

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

No. 2009-0416

The State Of New Hampshire

v.

Roger Leveille

---

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE  
HILLSBOROUGH COUNTY SUPERIOR COURT –  
NORTHERN JUDICIAL DISTRICT

---

---

BRIEF FOR THE STATE OF NEW HAMPSHIRE

---

THE STATE OF NEW HAMPSHIRE

Michael A. Delaney  
Attorney General

Nicholas Cort, NH Bar No. 236  
Assistant Attorney General  
Criminal Justice Bureau  
33 Capitol Street  
Concord, N.H. 03301-6397  
(603) 271-3671

(15 minutes)

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

ISSUE PRESENTED ..... 1

STATEMENT OF THE CASE ..... 2

STATEMENT OF FACTS..... 3

    A.    Testimony At Trial..... 3

    B.    Other Events During Trial..... 10

SUMMARY OF THE ARGUMENT ..... 12

ARGUMENT ..... 13

    THE COURT’S INSTRUCTION ON ACCIDENT WAS NOT  
    CONFUSING, BUT CLEARLY INFORMED THE JURY THAT THE  
    DEFENDANT’S CLAIM OF ACCIDENT WAS INCOMPATIBLE WITH  
    THE ELEMENTS OF ATTEMPTED MURDER AND ASSAULT. .... 13

CONCLUSION ..... 21

STATE’S APPENDIX ..... 22

**TABLE OF AUTHORITIES**

**Cases**

*Hall v. State*, 431 A.2d 1258 (Del. 1981)..... 17

*Hawthorne v. Howes*, No. 1:07-cv-287, 2007 WL 1701848  
(W.D. Mich. June 11, 2007)..... 19

*People v. Garcia*, 651 N.E.2d 100 (Ill. 1995)..... 16

*People v. Hawthorne*, 713 N.W.2d 724 (Mich. 2006)..... 18

*People v. Lester*, 277 N.W.2d 633 (Mich. 1979)..... 14, 17, 18

*Sims v. State*, 716 S.W.2d 774 (Ark. Ct. App. 1986)..... 15

*State v. Ash*, 526 N.W.2d 473 (N.D. 1995)..... 16

*State v. Aubert*, 120 N.H. 634 (1980)..... 13, 14, 17

*State v. Benham*, 23 Iowa 154 (1867)..... 20

*State v. Bortner*, 150 N.H. 504 (2004)..... 14

*State v. Brown*, 374 N.W.2d 28 (Neb. 1985)..... 16

*State v. Colby*, 116 N.H. 790 (1976)..... 13

*State v. Iromuanya*, 719 N.W.2d 263 (Neb. 2006)..... 16

*State v. Martin*, 240 S.E.2d 486 (N.C. 1978)..... 14, 18

*State v. Muhammad*, 651 S.E.2d 569 (N.C. Ct. App. 2007) ..... 18

*State v. Parker*, 142 N.H. 319 (1997) ..... 13, 14

*State v. Pugliese*, 122 N.H. 1141 (1982)..... 15

*State v. Rosciti*, 144 N.H. 198 (1999) ..... 15

*State v. Singleton*, 974 A.2d 679 (Conn. 2009)..... 15

*State v. Yarborough*, 679 S.E.2d 397 (N.C. Ct. App. 2009) ..... 20

**Statutes**

RSA 627 ..... 15

RSA 629:1 (2007) ..... 2

RSA 630:1-a (2007) ..... 2

RSA 631:1 (2007) ..... 2

RSA 631:2 (2007) ..... 2

RSA 631:4, I(a) (2007)..... 20

**ISSUE PRESENTED**

Whether the trial court's instruction on accident, in a trial for attempted murder and first degree assault, fairly covered the issues and law of the case, where the instruction defined "accident" as "an unexpected happening that occurs without intention or design on a defendant's part," and then said that if the jurors found that the State had not proved a requisite mental state beyond a reasonable doubt, they must find the defendant not guilty.

**STATEMENT OF THE CASE**

In March 2008, a Hillsborough County (North) grand jury indicted the defendant, Roger Leveille, on three alternative charges—attempted murder, first degree assault, and second degree assault—based on events on the evening of February 13, 2008, at 46 Musquash Road in Hudson. DBA 1-3.<sup>1</sup> See RSA 629:1 (2007); RSA 630:1-a (2007); RSA 631:1 (2007); RSA 631:2 (2007). After a jury trial in Hillsborough County Superior Court for the Northern District (*Nicolosi, J.*), the defendant was acquitted of attempted murder and convicted on the remaining two charges. T5 717-19. The court sentenced him to a term of five to ten years in the state prison, stand committed. NOA 2. This appeal followed.

