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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Beaufort County

Perry M. Buckner, Circuit Court Judge

RECEIVED

JUN 11 2014

S.C. Supreme Court

JOSE ANGEL HERRERA,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001119

SUPPLEMENTAL APPENDIX

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

G. Thomas Cooper, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOSE HERRERA,

APPELLANT.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the court erred by refusing to charge involuntary manslaughter where there was evidence the gun discharged accidentally but where appellant could be found to have been reckless particularly where defense counsel correctly cited State v. Light and State v. Burriss in support of the request to charge?

2.

Whether the court erred by refusing to charge accident, reasoning that appellant's statement alone was insufficient to justify the instruction, since what appellant told the police was evidence, and it provided evidence, in the alternative, that the gun discharged accidentally where appellant was legally in possession of a gun in his own home, and the jury could have concluded the shooting was an accident particularly where defense counsel correctly cited State v. Burriss in support of the request to charge?

3.

Whether the court erred by admitting State's Exhibit 7-12, photographs of holes in the wall particularly where Officer Patrilla testified the holes looked like they were caused by someone punching a hole in the wall, and Captain Bromage testified the photographs showed evidence of "domestic violence" where appellant told him the holes in the wall were months old since this evidence was not relevant to what happened at the time of the shooting and therefore it was just calculated to impermissible inference appellant was a violent person acting in conformance with that character trait?

STATEMENT OF THE CASE

Appellant was indicted by the Beaufort County Grand Jury for the offenses of murder and possession of a weapon during the commission of a violent crime. R. 273. His case was called to trial on March 16, 2009 before the Honorable G. Thomas Cooper, Jr., and a jury. Lauren Carroway and Gene Hood represented appellant. Solicitor Duffy Stone and Deputy Solicitor Angie Tanner represented the state. R. 1.

On March 20, 2009 the jury found appellant guilty on both counts. R. 381, ll. 10-20. Judge Cooper sentenced appellant to life imprisonment for murder and five years concurrent for possession of a weapon during the commission of a violent crime. R. 392, l. 22 – 393, l. 6.

This appeal follows.

ARGUMENT

1.

The court erred by refusing to charge involuntary manslaughter where there was evidence the gun discharged accidentally but where appellant could be found to have been reckless particularly where defense counsel correctly cited *State v. Light* and *State v. Burriss* in support of the request to charge

Relevant Facts

Appellant's wife was found shot in the head while apparently sitting on the toilet. Jose Guerrero testified that he knew appellant, his wife and his wife's daughter, Madison Aust. R. 236, l. 1 – 237, l. 21. Guerrero testified on September 16, 2006 appellant called him on his cell phone but he missed the call. Guerrero said appellant, his wife and Madison later arrived at his house. Guerrero said appellant was angry with his wife for opening the door while she was smoking a cigarette inside the car. R. 239, l. 10 – 240, l. 18. Guerrero said he wanted appellant to leave because he was "so angry." Guerrero identified a gun as allegedly belonging to appellant. R. 241, l. 3 – 24. SLED agent Dan DeFreese testified he did not know whether that gun was the one used to shoot appellant's decedent wife. R. 284, l. 18 – 285, l. 5.

Madison Aust was thirteen years old at the time of trial. R. 255, l. 25 – 256, l. 1. She remembered that at about five o'clock on the day her "mom died" that appellant and her mother were arguing. R. 257, l. 9 – 261, l. 5. Aust said her mother told her to "when I'm out stay in my room because they're arguing. She didn't want me to witness their arguing and stuff." R. 261, ll. 1-12. Aust said while in the shower she heard "a bang." R. 261, ll. 21-25. Aust said when she got out of the shower appellant told her to "just stay in your room.

Something happened. And so he got on the phone and started to walk outside." R. 262, ll. 6-11. Aust said when appellant came back inside he told her that there had been "a break-in." R. 264, ll. 11-12. Aust said she had never seen appellant hit her mother or seen "any signs of domestic violence." Aust said appellant and her mother did scream and laugh a lot. R. 266, ll. 12-23.

Police officer Rhett Parnell responded to a shot fired call at appellant's residence on September 16, 2007. Parnell remembered appellant told him upon his arrival that he had gone to the store and when he returned "he discovered his wife was deceased in their master bedroom." R. 300, l. 1 – 301, l. 12; r. 302, ll. 8-14.

Captain Robert Bromage testified that he spoke to appellant on the day of the shooting. R. 307, ll. 18-22. Bromage said appellant told him they had "a verbal disagreement." Appellant went and when he came back he "found her in the bathroom... noticed a small caliber gunshot wound." R. 309, ll. 7-16.

Appellant had earlier objected to State's Exhibits 7-12, photographs of holes in the wall because evidence of marital discord was not relevant and was "probative of nothing. We have no idea how long ago—" The judge stated that the solicitor told him appellant admitted to the police he made the holes in the wall. Defense counsel continued to object to these photographs allegedly indicating marital discord coming before the jury. He argued that State v. Braxton did not support the state's position because there the evidence was used to prove identity. R. 139, l. 5 – 145, l. 3. The judge ruled the photographs were admissible and they were entered in over appellant's objection and Officer Patrilla testified the holes in the walls appeared to be made where someone "punched something in the wall here." R. 174, l. 1 – 177, l. 15.

Bromage told the jury that "there were signs of domestic violence all over the house. And I ask him where all the holes came from." His testimony was again over appellant's objection. R. 315, ll. 3-24. Bromage testified appellant told him he made the holes in the wall months ago when he got mad because his wife had left. R. 315, ll. 19-24.

Bromage testified on September 18, 2007, two days after appellant's wife was found shot in the bathroom of their house that he read appellant his Miranda Warnings. R. 316, l. 16 – 319, l. 17. The following occurred between Bromage and the solicitor:

> Q: All right. What does he tell you?
>
> A: Well, after I asked him what happened, he said, I don't want to make it seem like she did – Okay. She was playing around. We came home. I told her I wanted to leave. She got mad because I was going to leave. She was using the restroom. She grabbed my pistol pointed at her head. I went to reach for it. When I reached up to get it, just accidentally shot itself.
>
> Q: Let me ask you to go down to the bottom of 111 in your notes.
>
> A: Yes, Sir.
>
> Q: You asked him to clarify. What was his response?
>
> A: You want the truth. I will tell you the truth. She was playing. I didn't know she was playing around. When I reached over and tried to get it, it went off. It triggered.
>
> Q: Further down, starting at 9, what else?
>
> A: It was in her hand, then I grabbed it. A soon as I grabbed it, she let go and I guess my finger went into the trigger because the hammer was already cocked back. That little .22 she had, you couldn't shoot it like that. You had to pull the hammer back. And then when I see her pull the hammer back that's when I reached out there. I reached out to try and get it from her. When I grabbed it, she let go so I

guess my hand – again, this is taped and some of it you just can't hear.

Q: Now, did you ask him specifically about this taking place in the bathroom on the toilet?

A: Yes, sir.

Q: Alright. What was his – what exactly was your question?

A: Why would she sit on the toilet and play around with a gun?

Q: And what did he say?

A: Because she had to go and pee because we'd already got back.

R. 319, l. 17 – 321, l. 3.

Bromage also said appellant told him the decedent was angry because they had just had an argument, and appellant said he was leaving. Appellant said the decedent did not want him to go, and she grabbed the gun from him and pointed it at her head. Appellant said, "That's when I went in because I didn't want my wife doing anything like that. I love my wife. She – when I reached in, she let it go, I guess my hand went on the trigger. " R. 321, ll. 6-15.

Bromage recalled appellant in addition told him "she was sitting on the toilet with the gun. He came in. Kind of tripped over like this. It went off and just leaned against the wall would be right her." R. 322, ll. 13-16. Appellant told Bromage "it was not intentional, sir. It was not intentional." Bromage testified appellant admitted he panicked and tried to get rid of the shells and the gun. R. 322, l. 13 – 324, l. 20.

On cross-examination, Bromage said he thought he remembered appellant telling his taped statement that "it was not intentional, I swear on my Mom's life . . . [and] it was an accident." Bromage said it "sounded right" that appellant told him he tripped "over a kitten or her feet, he's not sure what he tripped on." R. 328, l. 5 – 329, l. 15.

