STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENWOOD COUNTY

Court of General Sessions
The Honorable Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2020-001276

THE STATE,

Respondent,

v.

MARK ANTHONY HAILEY, JR.,

Appellant.

INITIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENT OF ISSUES ON APPEAL

I. A jury charge is adequate if it correctly conveys the substance of the applicable law. Hailey claimed he shot the victim after the victim pointed a gun at him. The trial court instructed the jury that a person need not retreat if doing so would increase his danger. Did the court abuse its discretion by declining to also charge that one need not wait until an adversary is on "equal terms" to use deadly force?

II. A trial court should only give jury instructions that are supported by the evidence. Hailey testified he shot the victim intentionally after the victim pointed a gun at him. Did the court err by refusing to charge the law of involuntary manslaughter?

III. A trial court may limit redirect examination on matters not inquired into on cross-examination. The State did not cross-examine Hailey's expert witness about "leaning fence posts" or ask whether the fence posts caused Hailey to shoot the victim. Did the trial court abuse its discretion by refusing to allow the expert to give an opinion on redirect examination whether the fence posts "contributed to the shooting."

STATEMENT OF THE CASE

A Greenwood County grand jury indicted Appellant Mark Hailey for murder, carjacking, and possession of a weapon during the commission of a violent crime. He proceeded to jury trial on September 11, 2020, before the Honorable Donald B. Hocker. Hailey was convicted of murder and possession of a weapon during the commission of a violent crime and sentenced to concurrent terms of 35 and 5 years, respectively. The jury could not reach a verdict on the carjacking charge and a mistrial was declared on that charge. (Tr.p.1152). This direct appeal follows.

STATEMENT OF FACTS

In the early morning hours of March 6, 2019, Appellant Mark Hailey shot Marty George in the head with a .20 gauge shotgun from a distance of one to three feet, killing him. (Tr.p.486–87; 517). He then dumped George's body on the side of an isolated dirt road and drove George's car to Hailey's mother's house. The State's theory of the case was that Hailey was high on methamphetamine and killed George in a bout of drug-induced paranoia.

The fact that Hailey shot George was not contested. Hailey's mother testified Hailey arrived home around 3:00 a.m. and told her he shot someone. (Tr.p.289–90). He was crying and acting "strange." Hailey's mother called 911 and told the operator she believed Hailey was "on drugs." (Tr.p.291). A body camera video recording showed the responding officer's initial interactions with Hailey. (Tr.p.374; State's Exhibit #1). Hailey displayed bizarre behavior. When police arrived, Hailey was sitting on a couch, crying and shaking, rocking back and forth while reading his bible. He made statements referencing "three dots," "forces of nature," and random numbers. (State's Exhibits #1 and 2; Tr.p.376). He told the responding officer the "energy" was out of his mind, it "carried him," and he saw symbols. (State's Exhibit #2 at 5:00–6:00). He told the officer he hurt someone and said there was a force of nature he couldn't reckon with. (State's Exhibit #2 at 5:00–6:20). He told the officer that "what he heard" the day before "took [him] right over to that spot." (State's Exhibit #2 at 6:30). The responding officer believed Hailey was "under the influence of something." (Tr.p.375). Hailey's mother told officers that Hailey exhibited this type of behavior when he was high, and that he

had been abusing drugs for seven to nine years. (State's Exhibit #1 at 19:20). Hailey was extremely emotional, shouting "God have mercy on my soul" as officers placed him in the back of a police cruiser before taking him to the hospital. (Tr.p.407).

Hailey told officers he shot someone named Marty, and that it happened on Warner Road, a nearby dirt road. (Tr.p.387–80). Officers looked into Marty George's car and observed "brain matter and blood on the inside of the car." (Tr.p.399). They also saw a shotgun and BB pistol. (Tr.p.399; 422).

Officers searched Warner Road and discovered Marty George's body on the side of the road about five miles from Hailey's mother's house. (Tr.p.419). George was shot in the head, with an entry wound behind the right ear and an exit wound at the left eye. (Tr.p.412; 451). A forensic pathologist testified that, based on stippling around the wound, the shot was fired from one to three feet away from George's head. (Tr.p.480–87). It appeared George's body had been dragged to the ditch on the side of the road. (Tr.p.555–58; 766). A forensic toxicologist testified George had methamphetamine in his system at the time of his death. (Tr.p.624–25).