---

<sup>1</sup> References to the record are as follows: “NOA” is the notice of appeal; “DB” is the defendant’s brief; “DBA” is the appendix to the defendant’s brief; “App.” is the appendix to this brief; “T1” through “T5” are the five volumes of transcript from the trial on December 16, 17, 18, 22, and 23, 2008.

**STATEMENT OF FACTS**

**A. Testimony At Trial**

The three alternative charges all flowed from the wounding by gunshot of Gregory Ellis on the evening of February 13, 2008, in the driveway of the home at 46 Musquash Road in Hudson. T1 12-13. The home was a duplex; one half was occupied by the defendant and his family, while the other was occupied by the defendant's half-sister Christine Ellis, her husband Gregory, and their two children. T3 455-56; T4 571.

The jury heard several conflicting versions of events on the night in question, including that of the defendant, who testified in his own behalf. Except as otherwise indicated, the following facts appear to be undisputed. The weather on February 13 was extremely bad; snow early in the day had changed to rain and sleet by evening. T3 457; T4 571-72. The defendant spent ten hours plowing for the city of Nashua on a contract basis, using his own dump truck. T4 572. He then stopped and drank "a couple of beers and a rum and Coke" before going home. T4 573.

When the defendant arrived at 46 Musquash, he started to plow one of the two driveways at the house, but the truck got stuck after he had to drive around Christine's Chevrolet Suburban, parked in the middle of the driveway. T4 574-76. He then used his cell phone to call his sister, who was in the house; they

exchanged some heated words because the defendant had repeatedly asked her to park on the street. T4 575-76. The defendant then called Albert Lanfair, who lived across the street, and asked him to help free the truck; Lanfair came within minutes. T1 136; T4 577. About five minutes later, Gregory came out of the house. T4 577-78. It was still raining and sleeting, and the dump truck, which had a diesel engine, was running very loudly, making it difficult to hear. T1 57-58; T4 604-05.

Gregory and the defendant spoke angrily to each other, and then started fighting; accounts differed as to exactly how the fight started. T1 140-42; T3 465-68; T4 579-80. Gregory punched the defendant at least twice, and the defendant fell to the ground; T1 143; T3 468; the defendant claimed that he slipped and fell into Gregory, and was already on his knees when Gregory started punching him, T4 579-80. The defendant and Lanfair both testified that Lanfair tried to break up the fight, T1 143; T4 582, but Gregory denied this, T3 469. There was also conflicting testimony about whether Gregory kicked the defendant while he was down. T1 143-44; T3 469; T4 582.

On the night of February 13, Lanfair twice told police that at this point, the defendant said that he was going to get his gun and shoot Gregory. T2 265-67, 274. In a later interview and again on the stand, Lanfair denied hearing this. T1 159-60. Gregory testified that he heard the defendant say, "I'm going to shoot this motherfucker." T3 470. Eventually the defendant went to the driver's side of his

truck, putting the truck between himself and Gregory. T147; T4 583. He reached into the cab and took out his pistol—a Smith and Wesson .22 caliber semiautomatic (Model 41). T1 147-53; T2 319; T3 470-72; T4 586-88. He then pointed the gun at Gregory. T1 153-56; T3 472; T4 589.

Gregory was unsure how the defendant got back to the other side of the truck. T3 472-74. The defendant said that he stood on the left front tire in order to point the gun over the truck's hood, then slipped and fell onto the hood itself. T4 589-94. Lanfair said the defendant climbed onto the hood, but slipped after he got there. T1 154-56. Both agreed that he fell off the hood on the passenger side, landing on his feet, but facing the truck. T1 156; T4 594.

Gregory said that the defendant walked up to him and started hitting him in the face with the pistol. T3 473-75. The defendant and Lanfair said that, while the defendant was still facing the truck, Gregory came up and grabbed him, and the two men then wrestled for the pistol. T1 157-64; T4 594-97. While this was going on, Lanfair heard the gun go off, T1 157; neither Gregory nor the defendant remembered hearing the shot, T3 473-74; T4 596-99. Gregory then fell to the ground, feeling “excruciating” pain in his right shoulder. T3 475-77. All three men testified that at this point they did not yet know that he had been shot. T1 178; T3 479; T4 599-604.