Defense counsel requested jury instructions of voluntary manslaughter, involuntary manslaughter, and accident. R. 341, l. 5 – 350, l. 15. Defense counsel cited State v. Light and State v. Burris in support of her argument on involuntary manslaughter. She noted the evidence appellant did not intend to shot the decedent, and there was also evidence that he tripped, R. 341, l. 6 – 344, l. 18. Defense counsel also noted appellant was in his home with the gun at the time. Defense counsel also cited State v. Burriss in support of her request for an instruction on accident. R. 343, l. 3 – 345, l. 20.

Defense counsel argued the judge had to view the evidence in the light most favorable to the defendant and if there was any evidence of involuntary manslaughter or accident the judge was obligated to support it. Defense counsel argued appellant's own statement was sufficient to get mandate these jury charges. The judge said he was not going to instruct on accident because the only evidence was appellant said it was an accident. "I mean, that's not the law of accident. You can't just say it and make it an accident." The judge ruled he would not charge involuntary manslaughter or accident. R. 346, l. 5 – 347, l. 21.

Discussion

Defense counsel correctly argued appellant was entitled to a jury instruction on involuntary manslaughter pursuant to State v. Light, 378, S.C. 641, 664 S.E.2d 465 (2008). In State v. Light there was also evidence the defendant was grabbing at the gun when it

"went off" accidentally. The Supreme Court held the defendant was entitled to an involuntary manslaughter instruction given these facts since the jury could have found the gun fired accidentally but where the defendant was not exercising due care in the handling of the gun. The facts of this case are not in any meaningful way distinguishable from State v. Light.

Defense counsel also correctly argued to the judge that he had to consider the evidence in the light most favorable to appellant and charge involuntary manslaughter if there was any evidence of that lesser included offense. See State v. Knotten, 347 S.C. 96, 302, 555 S.E.2d 391, 394 (2001); State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000).

Defense counsel also told the judge that appellant was entitled to instructions on involuntary manslaughter and accident pursuant to State v. Burriss, 334 S.C. 256, 513 S.E.2d 109 (1999). See, also State v. Brayboy, Op. No. 4652 (Ct. App. March 4, 2010); State v. Crosby, 355 S.C. 47, 584 S.E.2d 110 (2003); State v. Mekler, 379, S.C. 12, 664 S.E.2d 477 (2008).

Respectfully, the trial judge here stated that appellant's statement to the police stating the shooting was an accident and describing how the gun discharged accidentally was not enough to justify instruction on involuntary manslaughter and accident. However, as seen above the standard is that the trial court must charge the lesser-included offense of involuntary manslaughter or the defense of accident unless there is "*no evidence whatsoever*" of that lesser included offense or accident. State v. Mekler, 379, S.C. 12, 664 S.E.2d 477 (2008). Appellant is entitled to a new trial.

2.

The court erred by refusing to charge accident, reasoning that appellant's statement alone was insufficient to justify the instruction, since what appellant told the police was evidence, and it provided evidence, in the alternative, that the gun discharged accidentally where appellant was legally in possession of a gun in his own home, and the jury could have concluded the shooting was an accident particularly where defense counsel correctly cited *State v. Burriss* in support of the request to charge.

Relevant facts

As seen, appellant told the police that the gun discharged accidentally while the decedent was sitting on the toilet. Appellant's statement to the police, which the state chose to introduce of through Bromage, clearly entitled appellant to a jury instruction on accident. See State v. Burriss, supra.

There was evidence that gun went off accidentally, and even evidence the gun went off accidentally where appellant was not even touching it. There was also evidence appellant was trying to get the gun from his wife because she was angry with him for saying he was leaving. The clear inference from this evidence was that appellant feared she was going to commit suicide.

As seen, Defense counsel requested jury instructions of voluntary manslaughter, involuntary manslaughter and accident. R. 341, l. 5 – 350, l. 15. Defense counsel argued appellant was in his home with the gun at the time discharged accidentally. Defense counsel

also cited State v. Burriss in support of her request for an instruction on accident. R. 343, l. 3 – 345, l. 20.

In the light most favorable to appellant there was evidence of involuntary manslaughter and accident the judge was obligated to support it. They are obviously not mutually exclusive but since the judge would not even charge involuntary manslaughter it is apparent he was not going to charge accident. However, defense counsel correctly argued appellant's own statement was sufficient to get mandate these jury charges. As seen above, the judge ruled he was not going to instruct on accident because the only evidence was appellant said it was an accident. "I mean, that's not the law of accident. You can't just say it and make it an accident." R. 346, l. 5 – 347, l .21.

In determining whether the evidence requires the charge of accident the court views the facts in the light most favorable to the defendant. State v. Commander, 284 S.C. 66, 681 S.E.2d 31 (Ct. App. 2009). For a homicide to be excusable on the ground of accident, it must be shown that the killing was unintentional, the defendant was acting lawfully, and due care was exercised in the handling of the weapon. State v. Burriss, 334 S.C. 56, 59, 513 S.E.2d 104, 106 (1999); Tisdale v. State, 378 S.C.122, 662 S.E.2d 410 (2008).

Here there was evidence the decedent had the gun in her hand and that appellant tried to take the gun from her. There is a fair inference from one of appellant's statements that the gun went off *without him ever touching it or where he was only trying to get from the* decedent.

The fact is in this case there was evidence the gun discharged unintentionally while appellant was acting lawfully and not recklessly. The judge incorrectly stated that

appellant's statement to the police could not justify a charge on accident, and appellant is entitled to a new trial. State v. Burriss, 334 S.C. 56, 59, 513 S.E.2d 104, 106 (1999). Appellant was in his own home where he had every right to have a gun. If the jury believed appellant there was ample evidence from which it could have acquitted appellant by reason of accident. Defense counsel correctly cited State v. Burriss in support of the jury instruction on accident. Appellant should be granted a new trial.

3.

The court erred by admitting State's Exhibit 7-12, photographs of holes in the wall particularly where Officer Patrilla testified the holes looked like they were caused by someone punching a hole in the wall, and Captain Bromage testified the photographs showed evidence of "domestic violence" where appellant told him the holes in the wall were months old since this evidence was not relevant to what happened at the time of the shooting and therefore it was just calculated to impermissible inference appellant was a violent person acting in conformance with that character trait.

Relevant facts

As seen, the solicitor claimed he was entitled to introduce photographs of the holes in the wall in appellant's home because they were evidence of marital discord. The solicitor relied on State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001), in support of his argument. Appellant objected to State's Exhibits 7-12, photographs of holes in the wall because evidence of marital discord was not relevant and was "probative of nothing. We *have no idea how long ago*—" R. 139, l. 5 – 145, l. 3.

The judge interrupted stating that the solicitor told him appellant admitted to the police he made the holes in the wall. The judge stated he had to determine whether this was a State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923), problem. "I don't recall when those holes in the wall were made, what, some ten days prior to . . . " The solicitor said the defendant had actually said "those are holes I made months ago . . ." Bromage told appellant "I see signs of domestic violence all over your bedroom." The solicitor claimed

there the evidence was not being admitted under Rule 404(b), SCRE, but that it was relevant to the shooting. R. 139, l. 16- 144, l 8.

Defense counsel continued to object to these photographs allegedly indicating marital discord coming before the jury. She argued that State v. Braxton did not support the state's position because there the evidence was used to prove identity. R. 139, l. 5 – 145, l. 3. She said "They're not relevant at this point. They do nothing to prove anything about a gunshot." The judge responded, "that's true but he stated "previous quarrels and ill feelings" evidence was admissible and therefore the photographs of the holes in the wall were entered in over appellant's objection. R. 144, ll. 6-24.

Officer Patrilla testified the holes in the walls appeared to be made where someone "punched something in the wall here." R. 174, l. 1 – 177, l. 15. Bromage told the jury that he informed appellant "there were signs of domestic violence all over the house. And I asked him where all the holes came from." This testimony was again over appellant's objection. R. 315, ll. 3-24. Bromage testified appellant told him he made the holes in the wall months ago when he got mad because his wife had left. R. 315, ll. 19-24.

