

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Colleton County
Honorable Perry M. Buckner, Circuit Court Judge
Appellate Case No. 2011-195886

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JUN 24 2013

S.C. Supreme Court

THE STATE,

Respondent,

vs.

DESMOND JAVON SAMS,

Petitioner.

-BRIEF OF RESPONDENT

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SC Court of Appeals

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STATEMENT OF ISSUE ON APPEAL

The Court of Appeals correctly affirmed the trial judge's denial of Sams' request for an involuntary manslaughter jury charge because none of the evidence and testimony presented during trial supported a finding that Sams unintentionally killed the victim through either an unlawful act not naturally tending to cause death or great bodily harm or a lawful act committed with a reckless disregard for the safety of others when Sams intentionally wrapped his hands and arms around the victim's neck from behind and applied pressure to the victim's neck until the victim died from asphyxiation due to strangulation.

STATEMENT OF THE CASE

Petitioner Desmond Javon Sams was arrested after officers responding to a 911 call found him lying on top of a deceased man on the floor of a residence with his arms wrapped around the other man's neck. In October of 2008, the Colleton County grand jury indicted Sams for murder and assault and battery of a high and aggravated nature. On January 28, 2009, a jury trial was commenced in the Colleton County court of general sessions with the Honorable Perry M. Buckner, circuit court judge, presiding. At the conclusion of trial, the jury convicted Sams of the lesser-included offense of voluntary manslaughter and acquitted Sams of assault and battery of a high and aggravated nature. Following the verdict, the trial judge sentenced Sams to a twenty-four-year term of imprisonment suspended upon the service of an eighteen-year term of imprisonment and five years of probation. Sams then timely filed and perfected an appeal.

Subsequently, in an unpublished opinion, the Court of Appeals unanimously affirmed Sams' conviction. State v. Sams, Op. No. 2011-UP-205 (S.C. Ct. App. filed May 4, 2011). Sams petitioned the Court of Appeals for rehearing, and the petition was denied. Sams then filed a petition for a writ of certiorari in the Supreme Court, and the petition was granted on October 17, 2012.

STATEMENT OF FACTS

In the early morning hours of April 12, 2008, Senior Sergeant Steve Dunn of the Colleton County Sheriff's Department responded to a call about a fight in progress. (R. p. 56). He arrived at the home of Lisa Strickland approximately eight and a half minutes after being dispatched and was led to a bedroom where he found two men lying face down on the floor with one on top of the other.¹ (R. pp. 56-57; pp. 59-60; p. 61). Petitioner Desmond Javon Sams, the man on top, appeared to have his arms wrapped around the neck of the other man, Jake Frazier ("Victim"). (R. pp. 58-59). In response, Sergeant Dunn drew his taser and ordered Sams to release Victim. (R. p. 57). However, Sams refused to comply and responded, "No, he'll want to fight." (R. p. 57; p. 63). Sergeant Dunn then continued to order Sams to release Victim, and, after the officer's third command, Sams finally complied. (R. p. 57; p. 69).

Once he released Victim, Sams arose from the floor and was handcuffed and arrested. (R. pp. 58-59). However, Victim did not get up, did not appear to be breathing, and had a blue tint to his skin. (R. pp. 58-59). Based on Victim's condition, Sergeant Dunn asked Strickland and Stephanie Ballard, who was Victim's girlfriend, to roll him onto his back, and the officer radioed in for support and medical units. (R. p. 8; p. 59). Sergeant Dunn then continued to watch Victim as he waited for his support to arrive and never observed any life signs, movement, or signs of fighting or resistance from him. (R. pp. 63-64).

Shortly thereafter, firefighter and emergency medical technician Jason Benton arrived on the scene, entered the residence, and found Victim on the floor of the bedroom

¹ Specifically, the call about the incident was placed to 911 at 4:36 a.m. (R. pp. 59-60). Sergeant Dunn was then dispatched at 4:38 a.m. and arrived on the scene at 4:46 a.m. (R. p. 61).

with no pulse or signs of life and not breathing. (R. pp. 68-69). He attempted to restart Victim's heart and continued resuscitation efforts as Victim was transported to the emergency room, but those efforts were unsuccessful. (R. p. 69). Victim was pronounced dead at the hospital. (R. p. 14).

Later that day, Dr. Erin Presnell, a forensic pathologist at the Medical University of South Carolina and an expert in forensic pathology, performed an autopsy on Victim. (R. pp. 73-74). During the autopsy, she discovered a number of abrasions and contusions on Victim's body, with most of the injuries centered around his neck. (R. pp. 74-45). Specifically, Dr. Presnell discovered multiple bruises and scratches on the right, left, and front sides of Victim's neck and bruising to Victim's neck muscles underneath his skin. (R. p. 75). Additionally, she detected pin-point hemorrhages called petechiae in the lining of Victim's eyes and eyelids. (R. p. 75). Dr. Presnell ultimately concluded her findings were indicative of strangulation. (R. p. 75). Based on her findings, she determined Victim's cause of death was asphyxiation, or lack of oxygen, due to strangulation.² (R. pp. 76-77; p. 80).

Subsequently, Sams was indicted for murder and assault and battery of a high and aggravated nature, and he proceeded to trial. (R. p. 1; p. 188-189). During trial, the witnesses to the killing offered differing accounts of the events leading up to Victim's death. (R. pp. 8-13; pp. 37-44; pp. 93-107). Testifying for the State, Ballard stated she was drinking alcoholic beverages at Strickland's trailer with Strickland, Victim, and

² During trial, Dr. Presnell testified that most strangulation deaths like Victim's result from compression of blood vessels and not from compression of the airway. (R. p. 79). She explained: "So the person can still be breathing, it's just that the strangulation or the compression around the neck is not allowing the oxygenated blood to get to the brain, and that's what's causing the asphyxia, that actually, I mean, you can occlude the airway as well, but most of the cases of strangulation is the compression of the vessels, and the petechiae in this case are a result of that difference in the strength of the vessels going to and from the head." (R. p. 79).

