 262, 565 S.E.2d 298, 303 (2002). Instead, "a trial judge should specifically tailor the self-defense instruction to adequately reflect the facts and theories presented by the defendant." State v. Day, 341 S.C. 410, 418, 535 S.E.2d 431, 435 (2000) (citing Fuller, 297 S.C. 440, 377 S.E.2d 328). "A self-defense charge is erroneous where the trial court fails to charge on elements of the defense which were applicable to the issues raised by the defendant." Id. (citing Fuller, 297 S.C. 440, 377 S.E.2d 328).

In State v. Day, our Supreme Court held the trial judge's failure to charge the specific elements of self-defense that were applicable to Day's theory constituted reversible error. Day, 341 S.C. at 418, 535 S.E.2d at 435. The Court found the trial judge's instruction was incomplete because it failed to include a charge indicating: (1) Day had a right to judge the conduct of the

decedent more harshly than otherwise because of the decedent's drug consumption, and (2) the jury could consider prior instances of violence or unprovoked aggression by the decedent in determining whether Day had a reasonable belief of imminent danger. Id. Part of Day's defense was his argument that the decedent had previously pulled a gun on him and that the decedent was in a "drug induced paranoia" the day of the incident. Id. Consequently, the Court held the jury charge, which only included the standard self-defense instruction as outlined by our Supreme Court in Davis along a the charge on the right to act on appearances, was incomplete because the trial judge failed to charge on the decedent's substance abuse or his prior acts of violence. Id. Ultimately, the Court reversed Day's convictions and remanded for a new trial.

In State v. Nichols, 325 S.C. 111, 116-117, 481 S.E.2d 118, 121 (1997), the defendant argued the trial judge's instructions on the law of self-defense were inadequate under State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989), where the judge instructed the jury solely on the common law elements of self-defense. Nichols objected to the charge and requested additional instructions on: (1) the right to act on appearances; (2) relevance of prior difficulties; and (3) that a person does not have to wait before acting in self-defense. Id. at 117, 481 S.E.2d at 121. Nichols contended the trial judge's refusal to give further instructions was reversible error. Our Supreme Court agreed. Id.

The Court emphasized that the charge suggested in Davis was not intended to be the exclusive charge for self-defense and that trial courts have been instructed to consider the facts and circumstances of the case at hand to fashion a proper charge. Id. (citing Fuller, 297 S.C. at 443, 377 S.E.2d at 330). The Court held Nichols was entitled to a charge on the right to act on appearances because Nichols testified he thought he had seen a shiny object in the deceased's hand. Id. (citing State v. Jackson, 227 S.C. 271, 87 S.E.2d 681 (1955)). The Court also found

the evidence showed there had been prior difficulties between Nichols and the deceased including an instance where the deceased pointed a rifle at Nichols. Consequently, the Court concluded Nichols was entitled to a charge on the relevance of prior difficulties. Id. (citing State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978) (prior bad blood, intoxication, and prior threats by deceased were relevant to defendant's reasonable apprehension of bodily harm)). Further, the Court held Nichols was entitled to a charge that he did not have to wait before acting in self-defense since Nichols testified he thought he saw a gun in the deceased's hand and did not wait for the deceased to fire or aim at him. Id. (citing State v. Rash, 182 S.C. 42, 188 S.E. 435 (1936)). Accordingly, the Supreme Court reversed Nichols conviction and remanded for a new trial. Id. at 118, 481 S.E.2d at 122.

In State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978), our Supreme Court held Hendrix was entitled to a directed verdict since he was acting in self-defense as a matter of law when he shot the decedent. Id. at 661-662, 244 S.E.2d at 507. Hendrix was celebrating Labor Day with his family at his property on the shore of Lake Murray. Id. at 655, 244 S.E.2d at 504. Evidence established that "ill feelings characterized the relationship" between Hendrix and the decedent. Id. The decedent had confronted Hendrix earlier in the day and warned "they were going to have to fight to settle" the matter. Id. Hendrix was standing next to his truck, which was parked on his land, when the decedent arrived at the property, stopped his vehicle in the road, jumped out, and advanced toward Hendrix. Id. at 656, 244 S.E.2d at 505. Hendrix reached into the cab of his truck, pulled out a shotgun, leveled it at the decedent, and told him three times to back off. Id. The decedent immediately turned around, walked back to his truck, reached into the cab, drew out his own shotgun, and walked straight back to where Hendrix was standing. Id. A neighbor of the decedent observed the commotion and approached the scene. Id. at 657, 244

S.E.2d at 505. When she saw the two men facing each other with shotguns, she screamed the decedent's name. Id. The decedent turned his head in the direction of the scream. Id. As the decedent turned, Hendrix began firing. Id. He fired four times in rapid succession, killing the decedent. Id.