The State presented testimony from several witnesses who observed Hailey during the day of the shooting. Stella Burton knew Marty George. She testified George dropped off Hailey at her residence that afternoon. She had never met him before. (Tr.p.640). Hailey "walked right past" her into the apartment, which gave her an "uneasy" feeling. (Tr.p.642–43). She brought Hailey along to the home of

her friend Joey Lawson, where she went to do laundry. (Tr.p.645). She observed Hailey preparing drugs with a needle and can at Lawson's home. (Tr.p.646–47). She asked him not to inject drugs inside the house. (Tr.p.647). Later, she was alarmed by Hailey's statements that he "had a job to do." (Tr.p.647). Burton repeatedly called George and his girlfriend, Joni Kitchens, to come pick up Hailey. She remembered Hailey talking about the "colors of the rainbow." (Tr.p.649). When George came to pick up Hailey, Burton observed George, Hailey, Lawson and Kitchens smoking methamphetamine together. (Tr.p.650). Burton testified she used methamphetamine with George in the past, and that he became "comical" and "docile" when he used, but never aggressive. (Tr.p.651). Burton testified Hailey's behavior throughout the day gave her an "eerie, uneasy feeling . . . like it just gave you chill bumps." (Tr.p.653).

Joey Lawson testified about his interaction with Hailey that day. He explained that Hailey seemed fairly normal at first, but his demeanor changed within 30–45 minutes and he began acting "strange." (Tr.p.675). Hailey went in and out of the bathroom several times and began "mumbling to himself" and reading his bible. (Tr.p.675). Hailey became paranoid, asking whether the others were "plotting against him." (Tr.p.676). Hailey had some sort of "little bag" with him. (Tr.p.676). Lawson echoed Burton's testimony that George did not become aggressive when he used methamphetamine. (Tr.p.679).

George's girlfriend, Joni Kitchens, testified to the events of the day. She explained George went to pick up Hailey that afternoon, but she did not go along.

(Tr.p.696). George came home around 6:00 p.m. without Hailey. They left around 10 p.m. to pick up a friend and then went to pick up Hailey from Lawson's home. (Tr.p.701). Kitchens had never met Hailey before. (Tr.p.697). When they arrived, Hailey did not want to leave but George convinced him to go. (Tr.p.702). The three of them went back to George and Kitchens' home. She testified Hailey began "acting crazy," going in and out of the bathroom, "spacing out," and talking to (and answering) himself. (Tr.p.704–06). Around 45 minutes later, George left to take Hailey home.

Kitchens received a phone call from George that left her feeling concerned. (Tr.p.712). She believed he made the call from his car. She became more concerned after George did not respond to her text messages. She learned the next morning that he had been killed. (Tr.p.712).

Hailey testified in his defense. He denied using methamphetamine on March 5. (Tr.p.1016). He claimed he killed George in self-defense after George pointed the BB pistol at his face and accused him of stealing something from his bathroom. (Tr.p.1022). Hailey was seated in the back passenger seat with his shotgun. He testified he had his shotgun with him because he had planned to pawn it earlier in the day. (Tr.p.1013). Hailey claimed he "probably" loaded the shotgun when George turned down Warner Road and stopped the car. (Tr.p.1023). He claimed this caused him to fear for his life and he was afraid "something bad was going to happen." (Tr.p.1023). He admitted he loaded the shotgun before George allegedly pointed the gun at his face. (Tr.p.1024). Hailey testified he shot George in self-

defense when George turned his eyes away when he became distracted by his cell phone ringing. (Tr.p.1025–26). He claimed he was "defending himself" when he shot George. (Tr.p.1026).

Hailey also offered expert testimony from Dr. Amanda Salas, who was qualified as an expert in "general psychiatry, forensic psychiatry, and addiction." (Tr.p.903). Salas evaluated Hailey two weeks after the shooting and testified Hailey experienced an "acute stress disorder" brought on by the event. (Tr.p.907). She described Hailey's behavior leading up to the incident as "weird," but testified she did not believe Hailey was intoxicated at the time. (Tr.p.909–20).

ARGUMENT

I. The trial court acted within its discretion when it declined to give Hailey's requested charge that one need not wait until he is on "equal terms" with an aggressor to act in self-defense. The court's instruction that "one need not retreat if doing so would increase the danger to himself" was responsive to Hailey's concern about the State's closing argument and adequately covered the applicable law.

Hailey alleges the trial court committed reversible error by declining to charge his requested language that one need not wait until an aggressor is on "equal terms" before acting in self-defense. The trial court acted within its discretion when he instead chose to charge the jury that one need not retreat if by doing so he would increase the danger to himself. The charge given was correct and adequately covered the law applicable to the facts of the case and arguments of counsel. This Court should affirm.