Sams on the night of the incident. (R. p. 8; p. 15). She indicated Victim become ill after having too much to drink, Victim went to the bathroom, she and Sams both followed Victim, and Victim and Sams began arguing after Sams grabbed her and was “feeling on her.” (R. p. 10; p. 17). Once Victim confronted Sams about the inappropriate contact, Ballard testified an argument erupted and Sams pushed Victim into the tub while choking him with his hands around Victim’s neck. (R. p. 10). She stated Strickland then intervened and pulled Sams off of Victim. (R. p. 10). Afterwards, Ballard indicated she and Victim retired to the bedroom while Strickland and Sams went into the living room. (R. p. 10). Subsequently, Ballard testified Victim was on the bed preparing to sleep when Sams entered the bedroom and began fighting with Victim, and she stated the fight continued until Strickland threatened to call the police. (R. pp. 10-12). Ballard testified Sams responded to the threat by chasing Strickland, pushing her onto the couch, and choking her. (R. p. 12). Ballard indicated she then intervened, Sams stopped choking Strickland, and Sams again headed towards the bedroom where Victim was located. (R. p. 12). After Sams entered the bedroom, Ballard testified Sams and Victim started fighting for a third time. (R. p. 12). Ballard then recounted the event:

That’s when it just – they were fighting. [Sams] was on top of [Victim] the whole time, just choking him. Then [Victim] kept telling him he couldn’t breathe. He’d say, “Please let me go. Let me live for my kids.” [Sams] said, “I love your kids, but I’m going to fucking kill you.” and that’s what he did.

...

[Sams] was choking him, just telling, “I’m gonna kill you. You hit me. You tried to kill me. I’m gonna fucking kill you.”³

³ Regarding the choking, Ballard indicated that Sams had one hand under Victim’s stomach and the other hand wrapped around Victim’s neck. (R. pp. 33-34).

(R. p. 13). Ballard indicated she told Sams to stop, struck and pushed Sams, and did everything she could to get him to stop choking Victim, but she was unable to do so. (R. p. 13). As the fight progressed, Ballard stated she called Victim's sister, Sharron Glover, while Sams was on top of Victim yelling. (R. p. 16; pp. 22-23). At that time, she indicated Victim was lying still and was no longer struggling. (R. p. 23). Thereafter, Ballard testified law enforcement arrived and Sams immediately released Victim. (R. p. 13; p. 23). However, she stated she did not observe any movement from Victim, who had been killed by Sams, after he was released. (R. pp. 13-14).

In addition to Ballard's testimony, Strickland also testified for the State about the events of April 12, 2008. (R. p. 36). During her testimony, Strickland indicated she was drinking and listening to music at her home with Ballard, Victim, and Sams before Victim became sick and went to the bathroom. (R. pp. 37-38). She stated everyone then went to check on Victim, and she and Sams eventually returned to the living room. (R. p. 38). Strickland testified Sams then returned to the bathroom to check on Victim, exited the bathroom, and then re-entered the bathroom. (R. p. 38). At that time, Strickland stated she heard Victim confront Sams, and she went to see what was happening. (R. p. 38). She testified she then witnessed Sams grab Victim's neck and choke him down into the bathtub. (R. pp. 38-39). Thereafter, Strickland indicated Sams and Victim quit fighting, Victim retired to the bedroom, Sams subsequently followed him into the bedroom, and another fight broke out. (R. pp. 39-40). In response, Strickland stated she threatened to call the police and was then chased into the living room and choked by Sams. (R. p. 40). However, Strickland stated Ballard stopped Sams from choking her, and Sams apologized. (R. p. 40). Strickland testified she called 911, was on the line with dispatch while Sams had his hands around her neck, and hung up because she was

frightened of Sams. (R. p. 41). She stated one of the 911 dispatchers later called her back, and she told them everything was okay. (R. p. 42). Strickland testified she then went to the bedroom and observed Sams choking Victim, Victim stated he could not breathe, and Sams told Victim he was going to kill him. (R. p. 42). Strickland testified she and Ballard were then unable to stop Sams from choking Victim so she went outside, called the police, and waited for an officer to arrive. (R. p. 43). Subsequently, Strickland indicated an officer arrived, went to the bedroom, and ordered Sams to get off of Victim. (R. p. 43). She testified Sams then released Victim following the officer's second request and Victim was not breathing, was not moving, and was lifeless at that time. (R. pp. 43-44).

Following Ballard and Strickland's testimony, Sams testified in his own defense and offered his account of the incident. (R. pp. 93-107). During his testimony, Sams stated he and Victim met up with Ballard and Strickland, went to Strickland's house, and drank and danced until Victim became sick. (R. pp. 93-95). Sams claimed he then went to check on Victim in the bathroom, grabbed Ballard to get his balance, and was attacked by Victim in response. (R. pp. 95-96). During the ensuing attack, Sams testified Victim hit him, grabbed him around the neck, knocked him into a wall, and fell onto the floor on top of him. (R. pp. 96-97). Sams stated Victim then put one hand on his throat, tried to tear out his windpipe with the other hand, and bit his finger. (R. p. 97). Thereafter, Sams recounted how he was able to get on top of Victim:

Now, at this time, I'm scared with my adrenaline flowing. I can't hardly breathe, so I punched him. With my last bit of breath, I punched him off of me. When I punched him off me, I did like a superman punch. I kicked my leg up and I jerked my body. He rolled over and he was about to get up. I was about to get up. So I tried to hold him down in it and he was like "ohh, ahh, ohh[.]"