The Court determined Hendrix was not at fault in bringing on the difficulty since he armed himself on his own land in a legal manner after he was threatened. Id. at 659, 244 S.E.2d at 506. The Court further found the second and third elements of self-defense were established since the evidence showed Hendrix was actually in imminent danger of losing his life. Id. at 659-660, 244 S.E.2d at 506. Having no duty to retreat because he was on his own property and being without fault in bringing on the fatal confrontation, the Court held Hendrix was warranted in reacting to the situation with force. Id. at 660, 244 S.E.2d at 507. In so holding, and relevant to this case, the Court emphasized, "Once [Hendrix's] right to fire in self-defense arose, he was not required to wait until his adversary was on equal terms or until he fired or aimed his weapon." Id. at 660-661, 244 S.E.2d at 507. This is significant since the evidence showed Hendrix shot the decedent when he was distracted by his neighbor's scream.

In this case, as in Day and Nichols, the trial judge erred by refusing to instruct the jury on the specific element of self-defense requested by Appellant since it was applicable to Appellant's account of what occurred. Appellant testified that after driving two miles the wrong way down Warner Road and repeatedly ignoring Appellant's advice to turn around, the decedent pulled a gun, waived it in Appellant's face, and demanded Appellant return whatever he had allegedly stolen from the decedent's bathroom. Tr. 1020, l. 19 – 1022, l. 18. The decedent then became distracted by a noise or light from his phone and briefly placed the gun in his lap. Tr. 1025, ll. 1-7; Tr. 1045, ll. 2-11. As the decedent began to raise the gun up again, Appellant shot him. Tr.

1045, ll. 12-13; Tr. 1047, l. 25 – 1048, l. 4. Based on this testimony, the instruction from Rash and Hendrix, that once the right to fire in self-defense arose, Appellant was not required to wait until his adversary was on equal terms or until he fired or aimed his weapon, should have been charged to the jury as it was applicable to Appellant's account of what occurred.

Before waiting for the decedent to aim the pistol at him again and perhaps fire, Appellant shot him in self-defense. Consequently, there was evidence to support the requested instruction. As our Supreme Court stated in Day, "A self-defense charge is erroneous where the trial court fails to charge on elements of the defense which were applicable to the issues raised by the defendant." Day, 341 S.C. 410, 418, 535 S.E.2d 431, 435 (2000) (citing Fuller, 297 S.C. 440, 377 S.E.2d 328). Since the trial judge failed to charge an important element of self-defense relevant to Appellant's account of what occurred, respectfully, this Court should reverse Appellant's convictions and sentence and remand for a new trial.

2.

The trial judge erred by refusing to charge the jury on the lesser included offense of involuntary manslaughter when there was evidence to support the charge, specifically there was evidence Appellant (1) unintentionally killed the decedent while engaged in an unlawful act not tending to cause death or great bodily harm and (2) lawfully armed himself in self-defense and then accidentally discharged the firearm striking the decedent.

Relevant Facts

During an in chambers charge conference and via email, Appellant requested the trial judge charge the jury on the lesser included offense of involuntary manslaughter. Tr. 1065, l. 16 – 1066, l. 11; R. * (Court's Exhibit No. 4 – Request to Charge Email). Appellant submitted a memorandum in support of his request, which was marked as Court's Exhibit No. 5. R. * (Court's Exhibit No. 5 – Request to Charge Memorandum). On the record, defense counsel indicated he would rely on this memorandum in support of his argument. Tr. 1067, ll. 17-20.