A. Standard of Review.

An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion. State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010). To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant. Id.

B. Discussion.

The trial court's charge was substantially correct and adequately covered the law. The court's decision not to give the language requested by Hailey was within his discretion, and Hailey was not prejudiced. This Court should affirm.

i. The charge given was substantially correct and adequately covered the law.

"In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial. A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law. A jury charge that is substantially correct and covers the law does not require reversal." State v. Mattison, 388 S.C. 469, 478, 697 S.E.2d 578, 583 (2010) (internal citations and quotation marks omitted). The substance of the law is what must be charged to the jury, not any particular verbiage. Id. Failure to give requested jury instructions is not prejudicial error where the instructions given afford the proper test for determining the issues. Id. If the trial judge refuses to give a specific charge, there is no error if the charge actually given sufficiently covers the substance of the request. Id.

The trial court's instructions correctly stated the elements of self-defense as laid out in State v. Goodson, 312 S.C. 278, 280, 440 S.E.2d 370, 372 (1994). The court in this case instructed the jury:

> 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 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 bodily injury you should consider all the facts and circumstances surrounding the case and the crime 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 element 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.p.1133–35).

The court's charge correctly explained the applicable law. The instruction made perfectly clear that if Hailey's version of events was true, he would be entitled to acquittal because he was in apparent danger of imminent death or serious bodily injury and was not required to retreat. Given Hailey's straightforward testimony that George pointed a gun at his face, and that he was "defending himself," the charge was adequate to explain the law of self-defense under the facts of this case. See State v. Marin, 415 S.C. 475, 481, 783 S.E.2d 808, 812 (2016) (finding no error in refusal to give requested charge, even though it was a correct statement of law, where correct "rule was sufficiently encompassed in the jury charge provided by the

trial court"); see also State v. Mattison, 388 S.C. 469, 484, 697 S.E.2d 578, 586 (2010) (affirming trial court's refusal to give instruction encompassing correct statement of law where charge as a whole "sufficiently covered the substance" of applicable legal principles) (citing State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998) and State v. Austin, 299 S.C. 456, 458–59, 385 S.E.2d 830, 831–32 (1989) (explaining charge as given was "sufficiently clear")).

Hailey seems to suggest that it is always reversible error for the trial court to refuse a specific instruction on a statement of law arguably supported by the evidence. To support his argument, Hailey cites State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989), State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997), and State v. Day, 341 S.C. 410, 535 S.E.2d 431 (2000). However, in each of those cases the trial court gave the standard charge enunciating the four common law elements of self-defense, as found in State v. Davis, 282 S.C. 45, 317 S.E.2d 452 (1984). In each case, the court treated the Davis charge as the "exclusive self-defense charge" and refused to supplement his instructions beyond that basic instruction. Fuller, 297 S.C. at 443, 377 S.E.2d at 330.

That is not the case here. The trial court supplemented the standard charge following the State's closing argument in response to Hailey's concern that the State made a "duty to retreat" argument. As will be discussed below, this charge was directly responsive to Hailey's concerns and the State's closing argument. The court did not treat the Davis charge as the "exclusive self-defense charge," even though

the standard charge would have been sufficient to explain the law of self-defense based on the facts of this case.

Because the substance of the law was correctly charged, particularly in the instruction that a person need not retreat if doing so would increase the danger to himself, this is not a case where the court "completely omitted applicable principles of self-defense law." Marin, 415 S.C. at 483, 783 S.E.2d at 813. Accordingly, this case is not like those cited in Hailey's brief. Because the charge given was substantially correct and adequately covered the law, the court's refusal to give the "equal terms" charge does not require reversal. See Marin, 415 S.C. at 483, 783 S.E.2d at 813 ("While the 'continuing to shoot' charge may have been appropriate, its absence does not mandate reversal."). This Court should affirm.

ii. The charge given was responsive to Hailey's concern about the State's closing argument, and the court's decision about which language to charge was within its discretion.

Contrary to Hailey's argument on appeal, the "equal terms" charge did not reflect a central issue in the case. Defense counsel apparently did not believe so because he did not request the charge at the charge conference prior to closing arguments. (Tr.p.1065–66; Court's Exhibits #4–5). Hailey only requested the "equal terms" charge after the State argued in closing that, even under his version of the facts, Hailey could have retreated rather than resorting to deadly force. (Tr.p.1074). Following the State's closing argument, Hailey requested the "equal terms" charge, along with an instruction that a person has "no duty to retreat if doing so would increase the danger to himself." Defense counsel explicitly stated he

was requesting the additional instructions because the State argued that Hailey had a duty to retreat. He argued, "I never thought in my mind that the State would ever argue that when you are two miles down a deserted road that you have some ability to retreat from that situation . . . ." (Tr.p.1093).