...

I was just trying to restrain him. I wasn't trying to kill him. I was just trying to restrain him till the police came.

(R. pp. 97-98). After that, Sams testified he asked the others to call the police. (R. p. 98). Sams claimed he had no idea how long he was restraining Victim and asserted he never intended to kill Victim. (R. p. 99). Sams further admitted he had his arm around Victim's neck and throat but claimed he was only trying to restrain Victim. (R. pp. 98-99). Additionally, Sams testified he did not strike first, did not want to fight, and was only protecting himself. (R. p. 100).

Subsequently, on cross-examination, Sams testified he "wasn't trying to choke" Victim and claimed he "wasn't choking him hard, it didn't seem like." (R. p. 100). However, Sams admitted to killing Victim. (R. p. 101). Sams further asserted he was scared during the incident. (R. p. 102). When asked how in particular he was scared of Victim's lifeless body underneath him, Sams responded: "He wasn't lifeless the whole time, sir." (R. p. 103). Additionally, Sams denied Victim ever begged for his life, stating: "He was never begging for his life. Like I said, if my cousin would have said it was cool, that would have been it." (R. p. 105). Sams further reaffirmed he was only trying to restrain Victim and never intended to kill him. (R. pp. 105-106).

Thereafter, at the conclusion of the evidentiary phase of trial, defense counsel asked the trial judge to instruct the jury on the law of involuntary manslaughter. (R. p. 107; p. 121). In support of that request, defense counsel argued the evidence showed Sams never intended to kill Victim, believed he was in danger, and may have been criminally negligent. (R. pp. 122-123). In rebuttal, the solicitor argued the evidence supported instructions on murder, voluntary manslaughter, and self-defense. (R. pp. 123-

124). However, the solicitor asserted there was no evidence of any criminal negligence and argued an involuntary manslaughter charge was not applicable based on the evidence presented. (R. p. 124). After considering the arguments of counsel, the trial judge refused to give the requested involuntary manslaughter charge and ultimately instructed the jury on murder, voluntary manslaughter, and self-defense. (R. pp. 124-125; pp. 148-149; p. 152). Subsequently, at the conclusion of trial, Sams was convicted solely of the lesser-included offense of voluntary manslaughter. (R. pp. 175-176). Sams then timely appealed his conviction.

On appeal, the Court of Appeals affirmed the trial judge's decision not to instruct the jury on the law of involuntary manslaughter. (App'x p. 1). In reaching that decision, the Court found Sams did not qualify for an involuntary manslaughter charge under either recognized definition of the offense. (App'x pp. 2-3). Regarding the first definition of the offense, the Court found Sams' act of wrapping his arms around Victim's neck and applying pressure for several minutes naturally tended to cause death or great bodily harm, which meant Sams could not have killed the victim while engaged in an unlawful activity not naturally tending to cause death or great bodily harm. (App'x p. 2). In support of that finding, the Court noted Sams never asserted at trial or on appeal that his actions were **not** of a type naturally tending to cause death or great bodily harm. (App'x p. 2). Regarding the second definition of the offense, the Court determined the evidence could only support a finding that Sams was either lawfully acting in self-defense or was guilty of voluntary manslaughter through unlawful actions, meaning Sams could not have killed the victim while engaged in a lawful activity with a reckless disregard for the safety of others. (App'x p. 3). In support of that finding, the Court noted there was no evidence establishing that Sams' actions were unintentional. (App'x pp. 2-3). For those

reasons, the Court determined the trial judge committed no error in denying Sams' request for an involuntary manslaughter charge and affirmed the trial judge's ruling and Sams' conviction. (App'x p. 3).

ARGUMENT

The Court of Appeals correctly affirmed the trial judge's denial of Sams' request for an involuntary manslaughter jury charge because none of the evidence and testimony presented during trial supported a finding that Sams unintentionally killed the victim through either an unlawful act not naturally tending to cause death or great bodily harm or a lawful act committed with a reckless disregard for the safety of others when Sams intentionally wrapped his hands and arms around the victim's neck from behind and applied pressure to the victim's neck until the victim died from asphyxiation due to strangulation.

Sams contends the Court of Appeals erred in affirming the trial judge's denial of his request for an involuntary manslaughter charge. In support of that contention, Sams maintains he was entitled to an involuntary manslaughter charge because there was evidence presented from which the jury could find he unintentionally killed the victim while engaged in an unlawful activity not naturally tending to cause death or great bodily harm or while engaged in a lawful activity committed in a negligent manner. To the contrary, the Court of Appeals properly affirmed the trial judge's denial of Sams' request for an involuntary manslaughter charge because there was no evidence presented from which the jury could find Sams guilty of the required elements of involuntary manslaughter under either recognized definition of the offense. Accordingly, the trial judge properly refused to instruct the jury on involuntary manslaughter, and the Court of Appeals properly affirmed the trial judge's ruling. The decision of the Court of Appeals and Sams' conviction should be affirmed.⁴

⁴ As an additional sustaining ground, Sams' conviction should be affirmed because Sams' appellate argument in support of his request for an involuntary manslaughter charge was not properly preserved for appellate review. See Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."). On appeal to the Court of Appeals, Sams submitted an appellate brief containing only a single page of legal argument written in a conclusory manner without specifically stating which definition of involuntary manslaughter was applicable to his case. (Final App. Br. p. 5). In fact, the Court of Appeals noted in its opinion that "Sams' appellate brief does not articulate which definition of involuntary manslaughter he believes applies to the facts of his case." (App'x p. 1). Based on the conclusory nature of the argument and the lack of explanation as to why he was entitled to the charge or how the cited authority related to his case, the issue was abandoned on appeal. See *State v. Jones*, 392 S.C. 647, 655, 709 S.E.2d 696, 700 (Ct. App. 2011) ("An issue is deemed

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). In reviewing a trial judge's jury instructions, the appellate court must view the jury charge as a whole and in light of the evidence and issues from trial. State v. Simmons, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009). "A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied." State v. Rye, 375 S.C. 119, 123, 651 S.E.2d 321, 323 (2007).