In his memorandum, Appellant argued he was entitled to an instruction on involuntary manslaughter pursuant to both definitions of the offense. R. * (Court's Exhibit No. 5 – Request to Charge Memorandum at 2-4). He asserted there was evidence presented that Appellant unintentionally killed the decedent while engaged in an unlawful act not tending to cause death or great bodily injury. R. * (Court's Exhibit No. 5 – Request to Charge Memorandum at 2). More specifically, Appellant maintained there was evidence he "accidentally shot the decedent while in a state that would be considered public disorderly conduct," which "is not an offense 'tending to cause death or great bodily injury.'" R. * (Court's Exhibit No. 5 – Request to Charge Memorandum at 2-3). Because there was evidence Appellant was "engaged in disorderly conduct coupled with evidence concerning accident," Appellant concluded there was evidence in

the record to support a charge on the lesser included offense pursuant to the first definition. R. * (Court's Exhibit No. 5 – Request to Charge Memorandum at 3).

Alternatively, Appellant argued there was evidence Appellant lawfully armed himself in self-defense during the encounter with the decedent and then negligently handled the firearm while under the influence. R. * (Court's Exhibit No. 5 – Request to Charge Memorandum at 3-4). He emphasized the evidence presented by the state that Appellant's conduct was accidental and influenced by his use of methamphetamine. R. * (Court's Exhibit No. 5 – Request to Charge Memorandum at 4). Consequently, Appellant asserted there was evidence in the record to support a charge on involuntary manslaughter pursuant to the second definition of the offense. R. * (Court's Exhibit No. 5 – Request to Charge Memorandum at 3-4).

The trial judge ultimately refused to charge involuntary manslaughter based on his determination that the facts of the case do "not fit into what involuntary manslaughter is." Tr. 1066, ll. 10-13. He asserted, "The cases that allowed an involuntary manslaughter charge all deal with the facts like struggle, accidental shootings, things of that nature. So I don't believe the case law supports an involuntary manslaughter [instruction], notwithstanding the very creative memorandum that the Defense offered, I am declining that." Tr. 1066, ll. 11-19. However, the judge did charge the jury on accident pursuant to Appellant's request. Tr. 1066, ll. 6-11; Tr. 1135, ll. 9-18.

Standard of Review

"The law to be charged to the jury is determined by the evidence presented at trial." State v. Sams, 410 S.C. 303, 308, 764 S.E.2d 511, 513 (2014) (quoting State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993)) (internal quotation marks omitted). "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. Id. (citing State v. Drafts, 288 S.C. 30, 340 S.E.2d 784 (1986)). "To warrant the court in eliminating the offense of manslaughter it should clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter." State v. Smith, 391 S.C. 408, 413, 706 S.E.2d 12, 15 (2011) (quoting State v. Pittman, 373 S.C. 527, 572, 647 S.E.2d 144, 168 (2007)) (internal quotation marks omitted). "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." Sams, 410 S.C. at 308, 764 S.E.2d at 513 (quoting State v. Cole, 338 S.C. 97, 525 S.E.2d 511 (2000)) (internal quotation marks omitted).

Discussion

The trial judge erred by refusing to charge the jury on the lesser included offense of involuntary manslaughter when there was evidence to support the charge. In the light most favorable to Appellant, there was evidence Appellant (1) unintentionally killed the decedent while he was engaged in an unlawful act not naturally tending to cause death or great bodily harm; and (2) lawfully armed himself in self-defense and then accidentally discharged the firearm striking the decedent.

Involuntary manslaughter is defined as: (1) the unintentional killing of another without malice, but while engaged in an unlawful activity not amounting to a felony and 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. Smith, 391 S.C. 408, 414, 706 S.E.2d 12, 15 (2011) (citing State v. Cabrera–Pena, 361 S.C. 372, 380-381, 605 S.E.2d 522, 526 (2004)); See S.C. Code Ann. § 16-3-60 (2003) (stating a

person charged with involuntary manslaughter may be convicted only upon a showing of criminal negligence, "defined as the reckless disregard of the safety of others").