Greg White, who lived next door to 46 Musquash, heard the shot and then saw the truck's headlights when he opened his second-floor window, but it was

too dark to see people except as shadows. T2 238-40. He heard someone say, "Get the gun," and tried to call 911 but was unable to get through because of the storm. T2 243. He told his wife to keep trying to call 911; then, about four minutes after the first shot, he heard a second shot, much louder. T2 243-44.

After Gregory fell down, he got back up briefly, holding his right arm with his left hand, and said that he thought the defendant had broken his wrist. T2 177; T4 597. He then said he needed to sit down, and did; soon he said he needed to lie down, and did. T2 178; T4 598-99. At about this same time, Christine came out the front door of the house holding Gregory's pistol—a Glock .45 caliber semiautomatic. T2 178, 333. She told the defendant and Lanfair to stay away from her husband or she would shoot them. T2 178; T4 599-600. She fired one shot (this was undoubtedly the second shot heard by White), but when Lanfair told her to get back in the house and put the gun away, she did. T2 178; T4 602.

The defendant and Lanfair went over to Gregory; his jacket opened and they saw blood on his shirt. T2 178; T4 602-03. The defendant then told Lanfair to call 911, which he did. T4 603. At about the same time, Lanfair saw the defendant's pistol on the ground; he picked it up and put it on the cover of the nearby above-ground swimming pool. T2 179. The Hudson Police arrived within two to three minutes of the 911 call. T1 54.

Officer Daniel Dolan was the first on the scene. T1 53, 57-58. By that time, Christine had returned from the house; Dolan could hear her screaming as he

approached. T1 57-59. Gregory was lying on his back in the snow, bleeding from the left side of his neck, while the defendant was kneeling over him; the defendant was naked to the waist. T1 57-62. Dolan called for an ambulance and stayed with Gregory until the EMTs arrived. T1 64-65. Gregory told him that he did not know who had shot him, "but [the defendant] had a gun." T1 65.

The defendant told Officer Kevin Pucillo, "I didn't mean to shoot him"; Pucillo then handcuffed him. T1 122-23. Dolan spoke briefly to the defendant. T1 66-74. Dolan smelled alcohol on his breath, and noted that his eyes were bloodshot and glassy, and his speech slurred. T1 68-69. He was crying, and kept asking Dolan whether Gregory would "make it." T1 68. When asked if he was hurt, the defendant said no; Dolan saw no cuts or bruises, either on his face or on his chest and stomach. T1 69. The defendant agreed to waive his *Miranda* rights. T1 70-71.

He first told Dolan that he was "just plowing the driveway when they [i.e., Gregory and Christine] attacked me." T1 71-72. He said that he had gone to the truck to get his gun, and that the gun had gone off, but he did not remember pulling the trigger. *Id.* When asked whether Gregory had a weapon, he first said no, then said he had a shovel; Dolan could see no shovel anywhere. T1 72. When asked where the gun was, the defendant said he could not tell Dolan, but he could show him. T1 73. He was still crying, and said, "I'll regret this the rest of my life if he dies." T1 73-74.

In the meantime, Lanfair showed Officer James Stys where the gun was. T1 96. While Stys was removing the clip and making the gun safe, a spent shell casing came out of the chamber. T1 97. Dolan learned that the gun had been located and seized, so he took the defendant to the police station in a cruiser. T1 75. During the booking process, Dolan noted that the defendant's jeans smelled of urine; he called the defendant's family to get him some dry clothes. T1 76-77. By this time, the defendant had stopped crying and appeared more agitated; he said, "A black guy attacked me in my own driveway and I shouldn't be here." T1 79. The next morning, he told another officer that he was sorry, he did not mean to shoot Gregory, and he hoped Gregory was okay. T2 349-52.

Gregory was taken to Southern New Hampshire Medical Center, and was then airlifted to Massachusetts General Hospital in Boston for emergency surgery. T3 362-63, 413. X-rays revealed that the bullet had entered the left side of his neck and lodged in fragments in his right shoulder. T3 364-65. Before coming to rest, it had damaged both the common carotid artery and the right subclavian artery; the wound would certainly have been fatal if surgery had not been performed immediately. T3 367-72.