The trial court instructed the jury that 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.p.1135). The charge was directly responsive to Hailey's concern about the State's closing argument. Because Hailey explicitly requested additional instructions in response to the State's argument that Hailey could have retreated, the trial court understandably chose the jury charge most directly related to that point. His instruction directly and adequately addressed defense counsel's stated purpose for requesting a supplemental charge in addition to the agreed-upon self-defense charge discussed during the charge conference. This decision was within the trial court's discretion. See Mattison, 388 S.C. at 479, 697 S.E.2d at 584 ("An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion.").

iii. Hailey was not prejudiced.

As discussed above, the charge given was sufficient to explain the applicable law to the jury. But beyond that, the charge did not change the outcome of trial because Hailey's story was simply unbelievable and rightly rejected by the jury. See State v. Marin, 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016) (explaining that to "warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant"). The jury decided the case on the

facts presented, not based on minute differences in the jury charge. This Court should affirm.

Hailey's conspicuously brief description of the shooting on direct examination simply did not make sense. Hailey testified he was sitting in the rear passenger seat and George was in the driver's seat. George stopped the car, turned around, and pointed a gun at Hailey's face. George became distracted by his cell phone and "turned." (Tr.p.1025). On cross-examination, Hailey testified the cell phone was in George's lap, and that George lowered the gun when he became distracted. (Tr.p.1045). He then "brought [the gun] back up." (Tr.p.1045; 1048). When George started to raise his gun again, Hailey shot him. (Tr.p.1060). Hailey admitted he had already loaded the shotgun before George ever pointed the BB gun at him. (Tr.p.1045).

The obvious inconsistency is the location of the gunshot entry and exit wound which showed Hailey shot George in the back right area of his head, behind the ear, with an exit wound at the left eye. Even if George did turn his head to look at the cell phone in his lap, the trajectory still would not line up. George would have had to turn his head all the way around to face forward (if not slightly to the left) in order for Hailey to shoot him behind the right ear with an exit wound at the left eye. (Tr.p.1080). It would not make sense for George to turn completely around (with his head pointed towards the driver's side window) while threatening someone with a gun. Hailey testified George knew Hailey was carrying a shotgun. (Tr.p.1036). Hailey never testified George turned all the way around. He testified

George became distracted by the cell phone that was in his lap. (Tr.p.1045). If he shot George during the scenario he described, he would have had to shoot him in the face.

In addition to the inconsistent physical evidence was the circumstantial evidence of Hailey's bizarre behavior before and after the shooting. Several witnesses testified to Hailey's strange, chilling behavior before the incident. (Tr.p.642–43, 653, 704–06). Equally damning were the police body camera videos wherein Hailey does not claim self-defense, but instead expresses intense guilt and gives incriminating statements such as the statement that a noise "led" him to the spot where he shot George. (State's Exhibit #2 at 6:30 and 11:00). Hailey's mother and aunt described his paranoid behavior and persistent belief that people were out to get him. (State's Exhibit #2 at 21:00). Hailey's mother attributed the behavior to drug use. (State's Exhibit #2 at 23:50).

Hailey's story was untenable. The unbelievable story, along with all the other discrediting evidence presented as to Hailey's bizarre behavior and drug use, caused him to be convicted. The court's decision to give the "no duty to retreat" charge rather than the "equal terms" charge had no effect on the outcome of the case. This Court should affirm.

II. The trial court correctly refused to charge the law of involuntary manslaughter because the evidence did not support the charge.

Hailey claims the trial court erred by refusing to charge the law of involuntary manslaughter. The trial court correctly refused the charge because the evidence did not support it. Hailey testified that he shot Marty George in self-defense after George pointed a gun at his face. Because a trial court should not instruct the jury on matters not supported by the evidence, the trial court correctly refused the charge. This Court should affirm.

A. Standard of review.

An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion. State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010). To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant. Id.

B. Discussion.

"Involuntary manslaughter is defined as (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 but while engaged in a lawful activity with reckless disregard for the safety of others." State v. Mekler, 379 S.C. 12, 15, 664 S.E.2d 477, 478 (2008).