ANALYSIS

During a trial, the law to be charged is determined by the evidence presented. State v. Holland, 385 S.C. 159, 165, 682 S.E.2d 898, 901 (Ct. App. 2009). When instructing the jury on the law, the trial judge is required to charge only the current and correct law of South Carolina. State v. Buckner, 341 S.C. 241, 246, 534 S.E.2d 15, 18 (Ct. App. 2000). A trial judge's jury instructions are appropriate if they are substantially correct and adequately cover the law applicable to the particular case. State v. Foust, 325 S.C. 12, 16, 479 S.E.2d 50, 52 (1996); see State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d

abandoned if the argument raised in the brief is merely conclusory.' " (citations omitted)); see also State v. Tyndall, 336 S.C. 8, 16, 518 S.E.2d 278, 282 (Ct. App. 1999) (finding reliance on cited authorities was abandoned when the appellate brief contained neither discussion of the cases nor argument regarding their applicability to Tyndall's case). Subsequently, following the issuance of the Court of Appeals' decision in the case, Sams raised new arguments in support of his request for an involuntary manslaughter charge for the first time in a petition for rehearing. (App'x p. 4-8). Because Sams failed to raise the precise argument he is currently raising in his Brief of Petitioner at any point prior to the filing his petition for rehearing in the Court of Appeals, Sams never presented the argument to the trial judge and, thus, failed to preserve the argument for appellate review. See McClurg v. Deaton, 395 S.C. 85, 87, n. 2, 716 S.E.2d 887, 888 (2011) ("It is axiomatic that an issue cannot be raised for the first time on rehearing."); I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 725 (2000) ("Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it considered all relevant facts, law, and arguments." (emphasis added)). As a result, Sams' appellate argument should not be considered on appeal. See State v. Langford, 400 S.C. 421, 433, n. 5, 735 S.E.2d 471, 477 (2012) ("Preservation in South Carolina is a threshold issue and if an issue is unpreserved, it is not properly before the court and the merits should not be reached.").

460, 464 (Ct. App. 2003) (“A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law.”).

“Ordinarily, the trial court has the duty to give requested instructions which correctly state the law applicable to the issues and which are supported by the evidence.” State v. Peer, 320 S.C. 546, 553, 466 S.E.2d 375, 380 (Ct. App. 1996). However, “[n]o instruction should be given by the trial judge, at the request of the appellant, which tenders an issue which is not presented or supported by the evidence.” State v. Weaver, 265 S.C. 130, 137, 217 S.E.2d 31, 34 (1975). To warrant reversal, the trial judge’s refusal to give a requested charge must be both erroneous and prejudicial. State v. Hughey, 339 S.C. 439, 450, 529 S.E.2d 721, 727 (2000), overruled on other ground by Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009).

Critically, the trial judge only commits reversible error if he fails to give a requested charge on an issue raised by the evidence. State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 838, 849 (1993). If any evidence warrants the giving of a charge on a lesser-included offense and the charge is requested, then the trial judge must instruct the jury on the lesser-included offense. State v. Wharton, 381 S.C. 209, 216, 672 S.E.2d 786, 789 (2009); see Casey v. State, 305 S.C. 445, 447, 409 S.E.2d 391, 392 (1991) (“[A] request to charge a lesser included offense is properly refused only when there is no evidence that the defendant committed the lesser rather than the greater offense.”). However, “[t]he trial court may and should refuse to charge on a lesser-included offense where there is no evidence that the defendant committed the lesser rather than the greater offense.” State v. Smith, 315 S.C. 547, 549, 446 S.E.2d 411, 412-413 (1994); see State v. Cooney, 320 S.C. 107, 112, 463 S.E.2d 597, 600 (1995) (“A lesser included offense instruction is required only when the evidence warrants such an instruction.”).

Involuntary manslaughter can be a lesser-included offense of murder. See Tisdale v. State, 378 S.C. 122, 125, 662 S.E.2d 410, 412 (2008) (“Involuntary manslaughter is a lesser included offense of murder only if there is evidence the killing was unintentional.”). The offense of involuntary manslaughter is defined as: (1) the unintentional killing of another without malice while committing an unlawful act not naturally tending to cause death or great bodily harm and not amounting to a felony; or (2) the unintentional killing of another without malice while committing a lawful act with a reckless disregard for the safety of others. State v. Young, 319 S.C. 33, 40, 459 S.E.2d 84, 87 (1995). Criminal negligence, in the context of involuntary manslaughter, is statutorily defined as “the reckless disregard of the safety of others” and is a required element of the offense. See S.C. Code Ann. § 16-3-60 (“With regard to the crime of involuntary manslaughter, criminal negligence is defined as the reckless disregard of the safety of others. A person charged with the crime of involuntary manslaughter may be convicted **only** upon a showing of criminal negligence as defined in this section.” (emphasis added)); see also Casey, 305 S.C. at 447, 409 S.E.2d at 392 (“To constitute involuntary manslaughter, there must be a finding of criminal negligence, statutorily defined as a reckless disregard of the safety of others.”). “[I]nvoluntary manslaughter is at its core an unintentional killing.” Douglas v. State, 332 S.C. 67, 74, 504 S.E.2d 307, 310 (1998).