Discussion

In Braxton the Supreme Court held that testimony a witness knew the defendant possessed a nine millimeter pistol in the past was relevant to the identity of the shooter. In Braxton the Court also noted that the state wanted witness Berry to testify about an argument between Braxton and his brother on the night before the murder to establish Braxton was a violent person and quick to draw his pistol. The court held this evidence was inadmissible character evidence under Rule 404 (a), SCRE. The court in Braxton

found the error harmless. Here the argument and punching the holes in the wall apparently occurred months before the shooting.

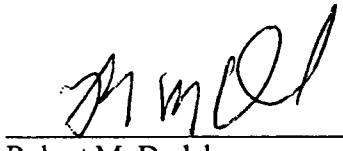
In Braxton the Court relied on State v. Williams, 321 S.C. 327, 468 S.E.2d 10 (1996) noting that evidence of previous quarrels and ill feelings or hostile acts between the parties was admissible to show the animus probably existed between the party at the time of the homicide. However, here, the fact appellant had punched holes in the wall while angry months earlier could not have legitimately been offered to show his state of mind at the time the decedent was shot. Most couples at some point argue, and the act of punching holes in the wall months before were, as defense counsel argued, simply not relevant to explain the shooting in this case.

The photographs were clearly meant to indicate to the jury that appellant had a bad temper, and that he was probably angry with the decedent again on the day of the shooting thereby negating the claims of involuntary manslaughter, accident, or simply not guilty of murder. In State v. McConnell, 290 S.C. 278, 350 S.E.2d 179 (1986). the Court held that evidence of different caliber bullets found in the home raised various impermissible inferences of prior bad acts and were not admissible since they were not in any way tied to the .357 which was the murder weapon. The bullets were only introduced as an impermissible comment on the defendant's character and his other prior bad acts. The same was true here, and appellant should be granted a new trial.

CONCLUSION

By reason of the foregoing arguments, appellant's convictions should be reversed and this case remanded to the Beaufort County Court of General Sessions for a new trial.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

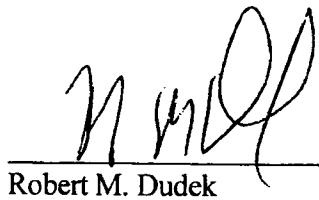
ATTORNEY FOR APPELLANT.

This 20th day of September, 2010.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief 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."

September 20th, 2010



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THE STATE,

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APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 , this 20th day of September, 2010.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 20th day of September, 2010.

_____(L.S.)
Notary Public for South Carolina

My Commission Expires: October 2, 2013.

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

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STATEMENT OF THE CASE

On September 16, 2007, appellant (Jose Angel Herrera) murdered his wife, Katherine Herrera, by shooting her with a pistol. The crime occurred in Beaufort County. Appellant was subsequently arrested and charged with his wife's murder on September 19, 2007. Appellant was indicted by the Beaufort County grand jury for the offenses of murder and possession of a weapon during the commission of a violent crime. (2007-GS-07-1921,1922). Lauren Carroway, Esq., and Gene Hood, Esq., represented appellant on the charges.

Appellant proceeded to trial on March 16, 2009 before the Honorable G. Thomas Cooper, Jr., Circuit Court Judge, and a jury. Solicitor Duffy Stone and Deputy Solicitor Angie Tanner prosecuted the case on behalf of the State of South Carolina. At the conclusion of the trial on March 20, 2009, the jury found appellant guilty of murder and possession of a weapon during the commission of a violent crime. (R. 263, Tr. p. 381, ll. 10-20). On the same date, Judge Cooper sentenced appellant to life imprisonment for murder and five (5) years concurrent for possession of a weapon during the commission of a violent crime. (R. 270-71, Tr. p. 392, ln. 22 - 393, ln. 6).[1] This appeal followed.

---

[1]At his sentencing, appellant's prior criminal record was provided to Judge Cooper. Appellant was convicted in 2002 of burglary in the second (2nd) degree, grand theft, receiving stolen goods, and theft by misrepresentation as a card holder. In 2003, appellant was convicted of receiving stolen goods and possession of a controlled substance. (R. 268, Tr. p. 388).

RESPONDENT'S STATEMENT OF FACTS

On September 16, 2007, Katherine Herrera ("Katherine") was murdered by her husband ("appellant") in her home, while she was sitting on a toilet with her pants down around her knees. (Court's Ex. 2, played for the jury & Court's Ex. 3, audio transcription viewed by the trial court and jury). EMS and police found Katherine's lifeless body just off of the toilet with a piece of tissue paper still clutched in her hand. (R. 61-62, Tr. pp. 178-179). Additionally, her pants were still down at her knees. (R. 61-62, 68-70, Tr. pp. 178-179, 185-187, State's Ex. 13 &14, 192-195). Yellow or straw colored urine was still in the toilet bowl. (R. 89, Tr. p. 206).

Appellant shot the victim in the base of her skull, in her hair line, with a .22 caliber pistol. (R. 155-167, Tr. 272-284). The gunshot wound was a distant gunshot wound, approximately 3 to 3/12 feet away. (R. 81-92, Tr. pp. 198-209). In addition to being shot in a helpless position, at the time the victim was shot she had a blood alcohol of .086. (R. 163, Tr. p. 280). Appellant was on parole from the State of California at the time of the murder, and he was not supposed to even possess a pistol at the time he murdered his wife. (R. 267-68, Tr. pp. 387-388).

After murdering his wife, appellant told his step-daughter, Madison A. ("Madison") to stay in her bedroom. (R. 144-48, Tr. pp. 261-265). Appellant then took the murder weapon, drove away from the crime scene in his own automobile, and disposed of the pistol in a wooded area approximately one (1) mile from the crime scene. While disposing of the murder weapon, appellant called the police on his cell phone and told them there had been an intruder to the home, and he had found his wife dead from a small caliber gunshot wound. (R. 110-15, 205-06, Tr. pp. 227-232, 323-324).

Appellant's First Version of Events (the intruder)

Appellant returned to the crime scene and when police arrived again told them there had been an intruder to the home, and he had found his wife dead from a small caliber gunshot wound. (R. 184-85, 187-88, 277, Tr pp. 302-303, 305-306, State's Ex. 20, State's Ex. 32 (CD of 911 calls). Police found no sign of forced entry to the home. (R. 61-62, Tr. pp. 178-179). Nor could first responders initially tell the exact cause of Katherine's death. (R. 62, 69-70, 75-78, Tr. pp. 179, 186-187, 192-195).

Upon his initial questioning at the scene, appellant stayed with this initial version of events.[2] Appellant explained that he had dropped his wife off at the home and had gone to the store to pick up something to drink (beer), when he realized he already had some beverages at the home. He told police that when he returned home, he found his wife dead in the bathroom. (R. 183, 185, Tr. p. 301, 303). During his initial questioning, appellant also denied to police that he owned a pistol. (R. 194-98, Tr. pp. 312-316). After his initial questioning, appellant was taken into custody *and* later arrested for a parole violation from the State of California. That evening appellant was interrogated and again related the same *intruder version* of events. (R. 195, Tr. p. 313).

Appellant's 2nd Version of Events (the toilet suicide attempt)

Appellant was questioned again two (2) days later, September 18th, around 2:50 p.m. at the Beaufort County Law Enforcement Center. At this time, appellant was confronted with the fact police had found the murder weapon and had found a box of similar caliber ammunition in the woods behind the victim's home. Appellant subsequently admitted there was no intruder. In this

[2]Appellant actually made two 911 calls relating *the intruder version.* When police arrived at the scene, he gave a written statement as a witness relating the same story. When the detective arrived approximately 30 minutes later, appellant related the same story.

version of how the shooting occurred, appellant alleged his wife was trying to commit suicide or acting like she was going to commit suicide while sitting on the toilet going to the bathroom, and he took the gun away from her, and it went off accidentally. Appellant stated he thought she was serious in the suicide attempt. Appellant claimed in a portion of this version that he stumbled as he tried to take the gun away from his wife. (R. 201-04, Tr. pp. 319-322).