Some of the physical evidence tended to corroborate Gregory's version of events and contradict the defendant's and Lanfair's versions, while other evidence had the opposite effect. In the former category was the fact that Gregory's face was heavily bruised. T3 407. This was consistent with Gregory's testimony that

the defendant had pistol-whipped him, T3 474, while neither the defendant nor Lanfair testified that Gregory had been struck in the face while fighting the defendant. The defendant's lack of bruises, which was confirmed by a doctor who examined him soon after the shooting, T3 380-91, was also consistent with Gregory's testimony that he hit the defendant in the head only two or three times, and only "kneed" him once after he fell but never kicked him, T3 468-69; it was not consistent with the defendant's (and Lanfair's) testimony that Gregory had kicked him several times, T1 143-44; T4 582. The doctor's report also said that the defendant denied any use (by Gregory) of "feet or weapons." T3 385. The fact that the gun had been fired contradicted the defendant's testimony that he never "racked" a bullet into the chamber. T4 590-91; *see* T2 325-27.

In the latter category was the fact that the spent shell casing had failed to eject from the defendant's gun. T1 97. Normally, firing the gun would cause the slide forming the top of the barrel to move back, opening an ejection port where the spent casing would come out. T2 324. Failure to eject could have several explanations, one of which was that, when the gun was fired, something such as a hand on top of the gun was preventing the slide from moving all the way back. T2 327-29. This was consistent with the defendant's and Lanfair's testimony that Gregory and the defendant were struggling for the gun when it fired, T1 157-64; T4 594-97, something Gregory denied, T3 481. Also in this category was the fact that the defendant's sweatshirt had come off during the fight, something that was

consistent with the defendant's and Lanfair's testimony about a struggle, but that Gregory's version did not account for. T1 57-58; T2 181; T3 538-39.

On cross-examination, the defendant admitted that Gregory had not had any weapons. T4 629. He also admitted that, when he got his pistol, there was a large truck between him and Gregory. T4 641-42. The prosecutor asked, "If he was on that side of the truck and you were on this side of the truck, he wasn't going to hurt you, was he?" T4 642. The defendant replied, "Well, I wish I had thought of that at the time." *Id.* He also admitted that he could have stayed inside the truck or walked to his neighbor's house instead of getting his gun. *Id.* When asked why he chose to get the gun, he said, "Well, it's—when you're in fear for your life and things were happening pretty fast, it's the decision that I made." T4 643.

#### **B. Other Events During Trial**

The defendant submitted a requested jury instruction on accident based on Massachusetts case law. DBA 4-10. The State objected. DBA 11-13. The court agreed to instruct the jury on accident. T4 656. After reviewing the elements of the three charges, including the respective culpable mental states, T4 701-04, the court instructed the jury as follows.

Mr. Leveille contends that the shooting of Mr. Ellis was accidental. As you were previously instructed, a crime is made up of a voluntary act and in this case, the allegation is that the gun was discharged[,] and a mental state.

The State must prove both the physical deed and a mental state beyond a reasonable doubt for the defendant to be found guilty of a crime.

An accident is an unexpected happening that occurs without intention or design on a defendant's part. It means a sudden unexpected event that takes place without the defendant's intending for it to occur. [Thus<sup>2</sup>,] if you find that the State has not proved, beyond a reasonable doubt, that Mr. Leveille acted with a requisite mental state, then you must find him not guilty.

T4 704-05; *see* App. 1. The defendant did not assent to this instruction. T4 654-55.

---

<sup>2</sup> The word "thus," which appears in the written version of the court's instructions, App. 1, was mistranscribed as "that's" in the trial transcript, T4 705.

**SUMMARY OF THE ARGUMENT**

The court was under no obligation to give an accident instruction in the words requested by the defendant, as long as it stated the applicable law correctly. The court's instruction on accident was not confusing, but was given in the context of the repeated instruction that the State had to prove a culpable mental state. By defining "accident" as something that happened without "intention" or "design" on the defendant's part, the court informed the jury that it could not find a culpable mental state if the shooting was accidental. This was sufficient.

In any case, because the defendant effectively admitted to pointing a gun at Gregory under circumstances where such an act was not justified, he was engaged in the unlawful act of felony criminal threatening. The defense of accident is not available when a shooting is a direct result of such an unlawful act, even if the defendant did not intend to fire the gun, as he claimed. Thus, the defendant here actually got a more favorable instruction than he was entitled to by law.