Under the first definition of involuntary manslaughter, an individual is guilty of the offense if the person unintentionally kills another person without malice while committing an unlawful act not naturally tending to cause death or great bodily injury. Bozeman v. State, 307 S.C. 172, 176, 414 S.E.2d 144, 146-147 (1992). In applying that definition of involuntary manslaughter, our courts have traditionally found the intentional

commission of an unlawful act naturally tending to cause death or serious bodily harm precludes a charge on the offense of involuntary manslaughter **regardless** of whether the resulting death was intended or not. See State v. Rivera, 389 S.C. 399, 405, n. 4, 699 S.E.2d 157, 160 (2010) (“Because the death at issue here occurred as the result of the discharge of a firearm, there is no evidence in the record to support a jury charge on the first theory of involuntary manslaughter: the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm.”); Wharton, 381 S.C. at 216, 672 S.E.2d at 789 (“Even assuming Wharton did not intentionally fire the gun at Shaw, by pointing the gun and waiving it in the air, Wharton committed an unlawful act that would naturally tend to cause death or great bodily harm. Accordingly, we hold the trial court properly denied his request for an involuntary manslaughter charge.”); Harris v. State, 354 S.C. 382, 389, 581 S.E.2d 154, 157 (2003) (finding Harris was not entitled to a charge on the law of involuntary manslaughter where the evidence established Harris intentionally fired a gun in the direction of the victim but only intended the shots to be warning shots); State v. Tyler, 348 S.C. 526, 529, 560 S.E.2d 888, 889 (2002) (holding the trial judge properly declined Tyler’s request for an involuntary manslaughter charge where the evidence established Tyler committed an intentional unlawful act naturally tending to cause death or great bodily injury when she poured gasoline on her husband’s head and ignited him on fire); Cooney, 320 S.C. at 112, 463 S.E.2d at 597 (“There is no error in the refusal to charge the law of involuntary manslaughter when the defendant admitted intentionally firing the gun, but claimed he only meant to shoot over the victim’s head.”); State v. Craig, 267 S.C. 262, 269, 227 S.E.2d 306, 309 (1976) (“Craig also contends the trial judge erred in refusing to charge the law of involuntary manslaughter. Craig admitted intentionally

firing his shotgun but claimed he only meant to shoot over Cooper's head. We find no error."); State v. Davis, 374 S.C. 581, 586, 649 S.E.2d 132, 134 (Ct. App. 2007) (holding the trial judge's correctly determined Davis was not entitled to an involuntary manslaughter jury charge where the evidence established Davis killed the victim by intentionally striking him twice in the head with a five-pound sledgehammer wrapped in a towel, which was an act naturally tending to cause death or great bodily harm, even though evidence was presented suggesting Davis committed the act in self-defense and with the intention of merely knocking the victim unconscious).

Under the second definition of involuntary manslaughter, an individual is guilty of the offense if the person unintentionally kills another person without malice while committing a lawful act with a reckless disregard for the safety of others. Bozeman, 307 S.C. at 176, 414 S.E.2d at 146-147. In applying that definition of involuntary manslaughter, courts in South Carolina have typically found that the evidence presented during trial must reflect the commission of a lawful act in a reckless but unintentional manner in order to warrant the submission of a charge on involuntary manslaughter to the jury. See State v. Crosby, 355 S.C. 47, 52, 584 S.E.2d 110, 112 (2003) (finding Crosby was entitled to an involuntary manslaughter charge because there was ample evidence he did not **intentionally** discharge his weapon); State v. Burriss, 334 S.C. 256, 265, 513 S.E.2d 104, 109 (1999) (finding Burriss was entitled to an involuntary manslaughter charge where evidence was presented from which the jury could find Burriss was lawfully armed in self-defense when his gun was unintentionally fired and killed the victim); Douglas, 332 S.C. at 74, 504 S.E.2d at 310-311 ("Douglas admitted he intentionally shot the gun into the crowd in self-defense. . . . [W]here a defendant intentionally arms himself and shoots into a crowd, as Douglas did here, he is not entitled to an involuntary

manslaughter charge.”); State v. Pickens, 320 S.C. 528, 531-532, 466 S.E.2d 364, 366-367 (1996) (holding Pickens was not entitled to a jury charge on involuntary manslaughter where Pickens admitted he intentionally fired a gun at a group of people allegedly rushing him and subsequently claimed he was acting lawfully in self-defense but in a reckless manner); Smith, 315 S.C. at 550, 446 S.E.2d at 413 (“The record here demonstrates that Smith acted intentionally in wielding the knife. When Evans grabbed Smith, Smith pulled the knife, a dangerous instrumentality, and stabbed at Evans. Just as in Craig, whether Smith intended to harm Evans is irrelevant. The stabbing is clearly not a lawful act, and the intentional use of a dangerous instrumentality does not support the allegation of mere criminal negligence. Because Smith's actions were outside the definition of involuntary manslaughter as we restated recently in Bozeman, the trial court did not commit error in refusing to instruct the jury on the law of involuntary manslaughter.”); State v. Mickle, 273 S.C. 71, 73, 254 S.E.2d 295, 296 (1979) (finding Mickle was not entitled to an involuntary manslaughter charge where Mickle admitted to intentionally shooting the victim but claimed he did not intend to kill him and was only trying to scare him when he did so); State v. Morris, 307 S.C. 480, 484, 415 S.E.2d 819, 822 (Ct. App. 1991) (“[E]ven if the jury were persuaded that Morris reasonably feared Burkhalter was going to strike him again, or that Morris's ability to control his emotional response was impaired by frontal lobe brain damage, the evidence still supported a finding that Morris intentionally pulled the pistol and fired it at Burkhalter. Whether the shooting was excusable in the circumstances (self defense) or was committed in the heat of passion upon a sufficient provocation (voluntary manslaughter) was for the jury to determine, and the judge so charged them. He committed no error when he refused, in addition, to charge involuntary manslaughter.”); see also State v. Light, 378 S.C. 641,

651, 664 S.E.2d 465, 470 (2008) (“When there is a factual issue as to whether the shooting was committed intentionally in self-defense **or was committed unintentionally**, then the defendant is entitled to both [self-defense and involuntary manslaughter] charges as there is ‘any evidence’ to support each charge.” (emphasis added)).