Appellant's 3rd Version of Events (the pointing and presenting)

Appellant was questioned again on the afternoon of the 18th around 4:15 p.m.. In this lengthy interview, appellant admitted his claim that Katherine was trying to commit suicide or acting like she was going to commit suicide while on the toilet was false. Instead, appellant claimed he and his wife had an argument; she pushed him, tried to hit or slap him and missed, refused to talk to him, he became angry, and he went and got the pistol off of a night-stand. Appellant admitted the gun was loaded and cocked when he retrieved it in anger. Appellant claimed he went to the bathroom with the loaded gun, was going to show it to his wife to scare her or make her be quiet, tripped or stumbled, and shot his wife. Later in the statement, appellant stated that he told his wife he was going to leave, she made a remark that made him angry, and she went to the bathroom. Again he stated that he went and got the loaded pistol and was going toward the bathroom to show her the gun to scare her into being quiet to end the argument. Toward the end of this statement, appellant claimed the real truth was that after he retrieved the pistol and was headed toward the bathroom, he blacked out and did not remember what happened. (R. 206-08, 278, Tr. pp. 324-326, Courts' Ex. 2 (Transcript of Statement read by the jury), & Court's Ex. 3 played for the jury). In this interview, appellant repeatedly admitted he armed himself in anger and was going to the bathroom to show his wife the gun to scare her into being quiet. (R. 278, Court's Ex. 2 & Court's Ex. 3). Near the end

of this interview, appellant admits he retrieved the gun, went into the bathroom, and shot his wife. (R. 278, Court's Ex. 2 & Court's Ex. 3). At the very end of this interview, it appears appellant admits he shot his wife after he pointed the gun at her, but he only shot her out of frustration or anger. (*See* R. 278, Court's Ex. 2 & Court's Ex. 3).[3]

The Other Incriminating Evidence

Police interviewed several witnesses who also provided incriminating evidence against appellant.

Appellant's Friend

Jose Guerero ("Guerrero"), a friend of appellant, testified he also knew Katherine and Katherine's daughter, Madison. (R. 119-120, Tr. pp. 236, ln. 1 - 237, ln. 21). Guerrero testified that on the day of Katherine's murder, in the late afternoon, at 5:33 p.m., appellant called him on his cell phone, but Guerrero missed the two (2) calls. Guerrero said appellant, his wife, and Madison then arrived at Guerrero's home at approximately 5:40 p.m.. Guerrero testified that Katherine and

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[3]Appellant was actually interviewed seven (7) times; three (3) times on the date of the murder, two (2) times on the 18th, once on the 19th, and again on the 21st. The first three (3) interviews of the 16th resulted in what Respondent has termed *the intruder version.* The first interview on the 18th resulted in *the toilet suicide version.* The final interview on the 18th resulted in the final version of how the shooting occurred, i.e. *the pointing or presenting version.* The State did not offer any evidence of the final two (2) interviews into evidence. Defense counsel did cross-examine the State's investigator on portions of those final two interviews, however, most of that cross-examination dealt with what the investigator said to appellant to prompt an incriminating or truthful response. (See R. 209-216, Tr. pp. 327-334). From Respondent's repeated review of this portion of the cross-examination, it does not appear appellant gave a new version of what happened, but merely clarified or expanded upon *the final version.* (See R. 209-216, Tr. pp. 327-334). For example, on the 19th, appellant admitted he had been drinking all day the day of Katherine's death, and appears to have stated on the 21st, though not clear, that when his wife pushed him in the bedroom, he stumbled onto the bed. (See R. 212-13, Tr. pp. 330-331 For this reason, in this brief, Respondent will refer to the 2nd statement of the 18th and the limited testimony regarding the interviews of the 19th and 21st as *the final version.*

Madison remained in their vehicle while he and appellant talked.

Guerrero stated appellant was angry with his wife. (R. 122-23, Tr. pp. 239-240). Guerrero testified that while at his residence appellant made statements such as: "This bitch is pissing me off," and "He's sick of this bitch." Guerrero testified that when Katherine opened the vehicle door to let cigarette smoke out of the vehicle, appellant yelled at Katherine. "He said, you know, I told you to stay in the fuckin car." Guerrero attempted to calm appellant down but was unsuccessful. Guerrero testified he wanted appellant to leave his house because appellant was "so angry."

Geurrero also identified the gun appellant discarded after the murder as being appellant's gun. The gun was a .22 caliber pistol. Guerrero testified appellant, his wife, and Madison left his residence in appellant's car. According to Guerrero, appellant was still angry when he left Guerrero's home shortly before the murder occurred. (R. 122-25, Tr. pp. 239-242).

Appellant's Step-Daughter (Madison)

The victim's daughter, Madison, testified similarly regarding the incident at Guerrero's home. Madison testified appellant and her mother had picked her up after visitation with her father, and they had stopped by Mr. Guerrero's home. Madison testified that while at Guerrero's home, appellant became angry with her mother. Madison testified they left Guerrero's home after a short period of time.

Madison testified that on the way home from Guerrero's house, appellant was still angry and was yelling at her mother, the victim. Madison testified appellant stopped on a bridge and told her mother to get out of the car. Madison testified her mother refused to get out of the car.

Madison testified that when they got home, her mother told her to take a shower and not to come out of her room because her mother did not want Madison to hear them, appellant and

Katherine, fussing. Madison testified that while she was in the shower, she heard a "bang."

Madison testified that after she got out of the shower, appellant told her to go to her room. Madison tried to leave her room again, but appellant told her not to come out because "something had happened." Madison testified she came out of her room anyway, and she saw appellant outside the home walking back and forth talking on a cell phone. Madison testified appellant seemed to be nervous or pacing. Madison testified appellant then told her there had been an intruder, but Madison saw no one around. (R. 140-150, Tr. pp. 257-267).

Madison also testified appellant did own or possess a pistol. She testified he kept it on his night table and carried it with him whenever he left the house. (R. 138-150, Tr. pp. 255-267).

The Neighbor

Terry Laseter, a neighbor of appellant and the victim, testified that in the late afternoon of September 16, 2007 he saw appellant, the victim, and her daughter go past his house in appellant's vehicle headed toward their home. Laseter testified appellant, the victim, and her daughter pulled into their driveway, and he heard doors opening and closing. Laseter then heard voices that sounded like people arguing. Laseter testified it was definitely angry sounding voices. Laseter testified the arguing lasted for two (2) or three (3) minutes, and then the front door of the victim's residence slammed.

Laseter testified that about seven (7) or eight (8) minutes later, the same car pulled back out of the victim's driveway and came "flying by" his, Laseter's driveway. This time, only appellant was in the car, and he was talking on the cell phone. About ten (10) minutes later, Laseter saw police headed toward the victim's residence. (R. 130-35, Tr. pp. 247-252).

The Forensic Evidence

Police, with the assistance of a trained scent dog, later recovered the pistol appellant discarded approximately one (1) mile from the crime scene. (R. 110-15, Tr. pp. 227-232).[4] Police also found a box of .22 caliber bullets appellant had thrown over the fence behind the victim's home after murdering his wife. (R. 105-09, Tr. pp. 222-226). Inside the bedroom, police also found a plastic cup containing unfired .22 caliber bullets. (R. 70-71, Tr. pp. 187-188).

Inside the home, police also found evidence of domestic violence. There were holes in the walls consistent with someone having hit the walls with his fist. (R. 56-57, 59-60, 189, 197, Tr. pp. 173-174, 176-177, 307, 315). These holes were located in the bedroom where appellant had retrieved the cocked and loaded pistol and which was adjacent to the bathroom where the victim was murdered. Appellant admitted to police that in the past he became angry with his wife and hit the walls with his fists. (R. 197, Tr. p. 315).[5]

The pathologist testified that the bullet wound to the base of the victim's skull took a slightly downward and forward path. (R. 95-103, Tr. pp. 212-220). Dr. Presnell testified the findings at autopsy were consistent with the victim being shot while she was on the toilet, her body or head being in a slightly angled or twisted position, and her assailant standing in the doorway of the bathroom or the victim's front and perhaps slightly above her. (R. 89-90, Tr. pp. 206-207).