**ARGUMENT**

**THE COURT'S INSTRUCTION ON ACCIDENT WAS NOT CONFUSING, BUT CLEARLY INFORMED THE JURY THAT THE DEFENDANT'S CLAIM OF ACCIDENT WAS INCOMPATIBLE WITH THE ELEMENTS OF ATTEMPTED MURDER AND ASSAULT.**

The defendant argues that, although the trial court instructed the jury on his defense of accident, it erred when it failed to give the instruction he requested.

DB 12-20. “The failure of the trial court to incorporate the specific language proposed by the defendant is not error providing the instructions correctly state the law.” *State v. Colby*, 116 N.H. 790, 795 (1976). More specifically, “[j]ury instructions are designed to give jurors neutral guidance on the law by which to evaluate testimony. Instructions are appropriate if they properly state the law and allow the jurors to exercise their own judgment in evaluating conflicting testimony.” *State v. Parker*, 142 N.H. 319, 324 (1997). The instructions in this case were actually more favorable to the defendant than the law requires.

In *State v. Aubert*, 120 N.H. 634 (1980), as in this case, there was some evidence that the defendant pointed a gun at the victim (in that case, the defendant's husband), that the victim initiated a struggle by grabbing the gun, and that the gun discharged, wounding the victim. *Id.* at 635. Unlike the evidence in this case, in *Aubert* there was also evidence that the defendant did not intend to use the gun, because she was right-handed and was carrying the pistol in her left hand. *Id.* The trial court refused the defense's request to charge the jury that if “the gun

went off accidentally ... you are instructed to return a verdict of not guilty.” *Id.*

This Court reversed the defendant’s conviction for attempted murder, saying:

A requested charge on a party’s theory of defense must be given if such theory is supported by some evidence. Refusal to charge on that defense is reversible error. This principle applies to the defense of accident as well as to other defenses. ... Because there was evidence to support this theory of defense, the trial court’s refusal to charge the jury about the defense of accident was error.

*Id.* (citations omitted). In support of its holding, this Court cited two cases from other jurisdictions: *People v. Lester*, 277 N.W.2d 633 (Mich. 1979), and *State v. Martin*, 240 S.E.2d 486 (N.C. 1978). *Aubert*, 120 N.H. at 635.

The defendant here acknowledges that the trial court instructed the jury on the defense of accident, but argues that the instruction given was too confusing to be correctly understood by the jury. DB 17-19. “[A] claim of an erroneous jury charge must be evaluated by reading the alleged offending portion in the context of the trial court’s whole charge. [This Court] will not reverse a jury verdict if the disputed charge fully communicates the relevant applicable law and standards to be followed by the jury.” *Parker*, 142 N.H. at 324. “When reviewing jury instructions, [this Court will] evaluate allegations of error by interpreting the disputed instructions in their entirety, as a reasonable juror would have understood them, and in light of all the evidence in the case.” *State v. Bortner*, 150 N.H. 504, 512 (2004) (quotation omitted). The instruction in this case was not confusing.

As this Court has acknowledged, “[a]ccident is not a recognized defense under the Criminal Code.” *State v. Rosciti*, 144 N.H. 198, 200 (1999). This is because, as suggested by the title of RSA chapter 627, the defenses recognized by the Code are “justification” defenses, in which a defendant expressly or implicitly admits the allegations in the indictment but argues that additional facts exist that justified his actions. *See, e.g., State v. Pugliese*, 122 N.H. 1141, 1146 (1982) (self-defense). Accident, on the other hand, has been described as a “failure of proof” defense, “which raises the entirely different question of whether [the defendant] *intended* to commit the crime, not whether he was justified in committing it.” *State v. Singleton*, 974 A.2d 679, 691 (Conn. 2009). Such defenses “are in essence no more than the negation of an element required by the definition of the offense,” *id.* (quotation omitted), in this case the element of intent.