There was evidence to support an involuntary manslaughter instruction pursuant to the first definition of the offense. Again, the first definition is the unintentional killing of another without malice while engaged in an unlawful activity not amounting to a felony and not naturally tending to cause death or great bodily harm. There was evidence presented during the 911 call made by Appellant's mother, Loretta Hailey, on the morning of the shooting that the act was an accident and that Appellant was under the influence of drugs when the killing occurred on Warner Road.

During her conversation with the 911 dispatcher shortly after Appellant arrived home, Ms. Hailey exclaimed, "I think there's been an accident. My son [Appellant] says an accident has happened . . . I think he's done something, you know, real bad." See State Exhibit No. 149 (911 Call Disc). She further asserted, "He [Appellant] said he was with a friend of his and the gun went off." See State Exhibit No. 149 (911 Call Disc). Ms. Hailey also said she thought Appellant was "on something," suggesting he was under the influence, and that he was crying and "walking back and forth." See State Exhibit No. 149 (911 Call Disc). She later emphasized, "He said it was a mistake . . . an accident is what he said." See State Exhibit No. 149 (911 Call Disc).

When Deputy Bonetti arrived at Appellant's house several minutes later, Ms. Hailey told Bonetti that Appellant "told me the gun went off." See State's Exhibit No. 2 (Thumb Drive – Bonetti Body Camera). When Deputy Young arrived at the residence shortly thereafter, Ms. Hailey told Young, "He [Appellant] came to me about thirty to thirty-five minutes ago and said he done something bad. He said it was an accident. . . . And he said he thinks he shot somebody." See State's Exhibit No. 2 (Thumb Drive – Bonetti Body Camera). She further stated, "He

[Appellant] said he done something. . . . A gun went off. . . . He was hysterical like he is now." See State's Exhibit No. 2 (Thumb Drive – Bonetti Body Camera).

During Ms. Hailey's testimony before the jury, the deputy solicitor also elicited from Hailey what Appellant told her that morning. Ms. Hailey asserted, "He [Appellant] just said he shot somebody and it was an accident." Tr. 341, ll. 8-24. Therefore, there was plenty of evidence presented that the killing was unintentional and without malice.[1]

In addition to the evidence that Appellant unintentionally killed the decedent, there was also evidence Appellant shot the decedent while engaged in conduct that would constitute public disorderly conduct, which is a misdemeanor, pursuant to S.C. Code Ann. § 16-17-530(A). Public disorderly conduct is defined as:

> (A) A person who is: (1) found on any highway or at any public place or public gathering in a grossly intoxicated condition or otherwise conducts himself in a disorderly or boisterous manner; (2) uses obscene or profane language on any highway or at any public place or gathering or in hearing distance of any schoolhouse or church; or (3) while under the influence or feigning to be under the influence of intoxicating liquor, without just cause or excuse, discharges any gun, pistol, or other firearm while upon or within fifty yards of any public road or highway, except upon his own premises, is guilty of a misdemeanor . . .

S.C. Code Ann. § 16-17-530. Public disorderly conduct applies to passengers in a vehicle. See State v. Pittman, 342 S.C. 545, 551, 537 S.E.2d 563, 567 (Ct. App. 2000) ("If a defendant is grossly intoxicated while riding in an automobile on a public highway, he is guilty of a violation of § 16-17-530.").

The state presented significant evidence that Appellant was under the influence when he shot the decedent on Warner Road and that Appellant had ingested illicit substances in the hours prior to the shooting, including marijuana and methamphetamine. Given the evidence that

[1] Notably, the trial judge charged the jury on accident presumably finding there was evidence to support the charge. See Tr. 1135, ll. 9-18.

Appellant unintentionally or accidentally shot the decedent while the pair were stopped on Warner Road and that Appellant was under the influence of methamphetamine or some other illegal substance while a passenger in the decedent's vehicle, which would constitute public disorderly conduct, there was sufficient evidence to support an involuntary manslaughter charge under the first definition of the offense. The trial judge's failure to charge this lesser included offense is reversal error.

Moreover, there was evidence to support an involuntary manslaughter instruction pursuant to the second definition of the offense. Again, the second definition is the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others. Appellant was entitled to an involuntary manslaughter instruction since there was evidence that during the encounter with the decedent, Appellant lawfully armed himself in self-defense and negligently handled the firearm, that is while intoxicated.