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[4]Forensic expert Dan Defreese of SLED could not make a positive identification of the bullet taken from the victim's head to the pistol, because the bullet was too badly damaged. (R. 161, Tr. p. 278). However, appellant admitted to police this was the weapon that fired the fatal shot, and the gun was recovered in the area where appellant later admitted he threw away the weapon. (R. 205-06, Tr. 323-324).

[5]Appellant did not testify at trial or offer any evidence.

ARGUMENT I.

The trial judge did not err in refusing to charge involuntary manslaughter where the facts upon which appellant relied below in justifying this charge did not support this lesser included offense. Appellant's assertion on appeal of other facts as justifying the charge are not preserved for appellate review because they were not asserted below, and for good reason.

What Occurred at Trial

During the trial, the State played for the jury the 2nd interview of appellant which took place on September 18th at approximately 4:15 p.m., i.e. what Respondent has referred to as the *final version* of how the shooting occurred. (R. 206-08, Tr. pp. 324-326, Court's Ex. 2). The jury also received a written transcript of this interview to view while it listened to the recording. (R. 206-08, 278, Tr. pp. 324-326, Court's Ex. 3).

At the charge conference, appellant requested Judge Cooper instruct the jury on the lesser included offenses of voluntary manslaughter and involuntary manslaughter *based on appellant's final version of how the shooting occurred.* (See R. 223-230, Tr. pp. 341-348). This included the 2nd interview of appellant by police on September 18th and very limited portions of the interviews of the 19th and 21st brought out on cross-examination. (See R. 223-230, Tr. pp. 341-348). Appellant did not argue the facts of the *toilet suicide version* in support of either charge. (See R. 223-230, Tr. pp. 341-348). Judge Cooper agreed the charge of voluntary manslaughter was appropriate under the facts as argued by appellant below. (R. 223, 226, Tr. pp. 341, 344, ll. 3-11).

Appellant argued that involuntary manslaughter was supported by State v. Light, 378 S.C. 641, 664 S.E.2d 465 (2008) and State v. Burris, 334 S.C. 256, 513 S.E.2d 109 (1999). The trial judge noted that based on the record appellant had gone and gotten a pistol and had pointed or presented a firearm, which would not entitle him to a charge on involuntary manslaughter. (See R.

224-231, Tr. pp. 342-349).

Appellant argued that in his final version to police appellant stated he had no intent to point the firearm in any way, and he tripped and fell.[6] The State relied on State v. Wharton, 381 S.C. 209, 672 S.E.2d 786 (2009) for its position that involuntary manslaughter could not be charged on these facts.

Judge Cooper noted on the record the State was relying on Wharton and that Wharton was based on State v. Reese, 370 S.C. 31, 36, 633 S.E.2d 898, 900-01 (2006). Judge Cooper also noted that pointing *or* presenting a firearm is a violation of the statute, and it is a felony. Judge Cooper also pointed out that involuntary manslaughter is defined as the killing of another without malice and unintentionally while engaged in either an unlawful act not amounting to a felony, "which we don't have here," or an unlawful [sic] act with reckless disregard. (R. 224, Tr. p. 342).

In response to Judge Cooper's query about the fact that appellant was presenting a firearm, appellant relied on the fact that he was in his own home when he armed himself, and, therefore, Wharton was inapplicable. Appellant admitted that Burris was a self-defense case but argued the case by analogy on the principle that he could arm himself in his own home. Judge Cooper pointed out that one cannot arm himself in his own home and point and present a firearm *illegally*. Appellant responded that under the any evidence standard of State v. Knoten,[7] he told police in his final version that he did not intend to point the gun at the victim. (R. 227-28, Tr. pp. 345, ln. 22 - 346, ln. 4). Solicitor Stone pointed out that in Wharton, which the Supreme Court had just decided one (1)

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[6]Appellant stated in both his 2nd version and 3rd version of how the shooting occurred that he tripped or stumbled, however, appellant argued below only the 3rd version of how the shooting occurred to support a charge of involuntary manslaughter. (See R. 223-230, Tr. pp. 341-348).

[7] 347 S.C. 296, 555 S.E.2d 391 (2001).

month before this trial, the defendant didn't intend to point the gun at anyone either, and the Supreme Court held involuntary manslaughter was not an issue to be submitted to the jury. Judge Cooper then pointed out that in State v. Reese, the defendant did not intend to point the gun either, he presented it, and there was a difference between the two. (R. 223-230, Tr. pp. 341-348).

After reviewing the cases submitted by appellant, including Burris, Judge Cooper declined to charge involuntary manslaughter. Judge Cooper specifically stated on the record that Burris was a self-defense case, self-defense is not an unlawful act, and Burris possessed a pistol in that case. Judge Cooper found that the facts of Burris and the present case were not the same. Judge Cooper found here there was "a pointing and presenting," regardless of how appellant characterized it, which is a felony. Judge Cooper found that this case did not involve self-defense. Judge Cooper ruled he would charge the jury on the crimes of murder and voluntary manslaughter based on the record before him. (R. 230-31, Tr. pp. 348-349).

Appellant's Brief

In his brief on appeal, appellant argues extensively that Judge Cooper erred in refusing to instruct the jury on involuntary manslaughter because the facts as recited in appellant's *second (2nd) version* of how the incident occurred, i.e. the toilet suicide attempt, were sufficient evidence to justify the charge of involuntary manslaughter. (See IBOA, pp. 5-8). However, this version of how the shooting occurred was not argued below as a basis for an instruction of involuntary manslaughter. (See Tr. starting at p. 341). Below, counsel argued appellant's final version to police, that he retrieved the gun in anger, stumbled as he was entering or proceeding through the bathroom, and the gun went off, justified a charge on involuntary manslaughter. (See R. 223-232, Tr. pp. 341-

350).[8]

Petitioner's assertion on appeal, that the facts from his second (2nd) version of how the shooting occurred justified a charge on involuntary manslaughter, is not preserved for appellate review, and he is not entitled to reversal of his convictions on this basis. State v. Wiggington, 375 S.C. 25, 649 S.E.2d 185 (Ct.App. 2007)(finding appellant's argument on appeal in support of involuntary manslaughter charge was not raised below, and therefore he would be entitled to reversal only on the basis he raised below), *referencing* State v. Freiberger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005)(finding argument advanced on appeal was not raised and ruled on below therefore the issue was not preserved for review); State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003)(holding arguments not raised to and ruled upon by the trial court are not preserved for appellate review, and defendant may not argue one ground below and another ground on appeal), *other citation omitted. See also* Knight v. Waggoner, 359 S.C. 492, 597 S.E.2d 894 (Ct. App. 2004)(arguments made for the first time on appeal are not preserved for review).

On appeal, appellant is now attempting to intertwine facts from the *toilet suicide version*, with just a few facts from the final version, to justify a charge of involuntary manslaughter. (See BOA). However, below, appellant did not argue the facts of the *toilet suicide version* in support of

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[8]A plain review of the charge conference *below* reveals that appellant did not mention one time *the toilet suicide* facts as a justification for a charge on involuntary manslaughter. (R. 223-230, Tr. pp. 341-348). It is clear appellant abandoned this version of events as a basis for a charge of involuntary manslaughter, and for good reason. Appellant told the police, and the jury knew, that this version of the shooting was not true. Because appellant argued below and relied on the 3rd version of how the shooting occurred to justify involuntary manslaughter, i.e. that he grabbed the gun in anger and was going to confront his wife and present the firearm, Judge Cooper correctly made the statement on the record that simply saying it was an accident does not make it an accident or entitle one to an accident charge under South Carolina law. (See R. 223-230, Tr. pp. 341-348). Appellant now argues on appeal *a different basis* for the involuntary charge than he argued below. (Compare R. 223-230, Tr. pp. 341-348 to FBOA pp. 5-8).

his request for a charge of involuntary manslaughter. (R. 223-230, Tr. pp. 341-348). A party may not argue one ground at trial and an alternate ground on appeal. *See* State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691 (2003); State v. Haselden, 353 S.C. 190, 577 S.E.2d 445 (2003). *See also* State v. Dickman, 341 S.C. 293, 534 S.E.2d 268 (2000)(finding issue was not preserved for appellate review where at trial defendant objected to accomplice liability charge because the indictment charged him only as a principal, but on appeal argued the evidence did not support an accomplice liability charge), *and* State v. Benton, 338 S.C. 151 526 S.E.2d 228 (2000)(finding issue not preserved for appellate review where defendant argued one ground in support of circumstantial evidence charge at trial and another ground in support of the charge on appeal).