In the case sub judice, Sams contends the Court of Appeals erred in affirming the trial judge’s denial of his request for an involuntary manslaughter charge. However, in light of the evidence presented during trial, Sams could not have been guilty of involuntary manslaughter under either recognized definition of the offense. For that reason, the trial judge properly declined to instruct the jury on the law of involuntary manslaughter, and the Court of Appeals correctly affirmed the trial judge’s ruling.

Turning to the first definition of the offense, Sams was not entitled to an involuntary manslaughter charge because the evidence presented during trial did not support a finding that he unintentionally killed Victim while engaging in an unlawful act not naturally tending to cause death or great bodily harm. Critically, the evidence presented indisputably established that Sams placed his hands and arms around Victim’s neck from behind and applied sufficient pressure to Victim’s neck to cause bruising to Victim’s neck and neck muscles. The evidence further established Sams continued to apply pressure to Victim’s neck for several minutes prior to the arrival of Sergeant Dunn. Furthermore, the evidence unquestionably demonstrated that Victim sustained bruising and scratches on the left, right, and front sides of his neck, suffered bruising to his neck muscles underneath his skin, and was asphyxiated until he ceased moving, turned blue, and died as a result of that intentional act. As plainly demonstrated by Victim’s death, Sams’ intentional act of manually strangling Victim by forcefully placing his hands and

arms around Victim's neck and applying pressure was an act that naturally tended to cause death or great bodily injury. Accordingly, under those circumstances, Sams could not have been guilty of involuntary manslaughter under the first definition of the offense and was, therefore, not entitled to an involuntary manslaughter charge on that basis.

In arguing the Court of Appeals incorrectly found he was not entitled to a jury charge under the first definition of involuntary manslaughter, Sams contends his act of allegedly restraining Victim by wrapping his arms around Victim's neck was **not** an act naturally tending to cause death or serious bodily harm and, instead, was simply an act intended to restrain Victim.⁵ In support of that contention, Sams primarily relies on this Court's decision in State v. Chatman, 336 S.C. 149, 519 S.E.2d 100 (1999).

⁵ As an additional sustaining ground, Sams' conviction should be affirmed because his argument in support of his request for involuntary manslaughter charge pursuant to the first definition of the offense is not properly preserved for appellate review. See Law v. South Carolina Dep't of Corr., 368 S.C. 424, 440, n. 3, 629 S.E.2d 642, 651 (2006) ("This Court may affirm the trial court based on any ground found in the record."). Specifically, during trial, defense counsel asserted Sams was entitled to a charge on involuntary manslaughter because Sams believed he was in danger and may have been criminally negligent. (R. pp. 122-123). However, defense counsel did **not** argue to the trial judge that Sams was entitled to an involuntary manslaughter charge because he killed Victim while committing an unlawful act not naturally tending to cause death or great bodily harm as he now contends on appeal. (R. p. 107; pp. 122-123; p. 163). Moreover, Sams did **not** even initially raise such an argument to the Court of Appeals and, instead, contended he was entitled to an involuntary manslaughter charge solely because the evidence supported a factual finding that he "unintentionally killed [Victim] while acting in self-defense." (Final App. Br. p. 5). As a result, Sams is bound to the argument raised to and ruled upon by the trial judge and cannot add new grounds in support of the requested charge on appeal. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party cannot argue one ground at trial and another ground on appeal."); State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003) (finding an issue is not preserved unless it was raised to and ruled upon by the trial court and instructing that alternate grounds cannot be asserted for the first time on appeal); see also State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial."). Accordingly, to the extent Sams is arguing for a charge on involuntary manslaughter based on the commission of an unlawful act not naturally tending to cause death or great bodily injury, the issue is not properly preserved for appellate review and should not be considered on appeal. See State v. Wigington, 375 S.C. 25, 35-36, 649 S.E.2d 185, 190 (Ct. App. 2007) (finding Wigington was bound on appeal to the argument asserted at trial in support of his request for an involuntary manslaughter charge and only considering that argument in deciding the appeal); see also State v. Benton, 338 S.C. 151, 156-157, 526 S.E.2d 228, 231 (2000) (finding Benton's challenge to the trial judge's refusal to give a requested charge was not preserved for appellate review where Benton "argued one ground in support of a circumstantial evidence charge at trial (State only presented circumstantial evidence of intent) and argues another ground in support of the charge on appeal (palm print is circumstantial evidence).").