In support of this claim, Hailey cites portions of the 911 call and police body camera video wherein Hailey's mother states Hailey told her the shooting was an accident. However, Hailey did not pursue an accident or involuntary manslaughter

theory at trial. Rather, he argued in opening that he acted in self-defense and testified unequivocally that he shot George in self-defense. (Tr.p.271; 1026). The evidence did not support a charge on involuntary manslaughter. See State v. Rivera, 389 S.C. 399, 404, 699 S.E.2d 157, 159 (2010) (explaining trial court should charge lesser-included offense when there is "evidence from which the jury could infer that the defendant committed a lesser offense").

This case contrasts sharply with those where a defendant testified to facts that would support an involuntary manslaughter charge, yet the court refused the charge because other evidence did not support it. See State v. Battle, 408 S.C. 109, 757 S.E.2d 737 (Ct. App. 2014) (collecting cases). In this case, Hailey testified to facts that very clearly **do not** support an involuntary manslaughter charge. Hailey gave unequivocal testimony that he shot George in self-defense after George pointed a gun in his face. He testified: "He was waving a gun in my face, asking me what did I take out of his bathroom." (Tr.p.1022). He claimed he was in fear for his life. (Tr.p.1023). He testified: "Something rung on his phone, I don't know what it was. But he turned and I don't know, I guess, he was to get back into motion and that is when it happened." (Tr.p.1025). Defense counsel asked: "Were you defending yourself at the time?" Hailey responded: "Yes, sir." (Tr.p.1026). Defense counsel followed up: "At the time that you lifted that gun did you think your life was in danger?" Hailey responded: "Yes, I did." (Tr.p.1026). Hailey even testified that he loaded his shotgun in anticipation of using it against George. (Tr.p.1023). The only reasonable inference is that Hailey acted intentionally when he shot George. Based

on this testimony, the evidence did not support a charge on involuntary manslaughter. See State v. Rivera, 389 S.C. 399, 405, 699 S.E.2d 157, 159 (2010) (holding trial court correctly refused voluntary manslaughter charge because it was inconsistent with appellant's trial testimony); see also State v. Pickens, 320 S.C. 528, 531, 466 S.E.2d 364, 366 (1996) (holding Appellant was not entitled to an involuntary manslaughter charge where he "admitted he shot the gun" intentionally); State v. Morris, 307 S.C. 480, 415 S.E.2d 819 (Ct.App.1991) (involuntary manslaughter charge not warranted because "under involuntary manslaughter the act must be unintentional and defendant had intentionally shot his gun although he claimed self-defense"); .

While there may be factual scenarios where it is appropriate to charge both involuntary manslaughter and self-defense, the two are "often mutually exclusive . . . ." State v. Williams, 400 S.C. 308, 317, 733 S.E.2d 605, 610 (Ct. App. 2012). The only evidence Hailey cites in support of his argument that the killing was unintentional is hearsay testimony from his mother drawn from officer body cam footage wherein his mother states Hailey told her the shooting was an "accident." However, his mother also told police that Hailey told her "he'd made a mistake and he's sorry." (State's Exhibit #1 at 20:00; State's Exhibit #149 at 9:00). Mrs. Hailey had no personal knowledge of what occurred. This hearsay testimony does not reasonably support a finding that the killing was unintentional in light of Hailey's unequivocal trial testimony that he acted in self-defense.

Had not Hailey taken the stand and testified unambiguously that he shot George intentionally in self-defense, his mother's testimony that he told her it was an accident may have presented the need for an involuntary manslaughter charge. But in light of Hailey's testimony, there was only one sustainable view of the evidence: Hailey acted intentionally. Accordingly, there was no evidence from which the jury could have reasonably inferred Hailey did not intentionally discharge the weapon. See Bozeman v. State, 307 S.C. 172, 177, 414 S.E.2d 144, 147 (1992) (holding trial court correctly refused involuntary manslaughter charge where defendant admitted he intentionally fired gun); State v. Craig, 267 S.C. 262, 269, 227 S.E.2d 306, 310 (1976) (holding trial court correctly refused involuntary manslaughter charge where defendant "admitted intentionally firing his shotgun"); Douglas v. State, 332 S.C. 67, 74, 504 S.E.2d 307, 310 (1998) (defendant not entitled to involuntary manslaughter charge where he "admit[ted] he intentionally shot the gun"); State v. Smith, 315 S.C. 547, 550, 446 S.E.2d 411, 413 (1994) (no involuntary manslaughter charge where "record here demonstrates that [appellant] acted intentionally"); State v. Sams, 410 S.C. 303, 309, 764 S.E.2d 511, 514 (2014) (affirming refusal of involuntary manslaughter charge where appellant acted intentionally and his "theory at trial was essentially self-defense"); see also State v. Niles, 412 S.C. 515, 523, 772 S.E.2d 877, 881 (2015) (no charge on lesser-included voluntary manslaughter where "the focus of Niles's testimony at trial was on who was the aggressor—Niles or the victim—apparently to support Niles's theory of self-defense"); State v. Cole, 338 S.C. 97, 102, 525 S.E.2d 511, 513 (2000) (no voluntary

manslaughter charge because "by Appellant's own testimony, he shot at the men to scare them away. Appellant's testimony appears designed to support a charge of self-defense, not heat of passion").