This Court will not allow appellant to do what he is attempting for the first time to do on appeal. State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691 (2003)(an issue that was not preserved for review should not be addressed by the Court of Appeals, and the Court's opinion should be vacated to the extent it addresses an issue that was not preserved.) The arguments by appellant in his brief that the facts from the *toilet suicide version* justify an involuntary manslaughter charge are not preserved for appellate review, and he is not entitled to reversal on this basis. Wiggington; Benton.[9]

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[9]Furthermore, even if appellant had argued below the *toilet suicide version* as a basis for a charge of involuntary manslaughter, which he did not, he would not have been entitled to a charge on this lesser included offense. Involuntary manslaughter is the killing of another without malice and unintentionally while engaged in either: (1) *an unlawful act* not amounting to a felony and not naturally tending to cause death or great bodily harm; or (2) a lawful act with *reckless disregard* for the safety of others. State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996). According to appellant's second version of events, the toilet suicide version, he believed his wife was trying to commit suicide and took the gun away from her in an attempt to save her from killing or harming herself. In this version, appellant told police his wife cocked the loaded pistol. (R. 202, Tr. p. 320). In this version, appellant was certainly not acting unlawfully, and he was not acting with reckless disregard for his wife's life or safety. Quite the opposite, he was acting to protect her from harming herself or taking her own life. Under such facts, appellant would not be entitled to a charge of involuntary manslaughter.

The Lack of Merit of Appellant's Argument Below

With regard to the facts that were argued below to justify a charge of involuntary manslaughter, Judge Cooper did not err in refusing to charge this lesser included offense. State v. Wharton; State v. Cabera-Pena, 361 S.C. 372, 605 S.E.2d 522 (2004). Appellant *did not assert* he lawfully armed himself in his final version of how the shooting occurred. By his own admission, he armed himself in anger. (R. 205-06, Tr. pp. 325-326, Court's Exhibit 2, audio transcription published to the jury & Court's Exhibit 3 transcription published to the jury).

Appellant told police in his final version that his wife and he were arguing, his wife pushed him and tried to hit him, she would not speak to him regarding why she had tried to slap him, he became angry, and he retrieved the loaded firearm and went to the bathroom where his wife was seated on the toilet. In the light most favorable to appellant, he told police that when he entered the bathroom his intent was to point the gun at the wall, in her general direction, or show her the gun with the intent of stopping the argument, i.e. confronting her and intimidating or scaring her into being quiet. (See R. 205-06, 278, Tr. p. 325-326, Court's Exhibit 2 played for the jury & Court's Exhibit 3 viewed by the jury). Appellant also told police in his final version that he became angry with his wife after she made a remark about him leaving, he retrieved the loaded firearm and went to the bathroom where his wife had gone after making the statement that made him angry. Appellant admitted he was going to the bathroom to show her the gun to make her be quiet. (See R. 205-06, Tr. p. 325-326, Court's Exhibit 2 published to the jury & Court's Exhibit 3 published to the jury). Appellant was neither lawfully armed nor acting lawfully.

Appellant was not lawfully armed at the time the shooting occurred. He admitted in his final

version, which was argued below, that he was not lawfully armed. He admitted he was going to use the firearm to intimidate his wife. Additionally, under these facts, appellant was not entitled to arm himself simply because he was angry. Being angry and retrieving a firearm does not make one lawfully in possession of the firearm. *Compare* State v. Brayboy, 387 S.C. 174, 691 S.E.2d 482 (Ct. App. 2010), *and* Reese, 370 S.C. at 36, 633 S..E.2d at 901. The decisions in State v. Burris, 334 S.C. 256, 513 S.E.2d 109 (1999) and State v. Light, 378 S.C. 641, 664 S.E.2d 465 (2008), on which appellant relies in his brief, and on which he relied below, are simply not controlling on these facts.

Nor was appellant acting lawfully. *See* Arnette v. State, 306 S.C. 556, 413 S.E.2d 803 (1991)(counsel was not ineffective in failing to discuss defense of accident with defendant where defendant was not acting lawfully when he fired first shot into the wall to scare the victim). Appellant admitted he was going to show the gun to his wife to intimidate her into being quiet. In fact, as the trial judge correctly found in declining to charge involuntary manslaughter, and as this Court recently addressed, appellant's actions constituted pointing and presenting a firearm, which is a felony and one inherently dangerous to human life. *See* In the Interest of Spencer R., 387 S.C. 517, 692 S.E.2d 569 (Ct. App. 2010)(defining presenting a firearm). Appellant was not entitled to an involuntary manslaughter instruction where he engaged in such conduct. State v. Wharton, 381 S.C. 209, 672 S.E.2d 786 (2009); State v. Reese, 370 S.C. 31, 36, 633 S.E.2d 898, 900-01 (2006), *overruled on other grounds by* State v. Belcher, 385 S.C. 597, 685 S.E2d 802 (2009); State v. Cabrera-Pena, 361 S.C. 372, 381, 605 S.E.2d 522, 526-27 (2004).

Contrary to appellant's argument to the trial judge below, in his final version of the incident to police, appellant admitted he armed himself in anger, and he intended to point or present the loaded and cocked firearm when he entered the bathroom. Appellant admitted to police his intent

was to confront and intimidate the victim. Judge Cooper did not err in declining to charge involuntary manslaughter under these facts. Cabera-Pena, *supra* (wherein the Court found on similar facts that the appellant was not entitled to an involuntary manslaughter charge when he armed himself unlawfully and went and confronted the victim in a domestic situation even though he claimed the gun discharged accidentally). This ground of appellant's appeal has no merit.[10]

ARGUMENT II.

The trial court did not err in refusing to charge the defense of accident, because appellant was not entitled to a charge on the defense of accident where appellant requested the charge based only on his final version to police of how the shooting occurred, and in that final version appellant admitted he armed himself in anger, and the gun discharged while he was pointing or presenting a firearm, and appellant was unlawfully in possession of the firearm at the time he committed the offense, and was not acting with due care in the handling of the firearm. Appellant's assertion on appeal of other facts as justifying the charge are not preserved for appellate review because they were not asserted below, and for good reason.

Judge Cooper did not err in refusing to charge *the defense of accident.* Given the facts argued below to support this charge, Judge Cooper did not err in declining to charge the defense of accident under South Carolina law.

What Occurred at Trial

At the charge conference, appellant also requested the trial court charge the defense of accident. Appellant based his request for a charge on the defense of accident on his final version to police of how the incident occurred. (See Tr. starting at p. 341). Appellant *did not* base his request for a charge on the defense of accident *on his* ridiculous assertion in his *second (2nd) version to police*

[10]As an additional sustaining ground, appellant was a convicted felon on parole from the State of California at the time of the murder. He could not lawfully possess the firearm for the reasons he asserted to police in his final version of the shooting.

of how the incident happened, i.e. that the victim was attempting to commit suicide as she sat on the toilet using the bathroom, and the gun went off when he tried to stop her. (R. 223-246, Tr. pp. 341-364). In fact, appellant abandoned any request for an accident charge based on this version of events. (R. 223-246, Tr. pp. 341-364).

Appellant abandoned any such request for good reason. As previously stated, appellant admitted to police in his final version of events that *the toilet suicide version* was not true. The jury knew this, and appellant could not credibly argue to the jury that they should return with a verdict of not guilty based on these facts. In fact, appellant made no such argument in his closing. There is no mention in appellant's final argument of *the toilet suicide version*, other than to state that appellant was scared and lied to police before his final version of what happened. (See R. 241-46, Tr. pp. 359-364).