In Chatman, Chatman grabbed his victim from behind following an initial physical altercation, the two fell to the ground, and they fought on the ground for two to three minutes. Id. at 151, 519 S.E.2d at 101. As they fought on the ground, the victim grabbed Chatman's testicles, and Chatman placed the victim in a face-to-face choke hold by placing his shoulder into the victim's neck. Id. Chatman's application of the choke hold ultimately resulted in the victim's death by causing asphyxiation due to manual strangulation. Id. at 152, 519 S.E.2d at 101. Id. Subsequently, during Chatman's trial for the killing, Chatman requested a jury charge on involuntary manslaughter, and his request was denied. Id. at 151, 519 S.E.2d at 101. Thereafter, on appeal, this Court determined Chatman's actions were not the kind that would naturally tend to cause death or great bodily harm, instructing:

Here, the evidence establishes that [Chatman] was not attempting to strangle Victim with his hands. [Chatman] testified that while on the ground he and Victim were facing one another and appellant had his shoulder pressed into Victim's neck. The doctor who performed the autopsy on Victim testified that his medical findings were consistent with sufficient force being applied to Victim's neck and further his findings were consistent with the Victim and [Chatman] being face-to-face and [Chatman] pressing his shoulder into Victim's neck. This is not the traditional strangulation type situation. [Chatman] was not attempting to strangle Victim by placing his hands around Victim's neck. As such, we think [Chatman]'s actions were not the kind which would naturally tend to cause serious bodily injury or death.

Id. at 153, 519 S.E.2d at 101-102. As a result, this Court concluded Chatman was entitled to a jury charge on involuntary manslaughter and reversed his conviction. Id. at 153, 519 S.E.2d at 102.

Contrary to Sams' argument on appeal, this Court's decision in Chatman does **not** establish Sams was entitled to an involuntary manslaughter charge because the facts and circumstances of Sams' case are markedly different from the facts of Chatman's case.

Critically, while Chatman merely pressed his shoulder into the victim's neck as he fought with him face to face, which could not be considered a typical act of strangulation, Sams admittedly placed his hands and arms around Victim's neck from behind and intentionally applied force to Victim's neck, which was a prototypical act of strangulation. Cf. id. ("This is not the traditional strangulation type situation. [Chatman] was **not attempting to strangle Victim by placing his hands around Victim's neck.**" (emphasis added)). Accordingly, under those circumstances, Sams' intentional act could not rationally be considered anything but an act naturally tending to cause death or great bodily harm.

Even viewing the evidence in a light most favorable to Sams, the evidence and testimony presented during trial did not support a charge on involuntary manslaughter because it established Sams engaged in act of a nature tending to cause death or great bodily harm. Regardless of Sams' claim that he was merely trying to restrain Victim, the method Sams chose to employ in his alleged effort to restrain Victim was a method naturally tending to cause death. Notably, Sams used sufficient force to cause injuries to Victim's neck and neck muscles, and Sams continued to forcibly squeeze Victim's neck while refusing to release him even after Victim's resistance ended. Additionally, the officer who first responded to the incident observed that Victim's skin had turned blue, and Sams acknowledged in his trial testimony that Victim became lifeless at some point during the struggle. Furthermore, Sams readily acknowledged in his trial testimony that he wrapped his arms around Victim's neck and applied pressure until he was ordered to release him by a law enforcement officer. Under those circumstances, the testimony and evidence presented during trial, including Sams' own testimony, established that death or serious bodily injury would be the natural and expected consequence of the actions

undertaken by Sams. Accordingly, those actions could not have constituted the offense of involuntary manslaughter even if Sams' claim of only intending to restrain Victim through those actions was found to be credible.

Just as Sams would not have been entitled to an involuntary manslaughter charge had he killed Victim while firing a warning shot at him to stop his alleged attack, Sams was not entitled to an involuntary manslaughter charge for using another method to allegedly stop or restrain Victim that naturally tended to cause death or great bodily injury. Cf. Harris, 354 S.C. at 389, 581 S.E.2d at 157 (finding Harris was not entitled to a charge on the law of involuntary manslaughter where the evidence established Harris intentionally committed an unlawful act naturally tending to cause death or great harm even though evidence was presented establishing Harris did not intend for the act to actually cause the victim any harm); Cooney, 320 S.C. at 112, 463 S.E.2d at 597 (finding Cooney was not entitled to an involuntary manslaughter charge when he committed an intentional act naturally tending to cause death or great bodily injury even though evidence was presented suggesting he only intended to fire his gun over the victim); Davis, 374 S.C. at 586, 649 S.E.2d at 134 (finding Davis was not entitled to an involuntary manslaughter jury charge where the evidence established he committed an act naturally tending to cause death or great bodily harm even though evidence was presented suggesting Davis only intended his act to knock the victim unconscious). Significantly, Sams has not suggested his actions were involuntary or unintentional and, instead, merely claims the ultimate result of those actions was unintended. Because Sams intentionally committed an unlawful act naturally tending to result in death or great bodily injury, he was not entitled to an involuntary manslaughter charge during his trial. Therefore, the trial judge properly denied Sams' requested charge under the first

definition of involuntary manslaughter, and the Court of Appeals correctly affirmed the trial judge's ruling on that basis. See State v. Goldenbaum, 294 S.C. 455, 457, 365 S.E.2d 731, 732 (1988) ("A request to charge on a lesser included offense is properly refused when there is no evidence that the defendant committed the lesser rather than the greater offense.").

Likewise, turning to the second definition of involuntary manslaughter, Sams was not entitled to a charge under that theory of the offense because the evidence presented during trial did not support a finding that he unintentionally killed Victim while engaging in lawful act with a reckless disregard for the safety of others. Critically, in the case at bar, Sams does not dispute the intentional nature of his act of placing his hands and arms around Victim's neck and applying pressure. See Morris, 307 S.C. at 483, 415 S.E.2d at 821 ("[In order for the act to constitute involuntary manslaughter], the act must still be unintentional."). Instead, Sams has readily acknowledged he intentionally committed the act that resulted in Victim's strangulation death while simply asserting the act might have recklessly been committed in self-defense. Thus, by his own admission, Sams was engaged in an intentional act that ultimately resulted in Victim's death, and that intentional act was an unlawful act of assault and battery **unless** the act was lawfully committed in self-defense. See Chatman, 336 S.C. at 153, 519 S.E.2d at 102 ("Here, [Chatman] was not acting lawfully, since he was engaged in an assault and battery, unless he was acting in self defense."). For that reason, Sams' actions were either immune from criminal liability pursuant to the doctrine of self-defense or were unlawful, which precluded a charge on involuntary manslaughter under the second definition of the offense.