Furthermore, Hailey did not testify to any facts that support the assertion he acted recklessly or unlawfully. His argument that he committed the crime of "public disorderly conduct" while in George's car is quite a stretch, and completely contrary to his trial testimony. Likewise, Hailey's argument that evidence of his drug use entitled him to an involuntary manslaughter charge directly conflicts with his trial testimony. Hailey testified unambiguously at trial that he did not ingest drugs on the day of the shooting, apart for marijuana that morning. And even if Hailey had met the other elements of involuntary manslaughter, he still would have had to show his acts were unintentional. Under Hailey's version of events, his acts were intentional and totally justified.

The trial court correctly characterized Hailey's argument in support of his request for a voluntary manslaughter charge "creative." He may not have his cake and eat it too. "The law to be charged to the jury is determined by the evidence presented at trial." State v. Goodson, 312 S.C. 278, 280, 440 S.E.2d 370, 372 (1994). Because Hailey testified unequivocally that he shot George intentionally in self-defense, the evidence did not support a finding that Hailey acted unintentionally. The trial court correctly determined that the evidence did not support a charge on involuntary manslaughter. This Court should affirm.

III. The trial court acted within its discretion by limiting Hailey's redirect examination of an expert witness because her proffered testimony about whether Hailey's observation of "leaning fence posts" caused him shoot the victim was not responsive to cross-examination and Hailey failed to lay a foundation to show the testimony was reliable. Hailey suffered no prejudice because the proffered testimony was not important to the case.

Lastly, Hailey claims the trial court erred by limiting the redirect testimony of his expert witness concerning whether "fence posts leaning . . . contributed to the shooting." The trial court correctly limited the witness's testimony because there was nothing new brought out on cross-examination relating to the "fence posts." The prosecutor's questions regarding the "symbols" Hailey saw were focused on the statements captured on the police body camera videos on the night of the shooting, not on statements Hailey made to his psychiatrist days later. Hailey was not prejudiced because he testified the "symbols" he saw, such as the leaning fence posts, did not cause him to shoot George, and the expert testified she had no opinion "about the event itself." Contrary to Hailey's assertion, the prosecutor did not make any argument about the fence posts in his closing argument. The proffered testimony was not important to the case and did not affect the result. This Court should affirm.

A. Standard of review.

The scope of redirect examination rests in the discretion of the trial court. State v. Stroman, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984).

B. Trial objection.

Hailey offered Dr. Amanda Salas as an expert in "general psychiatry, forensic psychiatry and addiction." (Tr.p.903). Dr. Salas testified "forensic psychiatry

involves psychiatry that deals with court . . . ." (Tr.p.902). She explained her practice focused on behavioral health assessment and mental health treatment. (Tr.p.904).

Dr. Salas explained she evaluated Hailey for mental illness following the shooting. Following consideration of various psychotic disorders, she diagnosed him with "acute stress disorder" which arose from the shooting itself. (Tr.p.907–08, 921). She testified that her diagnosis was based on her observations and interviews with Hailey after the shooting had already occurred, and she testified she had "no opinions about the events itself [sic]" because that was a task for the jury. (Tr.p.907).

She further testified that while Hailey had eccentric obsessions with symbols (as illustrated by his statements on the police body camera videos about "three dots" and seemingly random numbers), these were not hallucinations. She testified Hailey was trying to "find meaning" in external stimuli, but was not experiencing hallucinations of phenomena that were not actually occurring. (Tr.p.911, 916, 923–24). She testified she came to this conclusion because Hailey told her he was not hallucinating. (Tr.p.924). She explained this was just "weird" behavior and Hailey is "odd and strange at baseline. Because he is what he considers to be a merchant of the land capable of reading nature and it is not uncommon for him to look for symbols and meanings of things that the rest of us might not find worthy of our attention more than never having our attention." (Tr.p.910). When defense counsel asked her to elaborate, she further explained:

> So there were three rose bushes and that is the number three; there were three toilets and that is the number three; there are fence posts, some of them were straight up and down; and some of them were at an angle. On one side of the road where the victim was they were straight up and down and on the other side of the road they are off to the side. He doesn't really know what that means. . . . He has tried to find meaning, probably at an accelerated rate for what he was trying to find meanings from before that.