At the charge conference, appellant based his request for accident on his final version of how the shooting happened and State v. Burris, *supra* by extension. Appellant admitted Burris was a self-defense case, but argued he could arm himself in his own home pursuant to Burris even though he was not arming himself lawfully in self-defense or in any other fashion. Appellant again relied on his final version that he did not intend to point the gun at his wife when he went into the bathroom with the loaded cocked pistol. Judge Cooper pointed out that simply because the appellant said it was an accident, or characterized it as an accident, did not entitle him to a charge of the defense of accident under the law. Judge Cooper also pointed out that for there to be accident as defined by South Carolina law, the appellant must be acting lawfully. Appellant agreed and argued that pursuant to Burris he was lawfully in possession of the handgun. Judge Cooper pointed out that possession of a handgun can be lawful but asked appellant whether presenting it in this case could

be lawful. Appellant responded that his statement was he did not intend to point or present it. (R. 223-231, Tr. pp. 341-349). After reviewing the cases submitted by appellant, particularly with reference to Burris, Judge Cooper determined that he could not charge the defense of accident in this case based on this record. (See R. 223-231, Tr. pp. 341-369).

Appellant's Brief

In his brief on appeal, appellant argues facts *from his second version* of events, i.e. the toilet suicide, as justification for trial court error. This argument is not preserved for appellate review and appellant is not entitled to reversal of his convictions on this basis. State v. Wigington, 375 S.C. 25, 649 S.E.2d 185 (Ct. App. 2007)(holding basis argued on appeal for justification of jury charge was not argued below, and appellant would not be entitle to reversal except for basis argued below), *referencing* State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005)(finding argument advanced on appeal was not raised and ruled on below and therefore was not preserved for review); State v. Adams, 354 S.C. 361, 380 580 S.E.2d 785, 795 (Ct. App. 2003)(holding arguments not raised to or ruled upon by the trial court are not preserved for appellate review, and a defendant may not argue one ground below and another on appeal), *other citation omitted. See also* Knight v. Waggoner, 359 S.C. 492, 597 S.E.2d 894 (Ct. App. 2004)(arguments made for the first time on appeal are not preserved for review).

A party may not argue one ground at trial and an alternate ground on appeal. *See* State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691 (2003); State v. Haselden, 353 S.C. 190, 577 S.E.2d 445 (2003). *See also* State v. Dickman, 341 S.C. 293, 534 S.E.2d 268 (2000)(finding issue was not preserved for appellate review where at trial defendant objected to accomplice liability charge because the indictment charged him only as a principal, but on appeal argued the evidence did not

support an accomplice liability charge), *and* State v. Benton, 338 S.C. 151 526 S.E.2d 228 (2000)(issue is not preserved for appellate review where appellant argued one ground in support of circumstantial evidence charge at trial and another ground in support of the charge on appeal). Appellant's argument *in his brief* that facts from the *toilet suicide version* entitle him to a charge on the law of accident is not preserved for appellate review, and he is not entitle to a reversal of his convictions on this basis. Wigington; Benton.

The Lack of Merit of Appellant's Request Below

With regard to the facts that were argued below to justify a charge of accident, Judge Cooper did not err in refusing this charge. This is not a case where the defendant lawfully armed himself in self-defense or for some other reason. **Appellant did not claim self-defense at trial or in his final version of what happened, nor did he claim he armed himself in self-defense or for any other lawful reason.** Appellant asserted *in his final version* to police, and *on which his counsel relied in requesting a charge of accident*, that he and his wife argued, his wife pushed him and attempted to hit him, she would not talk to him or she said something, and as a result he became angry. Appellant admitted he then retrieved the cocked and loaded firearm from the couples bedroom night-stand because he was angry and proceeded back to the bathroom where the victim was seated on the toilet. In his final version of the events that led to the shooting, appellant admitted that when he entered the bathroom with the loaded and cocked gun in his hand he intended to point the gun at his wife, at the wall, or show her the weapon to make her be quiet. Even in his claim that he blacked out, appellant admitted he already retrieved the weapon in anger and was proceeding toward the bathroom to show his wife the gun. (R. 207-08, 278, Tr. pp. 325-326, Court's Ex. 2 & Court's Ex. 3). **Appellant was not lawfully armed under these facts nor was he acting lawfully.**

Appellant was not entitled to lawfully arm himself simply because he was angry with his wife, whether he was in his own home or not. Appellant admittedly was not acting in self-defense but in anger. Appellant admitted to police in his 3rd version of how the shooting took place that he armed himself in anger and was going to confront his wife and present the firearm to intimidate her.[11] Appellant was not acting lawfully at the time he shot his wife, nor was he lawfully armed. The decision in State v. Burris, 334 S.C. 256, 513 S.E.2d 109 (1999), which appellant argues as controlling in this case, and which appellant cited below, is simply not controlling under the facts of this case. The defense of accident does not apply to the facts upon which appellant relied below in justifying the charge. State v. Wharton, 381 S.C. 209, 672 S.E.2d 786 (2009)(affirming trial judge's refusal to charge accident where the defendant was not acting lawfully at the time of the shooting, did not exercise due care in the handling of the weapon, and there was no evidence he was lawfully armed in self-defense). The unlawful possession of a firearm does not preclude a charge of accident if the accused was engaged in lawful activity at the time of the killing. State v. Goodson, 312 S.C. 278, 440 S.E.2d 370 (1994). Appellant was not engaged in a lawful activity. Appellant was pointing and presenting a firearm. Additionally, the "unlawful possession of a firearm can under certain circumstances constitute an unlawful activity so as to preclude an accident defense if it is the proximate cause of the killing. Cabera-Pena, *quoting* Burris, 334 S.C. at 262, 513 S.E.2d 108, n. 5. Even considering the facts argued below to support a charge of accident in the light most favorable to appellant, it is patent that appellant's conduct, in arming himself with a loaded cocked firearm in anger, and taking it to the bathroom with him so he could confront and present his wife with the

[11]As an additional sustaining ground, appellant was on parole from the State of California and could not lawfully possess the weapon under the facts of his final version and which he argued below to justify this charge.

firearm in order to coerce and intimidate her, created the situation that resulted in her death. Judge Cooper did not err in denying to charge the defense of accident in this case. Wharton. This ground of appellant's appeal must be denied and dismissed.

ARGUMENT III.

Judge Cooper did not err in admitting State's Exhibits 7-12 because the evidence was relevant and admissible as evidence of prior difficulties between the parties, of malice, of intent, and of lack of mistake or accident, and even assuming *arguendo* error in the admission of the evidence it was harmless in any event.

Appellant alleges Judge Cooper erred in admitting State's Exhibits 7-12 which were photographs of the walls of the inside of the crime scene which showed where appellant had punched the walls of the home. The first investigator on the scene testified that upon entry to the crime scene there was evidence there had been domestic violence in the home. These photographs were from the bedroom located immediately adjacent to the bathroom where the victim was murdered. This is the same bedroom where appellant told police his wife pushed him and attempted to hit him, and the same bedroom where he became angry because his wife would not answer him, or made some smart remark, and he retrieved the loaded and cocked firearm in anger to point or present it to the victim.

During one of his interviews with police, appellant admitted he made the holes in the walls when he punched the walls when he was angry with his wife for leaving him on a previous occasion. Appellant claimed the holes were made several months before the murder of his wife. (R. 197-98, Tr. pp. 315-316). Judge Cooper did not err in admitting these photographs in this homicide case.

What Occurred at Trial

In an *in camera* hearing (*motion in limine*), appellant objected to the admission of the

photographs. The State argued the photographs were admissible pursuant to Rule 404(b), as *res gestae*, and *mainly* as evidence of prior difficulties between the parties under State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001) and State v. Williams, 321 S.C. 327, 468 S.E.2d 626 (1996). After hearing argument on the matter, Judge Cooper ruled *in limine* that the photographs were admissible as evidence of prior difficulties between the parties in a homicide case pursuant to Williams and State v. Clinkscales, 231 S.C. 650, 99 S.E.2d 663 (1957). (R. 8-13, 25-26, 35-40, Tr. pp. 65-70, 88-89, 139-144). The evidence was later admitted before the jury over appellant's objection.