For this reason, many courts, perhaps a majority of those addressing the issue, have held that even where there is evidence supporting a claim of accident, no specific instruction on accident is required as long as the jurors are clearly instructed that the State must prove a culpable state of mind beyond a reasonable doubt. *See id.* (“A claim of accident, pursuant to which the defendant asserts that the state failed to prove the intent element of a criminal offense, does not require a separate jury instruction because the court’s instruction on the intent required to commit the underlying crime is sufficient in such circumstances.”); *see also Sims v. State*, 716 S.W.2d 774, 777 (Ark. Ct. App. 1986) (“Appellant’s argument that

the shooting was accidental could have been, and was, addressed to each charge and its appropriately defined mental state. ... Where the subject matter is fully covered by instructions already given, it is not error for the trial court to refuse a certain requested instruction.”); *People v. Garcia*, 651 N.E.2d 100, 111 (Ill. 1995) (“An instruction on accident is not required where the jury is instructed on the elements of a crime and that the State bears the burden of proving a culpable mental state on the part of the defendant.”); *State v. Iromuanya*, 719 N.W.2d 263, 288 (Neb. 2006) (“a separate accidental homicide instruction [is] not necessary when the intent instruction given to the jury adequately cover[s] the issue”) (citing *State v. Brown*, 374 N.W.2d 28 (Neb. 1985)); *State v. Ash*, 526 N.W.2d 473, 480 (N.D. 1995) (“establishment of intentional or knowing conduct precludes accident, and proper instructions defining intentionally and knowingly make unnecessary any instructions on accident”).

Here, the court repeatedly instructed the jury that the State had the burden of proving every element of all three charges, including a culpable state of mind, T4 695, 698-705, and that the defendant had no burden to produce any evidence, T4 698-99, or to prove his innocence, T4 699. After reminding the jury, “Mr. Leveille contends that the shooting of Mr. Ellis was accidental,” the court reiterated that the State had to prove a culpable mental state for each of the three charges. T4 704.

The court then defined “accident” in the words used by the Massachusetts Criminal Jury Instructions, submitted by the defendant, DBA 9, saying:

An accident is an unexpected happening that occurs without intention or design on a defendant’s part. It means a sudden unexpected event that takes place without the defendant’s intending for it to occur.

T4 704-05. The court then said, “Thus, if you find that the State has not proved, beyond a reasonable doubt, that Mr. Leveille acted with a requisite mental state, then you must find him not guilty.” The court’s references to “intention” and “design” in its definition of “accident,” coupled with its immediate reiteration of the State’s burden to prove a culpable mental state, clearly conveyed the principle that the State could only prove such a mental state by proving that the shooting was not accidental. It follows that the instruction was a correct and complete expression of the applicable law. *Cf. Hall v. State*, 431 A.2d 1258, 1259-60 (Del. 1981) (“The jury could not fail to understand the accident contention of the defendant, which was emphasized throughout the trial. Accident is a commonly-used concept with a generally-accepted meaning, which in this context was obviously the antithesis of the acts and states of mind which characterize the various degrees of homicide.”).

Although there was no error here, this Court should make it clear that failure to give an accident instruction is subject to harmless error analysis. As noted above, in *Aubert* this Court relied for its holding on the *Lester* case from

Michigan and the *Martin* case from North Carolina. The North Carolina Court of Appeals found harmless error when a trial court refused to give a requested instruction on accident, where the jury had found the requisite intent for first degree murder. *State v. Muhammad*, 651 S.E.2d 569, 574 (N.C. Ct. App. 2007).

The Supreme Court of Michigan recently overruled *Lester* when it held that a failure to instruct on a defense of accident would be subject to harmless error analysis. *People v. Hawthorne*, 713 N.W.2d 724, 727-30 (Mich. 2006). In *Hawthorne*, a murder case, the court held that the defendant could not have been prejudiced by the lack of an accident instruction, because “[t]he jury instructions explaining the intent element of murder made it clear that a finding of accident would be inconsistent with a finding that the defendant possessed the intent required for murder.” *Id.* at 728.

When the defendant in *Hawthorne* then petitioned the federal courts for a writ of habeas corpus, the writ was denied in an unpublished order approving the recommendation of a magistrate judge, who said:

Because “failure of proof” defenses are merely unnecessary restatements, in a defense format, of the requirements of the definitional elements of an offense, it is doubtful that a separate instruction on any such defense is ever necessary, let alone required in every case as a matter of constitutional law. This is so because a jury, having been properly instructed on the prosecutor’s burden to establish malice beyond a reasonable doubt, could not possibly find malice if it believed that the shooting was an accident. ... The standard instruction on accident requested by defense counsel would have added virtually nothing to the malice instruction, but merely

reiterated the obvious—if the shooting was accidental, and not intentional or wanton, Petitioner should be acquitted. ...