Our courts have long held that a criminal defendant is entitled to an involuntary manslaughter instruction when there exists evidence of the negligent operation of a dangerous instrument. See State v. Caldwell, 231 S.C. 184, 189, 98 S.E.2d 259, 262 (1957); State v. Addis, 257 S.C. 482, 489-490, 186 S.E.2d 415, 418 (1972); State v. Quick, 168 S.C. 76, 167 S.E. 19 (1932); State v. Cribb, 310 S.C. 518, 523, 426 S.E.2d 306, 309 (1992). Our courts have further held that an instruction on involuntary manslaughter is proper when the evidence shows the defendant was lawfully armed in self-defense at the time of the shooting and the defendant recklessly handled the loaded gun. See Wigington v. State, 413 S.C. 578, 588, 776 S.E.2d 407, 412 (Ct. App. 2015); State v. Rivera, 389 S.C. 399, 404-405, 699 S.E.2d 157. 159-160 (2010); State v. Light, 378 S.C. 641, 648-649, 664 S.E.2d 465, 468-469 (2008); Tisdale v. State, 378 S.C. 122, 125-126, 662 S.E.2d 410, 412 (2008); State v. Brayboy, 387 S.C. 174, 180-182, 691

S.E.2d 482, 485-486 (Ct. App. 2010); State v. Burris, 334 S.C. 256, 265, 513 S.E.2d 104, 109 (1999).

In Wigington v. State, 413 S.C. 578, 587, 776 S.E.2d 407, 411 (Ct. App. 2015), this Court held Wigington was entitled to an involuntary manslaughter instruction under the second definition of the offense. Wigington testified that he did not intend to kill his son. Id. He maintained the gun went off during a struggle with his son, that he did not mean to pull the trigger, and that his son had not done anything to make Wigington want to shoot him. Id. Moreover, this Court determined there was evidence Wigington lawfully armed himself in self-defense and then negligently handled the loaded gun at the time of his son's death. Id. at 588-589, 776 S.E.2d at 412. Accordingly, this Court held Wigington's trial counsel was ineffective for failing to request a jury instruction on the lesser included offense, and that Wiginton was prejudiced by trial counsel's deficient performance because had counsel requested the charge, Wiginton would have been entitled to an involuntary manslaughter instruction. Id. 589, 776 S.E.2d at 412.

In this case, Appellant was entitled to an instruction on involuntary manslaughter where evidence was presented that the killing was unintentional and where Appellant lawfully armed himself in self-defense and then accidentally discharged the firearm while striking the decedent.

3.

The trial judge erred by refusing to allow Appellant to question Dr. Amanda Salas on redirect examination concerning her opinion that an intervening cause led to the shooting on the basis that the subject matter of the questioning was not responsive to the state's cross-examination of the expert witness, particularly where this evidence was crucial to counter the state's theory of the case.

Relevant Facts

Dr. Amanda Salas, who was qualified as an expert in general psychiatry, forensic psychiatry, and addiction, met with Appellant at the detention center two weeks after his arrest. Tr. 906, l. 24 – 907, l. 4. Dr. Salas was a board-certified psychiatrist. Tr. 901, l. 18 – 902, l. 10. She had previously been qualified in various areas of psychiatry: general, forensic, and child adolescent psychiatry. Tr. 902, ll. 4 – 11. She was qualified as an expert without objection. Tr. 903, ll. 9 – 15. As part of her duties, she made rounds at the hospital and assessed, evaluated, diagnosed, and treated patients. Tr. 904, l.

For Appellant's case, she met with him at the jail two weeks after he was arrested and interviewed him:

> And I interviewed him and at that time my consideration for what was going on was very broad. It included a primary psychotic element such as dispredia; schizo affective disorder; a mood disorder that could have some psychosis such as bipolar disorder, substance induced disorder. Lower down on my list of consideration is what I really think was going on which is acute stress disorder.

Tr. 907, ll. 2 – 10.

On cross-examination, the state questioned Dr. Salas regarding Appellant's thoughts and actions on the night in question:

Q: Dr. Salas, again, you mentioned that Mr. Hailey could have distorted views or what he is seeing or what he is going through in his head is really not grounded in reality. Is that correct?