To the extent Sams is arguing on appeal that he was entitled to an involuntary manslaughter charge because he was lawfully but negligently acting in self-defense when he asphyxiated Victim, charges of both self-defense and involuntary manslaughter were not appropriate based on the facts of Sams' case. See State v. Mekler, 379 S.C. 12, 16, 664 S.E.2d 477, 479 (2008) (“[A] self-defense charge and an involuntary manslaughter charge are not mutually exclusive, as long as there is any evidence to support both charges.”). This is true because unless Sams was lawfully acting in self-defense, which would have entitled him to acquittal, he had no right to use force against Victim, and, thus, his intentional act of strangling Victim could only have been unlawful. See Pickens, 320 S.C. at 532, 466 S.E.2d at 366-367 (“Under the definition of involuntary manslaughter, however, the jury could not find [Pickens] had acted lawfully without finding self-defense.”).

As this court has previously recognized, a claim of imperfect self-defense cannot be harmonized with the offense of involuntary manslaughter in South Carolina. See Douglas, 332 S.C. at 75, n. 4, 504 S.E.2d at 331 (“A claim of imperfect self-defense would also be unavailing because it has no application to involuntary manslaughter.”). If Sams was reckless or criminally negligent while engaging in self-defense and attempting to “restrain” Victim, then self-defense would no longer apply and Sams' actions would have been an unlawful act of assault and battery. See State v. Goodson, 312 S.C. 278, 280, 440 S.E.2d 370, 372 (1994) (defining the elements of self-defense as: (1) no fault in bring on the difficulty; (2) belief or existence of imminent danger of loss of life or serious bodily harm; (3) reasonableness of belief and actions; and (4) lack of any other probable means to avoid the danger). Therefore, there was no way for Sams to be both lawfully acting in self-defense and lawfully acting in reckless, imperfect self-defense. See

Pickens, 320 S.C. at 532, 466 S.E.2d at 366-367 (recognizing that Pickens could not have been acting in a lawful manner as required for entitlement to an involuntary manslaughter charge without also acting lawfully in self-defense); see, e.g., United States v. Skinner, 667 F.2d 1306, 1310 (9th Cir. 1982) (finding the appellant's request for an involuntary manslaughter charge based on a lawful act of self-defense committed unlawfully with excessive force was inappropriate because a killing committed in self-defense is intentional and, if imperfect, could only lead to a conviction for murder or voluntary manslaughter); People v. Heflin, 434 Mich. 482, 509, 456 N.W.2d 10, 21-22 (Mich. 1990) (“[B]y definition, ‘imperfect self-defense’ is an unlawful act that does not fall within the definition of common-law manslaughter: *a lawful act* negligently performed.” (italics in original)); State v. Abeyta, 120 N.M. 233, 241-242, 901 P.2d 164, 172-173 (N.M. 1995) (“Self-defense is only a justification for a killing, and thus a lawful act, if all the elements necessary for self-defense are met. . . . The use of excessive force in self-defense renders the entire action unlawful. Therefore the action cannot be deemed a lawful act done in an unlawful manner under the involuntary manslaughter statute.”), abrogated on other grounds by State v. Campos, 122 N.M. 148, 921 P.2d 1266 (N.M. 1996).

Thus, Sams was either lawfully acting in self-defense or his actions fell short of self-defense and were, therefore, unlawful. If Sams' action were committed in imperfect self-defense because of any negligence or recklessness on his part, then the act of “restraining” or choking Victim could no longer be considered a lawful act. Accordingly, Sams' actions could not have been considered lawful but reckless as required for a conviction for involuntary manslaughter based on an unintentional killing committed during a lawful, reckless, and intentional act. Therefore, Sams was not entitled to a

charge on involuntary manslaughter under the second definition of the offense. See Goldenbaum, 294 S.C. at 457, 365 S.E.2d at 732 (“A request to charge on a lesser included offense is properly refused when there is no evidence that the defendant committed the lesser rather than the greater offense.”).

After considering the evidence and testimony presented during trial, the trial judge properly instructed the jury on murder, voluntary manslaughter, and self-defense because those issues were raised by the evidence. See Mickle, 273 S.C. at 73, 254 S.E.2d at 297 (“We conclude the trial judge properly held that the question for the jury was whether appellant was guilty of voluntary manslaughter or not guilty because she acted in self-defense.”). However, none of the evidence presented during trial supported a conclusion that Sams’ intentional act of wrapping his hands and arms around Victim’s neck and applying pressure constituted an unlawful act not naturally tending to cause death or great bodily harm or a lawful act committed with a reckless disregard for the safety of other. Accordingly, Sams was not entitled to a jury charge on the law of involuntary manslaughter, and neither the trial judge nor the Court of Appeals erred in finding Sams was not entitled to an involuntary manslaughter charge. The decision of the Court of Appeals and Sams’ conviction should be affirmed.

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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June 21, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Colleton County
Honorable Perry M. Buckner, Circuit Court Judge
Appellate Case No. 2011-195886

THE STATE,

Respondent,

vs.

DESMOND JAVON SAMS,

Petitioner.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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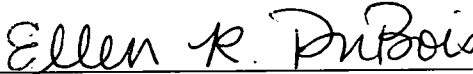
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PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Susan B. Hackett, Esquire
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I further certify that all parties required by Rule to be served have been served.
This 21st day of June, 2013.


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