(Tr.p.910–11).

On cross-examination, the solicitor asked Dr. Salas to elaborate on her conclusion that Hailey was not experiencing hallucinations. She opined that Hailey was not hallucinating, but rather was "reading nature in the moments riding down the road before the event occurs . . . ." (Tr.p.946). She described blue and pink rocks and the color red as having special significance. (Tr.p.948–50). Dr. Salas elaborated further, and referenced the "fence post" Hailey apparently described in his interviews with her. She explained:

> So for example, with the fence post. I would not have found significance in meaning between the 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 on the other side. . . . But the issue is that I might think, well, I should have interpreted those fence post [sic] to mean something was getting ready to happen. I should have read nature better than I did."

(Tr.p.953–54). The solicitor asked whether a "reasonably prudent person of ordinary firmness and courage" would have "entertained the same ideas" which were "not grounded in reality." (Tr.p.953). Dr. Salas again referenced the fence posts in her answer concerning Hailey's obsession with symbols. (Tr.p.954). Several times during cross-examination, the solicitor asked questions referencing Hailey's statements captured in the body camera videos, but he did not ask about

the fence posts. (Tr.p.945–51). Hailey does not reference the fence posts in any of the body camera videos.

On redirect examination, defense counsel attempted to ask Dr. Salas "what Mr. Hailey said to you" at a certain part of the interview. The trial court sustained a State objection after conducting a bench conference. (Tr.p.958). Defense counsel went on to elicit further testimony from Dr. Salas about why she did not believe Hailey was hallucinating on the day of the shooting. After recross-examination, defense counsel placed an objection on the record. He stated he wanted to ask Dr. Salas "whether she believes that the fence post led him to commit this offense . . . ." (Tr.p.965–66).

The court took proffered testimony from Dr. Salas. Defense counsel asked:

Q: "The fence post leaning, did that contribute to the actual shooting?"

A: "No."

Q: "Okay. Would you agree that there was an intervening cause that—"

A: "Yes."

Q: "Ok."

The court excluded the testimony because it was not responsive to cross-examination. (Tr.p.975).

C. Discussion.

i. The testimony was outside the scope of cross-examination.

Dr. Salas's proffered testimony was not responsive to the State's cross-examination. While the prosecutor did question Dr. Salas about Hailey's "distorted views," he did not specifically ask about the leaning fence posts. Hailey did not

reference the fence posts in the officer body camera videos admitted as evidence, which were the focus of the prosecutor's questions. (Tr.p.946). Rather, he discussed the fence posts in his interviews with Dr. Salas after the event. The prosecutor never suggested the leaning fence posts "contributed to the shooting." Nor did defense counsel ask Dr. Salas to opine whether the fence posts "caused" Hailey to shoot George during her direct examination. The trial court acted within its discretion when it refused to allow defense counsel to open a new inquiry on cross-examination into whether the fence posts "contributed to the shooting."

ii. Hailey failed to lay a foundation to show the proffered testimony was reliable.

Not only was the proffered testimony outside the scope of cross-examination, Hailey failed to lay a foundation to show the testimony was reliable. This Court should affirm the exclusion of the proffered testimony on this alternate sustaining ground. See Rule 220(c), SCACR (providing the appellate court may affirm on any ground appearing in the record).

Trial courts have a gatekeeping responsibility in admitting expert testimony. State v. Phillips, 430 S.C. 319, 334, 844 S.E.2d 651, 659 (2020). Expert testimony must "rest[] on a reliable foundation and [be] relevant to the task at hand" Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 597 (1993); see also State v. Andrews, 424 S.C. 304, 318, 818 S.E.2d 227, 234 (Ct. App. 2018), aff'd as modified, 427 S.C. 178, 830 S.E.2d 12 (2019) (explaining " an opinion may be offered on the ultimate issue of the case only when the witness is otherwise qualified" and "an expert's testimony may not exceed the scope of his expertise").

Dr. Salas was offered as an expert to give her opinion that Hailey was not intoxicated and was not hallucinating at the time of the shooting, and to share her diagnosis of Hailey's mental disorder following the shooting. She was not offered to give an opinion about the cause of the shooting. The defense did not lay any sort of foundation for this type of opinion. On the contrary, Dr. Salas testified on direct examination that she had "no opinions about the events itself [sic]." (Tr.p.907). In her proffer, Dr. Salas offered only a conclusory statement that the fence posts did not contribute to the shooting. (Tr.p.975).