A: It is distorted that it is not mainstream beliefs, yes.

Q: Okay. And with that, generally speaking, in your opinion some of these beliefs based on his personality, would a reasonably prudent person of ordinary firmness and courage have entertained the same idea?

A: Np. So for example, with the fence post. I would not have found significance in meaning between fence post on one side of the road standing up and down, holding a meaning for me as I am driving down a dirt road and they are leaning to the other side. But that doesn't really matter to me. But what it doesn't mean that if you come up here and punch me in the face do I think that has anything to do with thinking that I have been attacked and now being attacked, being a paranoid basis. No, there is some things that you would have that is very congruent with what everybody else is seeing. But the issue is that I might think, well I should have interpreted those fence posts to mean something was getting ready to happen. I should have read nature better than what I did.

Tr. 953, l. 14 – 954 l. 12.

During defense counsel's redirect examination of Dr. Salas, the deputy solicitor objected and a bench conference occurred. Tr. 957, l. 20 – 958, l. 8. After the state completed its recross examination, the bench conference discussion was placed on the record. Tr. 965, l. 12 – 967, l. 25.

Defense counsel "wanted her to finish the question about the events that led up to it, that the Solicitor cut her off from." Id. The other question defense counsel hoped to ask dealt with whether Dr. Salas believed "that the fence post led [Appellant] to commit this offense." Id. The trial judge stated that he did not want Dr. Salas to vouch for Appellant's credibility. Tr. 966, ll. 3 – 14. The deputy solicitor also contended that the proposed testimony exceeded the scope of his cross-examination. Tr. 966, ll. 15 – 23. The trial judge agreed to hear proffered testimony. Tr. 966, l. 24 – 967, l. 7.

During her proffered testimony, Dr. Salas shared her notes regarding Appellant's recollections from the night of the shooting. Tr. 970, l. 10 – 973, l. 2. Specifically regarding the leaning fence posts, she plainly testified that they did not contribute to the shooting. Tr. 972, ll. 2 – 5.

The deputy solicitor opposed defense counsel's attempt to get the above information before the jury. Tr. 974, ll. 11 – 15. In response, defense counsel noted how each of the questions he hoped to ask Dr. Salas in front of the jury dealt with expert opinions. Tr. 974, l. 24 – 975, l. 3. The trial judge indicated his belief that the proposed testimony was non-responsive to the deputy solicitor's cross-examination. Tr. 975, ll. 4 – 17. As a result, he denied defense counsel's request. Id.

Standard of Review

The scope of questions permitted on redirect examination rests in the sound discretion of the trial court. State v. Stroman, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984); See also State v. Tyner, 273 S.C. 646, 654, 258 S.E.2d 559, 563 (1979) (extent of redirect examination is subject to trial court's discretion); State v. Nichols, 325 S.C. 111, 121, 481 S.E.2d 118, 123 (1997) (the scope of redirect examination rests in the discretion of the trial court).

Discussion

Rule 611(d), SCRE, states that a "witness may be re-examined as to the same matters to which he testified only in the discretion of the court, but without exception he may be re-examined as to any new matter brought out during cross-examination. After the examination of the witness has been concluded by all the parties to the action, that witness may be recalled only in the discretion of the court. This rule shall not limit the right of any party to recall a witness in rebuttal." Testimony in the form of an opinion or inference otherwise admissible is not

objectionable because it embraces an ultimate issue to be decided by the trier of fact. State v. Mitchell, 399 S.C. 410, 731 S.E.2d 889 (Ct. App. 2012).

In State v. Beam, 336 S.C. 45, 518 S.E.2d 297 (Ct. App. 1999), the appellant contended he was unfairly denied the opportunity to conduct cross-examination. This Court noted "when a party introduces evidence about a particular matter, the other party is entitled to explain it or rebut it, even if the latter evidence would have been incomplete or irrelevant had it been offered earlier. Id. at 52, 518 S.E.2d at 301; see also State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984).