[T]he pattern jury instructions used throughout the Sixth Circuit contain no model instruction on accident, although they do contain instructions on true defenses, such as alibi, entrapment, insanity, coercion, duress, self-defense, and justification. One would expect that a defense fundamental to a fair trial would be reflected in these and other standard works on the subject. Unlike defenses such as entrapment, however, accident is not truly a defense at all, and the argument remains fully available to a defendant under the standard instruction covering *mens rea*.

*Hawthorne v. Howes*, No. 1:07-cv-287, 2007 WL 1701848, at \*11 and n.2 (W.D. Mich. June 11, 2007) (citation and quotation omitted). It follows that failure to give an accident instruction should not lead to automatic reversal, but will constitute harmless error if the failure could not have affected the verdict beyond a reasonable doubt.

Finally, in the circumstances of this case it is doubtful that the defendant was entitled to any instruction on accident. In addition to requesting an accident instruction, the defendant also asked the court to instruct the jury that his act of pointing a gun at Gregory was not a crime. DBA 7. The State objected, arguing that the defendant could have been charged with criminal threatening for that act. DBA 12. The court did not give the requested instruction, and the defendant has not appealed that decision.

At trial, the defendant admitted pointing the gun at Gregory, T4 589, and effectively admitted on cross-examination that this was unjustified because he

could have avoided any further confrontation by retreating, T4 642-43. He thus effectively admitted to all the elements of felony criminal threatening. RSA 631:4, I(a) (2007). Under these circumstances, even if the jury believed his account of a struggle for the gun resulting in its discharging accidentally, the shooting could not be considered accidental, under an old common-law rule:

Accidental death, *wholly* to be excused from *all* guilt, must be caused in the doing of some *lawful act*. ...

If, therefore, the defendant pointed a loaded gun at the deceased, under circumstances which would not have justified him in shooting the deceased, and the deceased seized it and struggled for it to save himself from the menaced injury from it, and in the struggle it went off without being purposely shot off by the defendant, the latter could not claim that the homicide was excusable. It would be manslaughter ....

*State v. Benham*, 23 Iowa 154, 164 (1867). The rule is still applied today. *See, e.g., State v. Yarborough*, 679 S.E.2d 397, 407 (N.C. Ct. App. 2009) (“[T]he defense of accident is unavailable if the defendant was engaged in misconduct at the time of the killing.”). It therefore appears that the defendant here received a more favorable instruction than required by law. There was no error.

**CONCLUSION**

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment below.

The State requests a 5-minute oral argument.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

Michael A. Delaney  
Attorney General



---

Nicholas Cort, NH Bar No. 236  
Assistant Attorney General  
Criminal Justice Bureau  
33 Capitol Street  
Concord, N.H. 03301-6397  
(603) 271-3671

February 16, 2010

I hereby certify that two copies of the foregoing were mailed this day, postage prepaid, to Pamela E. Phelan, Assistant Appellate Defender, counsel of record.



---

Nicholas Cort

**STATE'S APPENDIX**

Excerpt from Trial Court's Jury Instructions .....1

It is not enough for the State to prove that the defendant acted negligently; that is, it is not enough to prove that the defendant failed to become aware of the risk involved. The State must prove that the defendant was aware of the risk and consciously disregarded it.

### Accident

Mr. Leveille contends that the shooting of Mr. Ellis was accidental. As you were previously instructed, a crime is made up of an act, in this case discharging the gun, and a mental state. The State must prove both a physical deed and the mental state beyond a reasonable doubt for a defendant to be found guilty of a crime.

An "accident" is an unexpected happening that occurs without intention or design on a defendant's part. It means a sudden, unexpected event that takes place without the defendant's intending for it to occur. Thus, if you find that the State has not proved beyond a reasonable doubt that Mr. Leveille acted with the requisite mental state, then you must find him not guilty.

### Multiple Charges

Each of the charges against Mr. Leveille constitutes a separate offense, although they are what we call alternative charges. You must consider each charge separately and determine whether the State has proven the defendant's guilt beyond a reasonable doubt as to each. The fact that you may find the defendant guilty or not guilty on any one charge should not influence your verdict with respect to the other charges.

### Conclusion

Ladies and gentlemen, this case is important to both of the parties, the State and the defendant. In your deliberations, you should follow these instructions which the Court has given you. You should not decide this case out of bias or sympathy, but with honesty