Because Dr. Salas did not offer any foundational testimony that would qualify her to give an opinion about causation, or whether Hailey acted in self-defense, Hailey failed to establish her testimony was reliable. See Phillips, 430 S.C. at 334, 844 S.E.2d at 659 (explaining the "proponent of scientific evidence has a . . . responsibility to provide the trial court the factual and scientific information the court needs to carry out its gatekeeping duty"). Hailey had an uninterrupted opportunity to lay a proper foundation to establish the reliability of Dr. Salas's opinion whether the leaning fence posts "contributed to the shooting," but failed to do so. The record supports exclusion of the testimony on this ground. This Court should affirm.

iii. Hailey was not prejudiced because he testified the "fence posts leaning" did not cause him to shoot George.

Finally, the proffered evidence was not important to the case and Hailey cannot show prejudice. See Ward v. Epting, 290 S.C. 547, 559, 351 S.E.2d 867, 874 (Ct. App. 1986) (explaining limitation of re-direct examination not reversible unless

it causes prejudice). Dr. Salas testified on direct examination that she had "no opinions about the event[] itself." (Tr.p.907). Rather, her testimony focused on the diagnosis of Hailey's mental condition following the event and whether he was having hallucinations. Defense counsel did not explain how the proffered testimony about fence posts had anything to do with Dr. Salas's diagnosis or how it added anything to her prior testimony concerning hallucinations.

The proffered testimony had nothing to do with Hailey's defense. On the contrary, Hailey testified the "leaning fence posts" **did not** cause him to shoot George. Hailey testified that he thought about the posts after the fact, not before the shooting. (Tr.p.1052). Hailey was asked "Did any of these signs cause you to shoot him?" He responded: "No." (Tr.p.1061). Hailey testified specifically that the shooting had nothing "to do with signs and nature or anything like that." (Tr.p.1026). Rather, he testified the shooting was brought about by that "pistol that was pointing at [him]." (Tr.p.1027).

Likewise, Dr. Salas stated in her proffer that the leaning fence post **did not** contribute to the shooting. (Tr.p.972). The whole point of her testimony was to rebut the argument that Hailey was hallucinating and intoxicated on methamphetamine. She testified that the "behaviors I saw do not have compatibility with acute intoxication of drugs." (Tr.p.920). Dr. Salas was not offered to testify that the leaning fence posts caused Hailey to shoot George. The "intervening cause" to which Dr. Salas referred in her proffer was obviously that

George allegedly threated Hailey with a gun. This is consistent with his theory of the case and his trial testimony: that he acted in self-defense.

While Hailey claims the State "weaponized the testimony he elicited during cross-examination" during his closing argument, see Brief of Appellant at 23, the State did not argue the symbolism of the leaning fence posts caused Hailey to shoot George, or reference the fence posts at all. Rather, he focused on Hailey's conduct in the officer body-worn and in-car camera videos, such as Hailey's statement that a noise he heard the day before guided him to the spot where he shot George. (Tr.p.1079, 1087; State's Exhibit #2 at 6:30). Hailey does not refer to the fence posts at any point in these videos. (State's Exhibits #1, 2, and 152).

Hailey and Dr. Salas both testified the "leaning fence posts" did not contribute to the shooting. Dr. Salas's proffered testimony was not important to the issues in the case and had no effect on the verdict. While Hailey claims the proffered testimony was "crucial to the defense," he has not explained on appeal why this proffered testimony mattered at all. Hailey cannot show prejudice. This Court should affirm.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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February 15, 2022

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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENWOOD COUNTY

Court of General Sessions
The Honorable Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2020-001276

THE STATE, Respondent,

v.

MARK ANTHONY HAILEY, JR., Appellant.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Final Brief of Respondent on Laura M. Caudy, Esquire and Taylor D. Gilliam, Esquire, counsel of record for the Appellant, by electronic mail to the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served.

This 15th day of February, 2022.

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Attachments:	image001.png Hailey Mark - 2020-001276 -Initial Brief of Respondent and Designation of Matter (02901897xD2C78).PDF

Good afternoon, Ms. Caudy and Mr. Gilliam.
Attached to this email is a copy of the State's Initial Brief of Respondent in the above matter.
Shortly, we will be electronically filing this brief with the Court.
If you would, please confirm by return email that you have received this email and the attachment.
Thank you in advance for your cooperation.
Sincerely,
Anne Mueller, Legal Assistant for Assistant Attorney General Joshua A. Edwards

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