In Beam, this Court analyzed the questions asked by Beam's counsel and held that the state was free on redirect to expand upon the testimony elicited:

> Once Beam's counsel questioned [an expert witness] about the existence of the switch point test, its superiority over visual inspection in the detection of counterfeit videos, and whether the State should have been required to perform the test on the seized videotapes, the State was free on redirect to ask whether the test could be performed. Beam's counsel's questions directly attacked the expert's testimony that the seized videos were counterfeit. The State asked [the expert witness] to perform the test, in part, to rehabilitate him.

Id. at 53, 518 S.E.2d at 301.

In State v. Nichols, 325 S.C. 11, 481 S.E.2d 118 (1997), the South Carolina Supreme Court decided a similar case in an identical fashion. In Nichols, the appellant alleged the trial court erred in allowing the state to question a witness on redirect examination about a relationship. Id. at 121, 481 S.E.2d at 123. The South Carolina Supreme Court found no error in the trial judge's decision. Id.

In the case at hand, defense counsel was seeking to ask questions responsive to the state's cross-examination of Dr. Salas. The trial judge's ruling, that the proffered testimony was not responsive to the state's cross-examination, was an error:

> But I am trying to figure out [how] the last two [are] responsive to what was brought out in cross. I don't think it necessarily vouches on the believability of what Mark says what happened. I don't think that but I am trying to figure out how that is in response to what was brought out in cross. So I am going to deny two and three.

Tr. 975, ll. 4 – 17. Items two and three, as mentioned above, were remarks about the leaning fence posts and an intervening cause. Tr. 971, l. 20 – 975, l. 3.

The deputy solicitor weaponized the testimony he elicited during cross-examination of Dr. Salas:

> This whole diagnosis of acute distress disorder. What did the doctor say[?] It happens after the event, after the event. Mark was experiencing some of this before the event. That is the reason why he left that morning, talking to his aunt, talking with Stella, talking with Joey, talking with Joni? Why? What is the common denominator[?] He told you. He was seeing things, things that weren't really happening, he was seeing them.

Tr. 1088, ll. 13 – 21. The proffered testimony spoke directly to this argument, which is why defense counsel moved for a mistrial. Tr. 1095, l. 20 – 1099, l. 19. The mistrial motion was denied. Id.

The state's cross-examination included multiple references to a "reasonable prudent person of ordinary firmness." Tr. 952, l. 23 – Tr. 956, l. 11. The deputy solicitor questioned whether "a reasonably prudent person of ordinary firmness and courage" entertained the same distorted views as Appellant. Tr. 953, l. 14 – Tr. 954, l. 14. Dr. Salas spoke about the leaning fence posts in her reply:

> So for example, with the fence post. I would not have found significance in meaning between fence post[s] on one side of the road standing up and down, holding a meaning for me as I am driving down a dirt road and they are leaning on the other side. But that doesn't really matter to me. … But the issue is that I might think, well, I should have interpreted those fence post[s] to mean something was getting ready to happen. I should have read nature better than what I did.

Tr. 94, l. 24 – Tr. 954, l. 12.

In response, the proffered testimony included a direct question-and-answer series wherein Dr. Salas responded in the negative when asked if the fence post leaning contributed to the shooting. Tr. 972, ll. 2 – 5.

Appellant should have been allowed to question Dr. Salas about the leaning fence posts and a potential intervening cause on redirect. The error by the trial judge in refusing to allow defense counsel to elicit a response from the Appellant's own expert resulted in prejudice which manifested itself in the state's closing arguments. As a result, this Court should reverse Appellant's convictions and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his convictions and sentence and remand for a new trial.

Respectfully Submitted,

TAYLOR D. GILLIAM
Appellate Defender

ATTORNEY FOR APPELLANT

This 23rd day of August, 2021.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
Aug 23 2021
SC Court of Appeals

Appeal from Greenwood County

Honorable Donald B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARK ANTHONY HAILEY, JR.,

APPELLANT.

APPELLATE CASE NO. 2020-001276

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency" dated March 20, 2020, the undersigned hereby certifies a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case have been served upon Melody J. Brown, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Mark Anthony Hailey, #384088, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 23rd day of August, 2021.

Taylor D. Gilliam
Appellate Defender

ATTORNEY FOR APPELLANT