Standard of Review

In criminal cases, an appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006); State v. Wood, 362 S.C. 520, 525, 608 S.E.2d 435, 438 (Ct. App. 2004). Thus, the appellate court is bound by the trial court's factual findings unless they are clearly erroneous. Id.; State v. Landis, 362 S.C. 97, 101, 606 S.E.2d 503, 504 (Ct. App. 2004). On appeal, the appellate court is limited to determining whether the trial court abused its discretion. State v. Walker, 366 S.C. 643, 653, 623 S.E.2d 122, 127 (Ct. App. 2005). The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed absent a prejudicial abuse of discretion. State v. Bridges, 278 S.C. 447, 448, 298 S.E. 2d 212, 212 (1982); State v. Patterson, 367 S.C. 219, 230, 625 S.E.2d 239, 245 (Ct. App. 2006).

The admission or exclusion of evidence is within the sound discretion of the trial judge and is reversible only for an abuse of discretion. State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006); State v. Stanley, 365 S.C. 24, 33, 615 S.E.2d 455, 460 (Ct. App. 2005); State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999). The relevance, materiality, and admissibility of evidence are matters within the sound discretion of the trial court, and a ruling will be disturbed only

upon a showing of an abuse of discretion. State v. Rosemond, 335 S.C. 593, 518 S.E.2d 588 (1999).

The Evidence was Admissible

South Carolina law is clear; prior difficulties between the victim and the defendant are admissible in a homicide prosecution to establish malice. *See* State v. Williams, 321 S.C. 327, 468 S.E.2d 10 (1996)(noting that evidence of previous quarrels and ill feelings or hostile acts between the parties was admissible to show animus probably existed between the parties at the time of the homicide), *and* State v. Sweat, 362 S.C. 117, 606 S.E.2d 508 (Ct. App. 2004)(evidence admissible for several reasons including to show prior difficulties between the parties). Additionally, malice "may be proved by previous threats, former grudges, hatred and ill-will, or it may be inferred from facts attending the homicide, showing a cruel and vindictive temper, a wantonness in the destruction of human life, and a heart regardless of social duty and fatally bent on mischief." State v. Hammond, 36 S.C.L. (5 Strob.) 91, 1850 WL 2840 (S.C. App. 1850). The photographs were admissible. State v. Hammond; State v. Williams; State v. Clinkscales, 231 S.C. 650, 99 S.E.2d 663 (1957)(evidence defendant shot victim *six or seven weeks* prior to murder was admissible); State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001)(evidence defendant argued with victim approximately one month before the murder was admissible to show animus between the parties probably existed at the time of the murder); State v. Brooks, 79 S.C. 144, 60 S.E. 518 (1908)(evidence of previous quarrels and ill feeling between the victim and defendant arising out of child custody controversy was admissible). Judge Cooper did not abuse his discretion in admitting the photographs. *See also* 22A C.J.S. *Criminal Law* Section 721 (1989)(evidence of relations existing between accused and victim prior to crime are admissible).

Nor were the acts demonstrated by the photographs remote. *See* State v. Clinkscales, *supra*

(evidence defendant shot victim six or seven weeks prior to murder was admissible); State v. Beck, 342 S.C. 129, 536 S.E.2d 679 (2000)(testimony that defendant made statement of intent to perpetrate crimes, albeit four months prior to the crime-was highly probative as evidence of intent and temporal connection went only as to weight not admissibility under Rule 401 SCRE); State v. Smith, 337 S.C. 27, 522 S.E.2d 598 (Ct. App. 1999)((criminal domestic violence conviction that occurred *three months before homicide* was properly admissible under Rule 404(b) in murder and ABWIK prosecution of murder of wife to refute defendant's claim shooting was an accident); State v. Sweat, 362 S.C. 117, 606 S.E.2d 508 (Ct. App. 2004)(evidence that victim had defendant arrested for CDV approximately two months before burglary, ABWIK, and AHAN not too remote where CDV case was proof of defendant's motive and intent and res gestae of the crime). Appellant stated the acts occurred months before the murder, not years. Therefore, they were admissible. Additionally, neither the State, nor the jury had to accept appellant's explanation of when these events occurred when they were discovered there at the crime scene immediately adjacent to the body.

As an additional sustaining ground, the photographs were also admissible to show intent, and absence of mistake or accident. Rule 404(b) SCRE. *See* State v. Key, 277 S.C. 214, 284 S.E.2d 781 (1981)(prior threats admissible to show absence of mistake or accident in shooting victim); State v. Smith, 337 S.C. 27, 522 S.E.2d 598 (Ct. App. 1999)(criminal domestic violence conviction that occurred *three months before homicide* was properly admissible in murder and ABWIK prosecution of murder of wife to refute defendant's claim shooting was an accident); State v. Martucci, 380 S.C. 232 669 S.E.2d 598 (Ct. App. 2008)(prior incidents of abuse or neglect admissible in homicide by child abuse prosecution to show intent and absence of accident); State v. Sweat, 362 S.C. 117, 606 S.E.2d 508 (Ct. App. 2004). The fact that appellant was not entitled to a charge on involuntary

manslaughter or accident under the law, does not negate the relevancy and admissibility of this evidence, where in his statements to police, appellant claimed the shooting was not intentional but was a mistake or accident. Furthermore, appellant admitted the acts portrayed in the photographs, therefore they were proved by clear and convincing evidence. Rule 404(b) SCRE; State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001)(proof of prior bad act must be by clear and convincing evidence). Their probative value was not substantially outweighed by their prejudicial effect where appellant eventually claimed the murder was an accident. Rule 403 SCRE; State v. Pipkin, 359 S.C. 322, 597 S.E.2d 831 (Ct. App. 2004); State v. Hamilton, 344 S.C. 344, 543 S.E.2d 586 (Ct. App. 2001). The photographs were admissible. Judge Cooper did not abuse his discretion in admitting them.[12]

Harmless Error

Even assuming *arguendo* the photographs were inadmissible, the admission of such evidence was harmless. "Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained." State v. Pagan, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006) (*citing* Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992); State v. Mizzell, 349 S.C. 326, 333, 563 S.E.2d 315, 318-19 (2002). This Court will not set aside a conviction for an insubstantial error not affecting the result when guilt is conclusively proven by competent evidence, such that no other

[12]As an additional sustaining ground, the photographs were also admissible to show motive and identity of appellant as the perpetrator. *See* State v. Braxton, *supra*, *citing* State v. Atkins, 303 S.C. 214, 399 S.E.2d 760 (1990)(testimony regarding disputes between defendant and victim's family was relevant to motive and admissible), *and* State v. Plyler, 275 S.C. 291, 270 S.E.2d 126 (1980)(testimony concerning verbal altercation between the victim and defendant prior to the murder was admissible as evidence of accused's motive and related to defendant's identity as perpetrator). Additionally, the photographs were admissible to show why the police focused their investigation on appellant even though he initially claimed an intruder murdered his wife. (R. 8-10, 25-26, 36, Tr. pp. 65-70, 88-89, 140). *See* State v. Weaver, 361 S.C. 73, 602 S.E.2nd 122 (Ct. App. 2004). *But see* State v. Jones, 343 S.C. 562, 575, 541 S.E.2d 813, 820 (2001).

rational conclusion could be reached. State v. Kelley, 319 S.C.173, 460 S.E.2d 368 (1995).

The evidence appellant murdered his wife was overwhelming. Appellant argued with the victim before her murder. Appellant expressed his malice toward the victim to a close friend, Guerrero, shortly before the victim's murder. Appellant was witnessed arguing with the victim on the way home from Guerrero's residence, and appellant demanded that the victim get out of their car. A neighbor overheard appellant and the victim violently arguing just minutes before the murder occurred. The victim was last seen alive by her daughter while she was arguing with appellant. Appellant was living with the victim at the residence, and the victim's daughter was in the shower when the fatal shot was fired. Appellant told the victim's daughter to stay in her room after the victim's daughter had heard the fatal shot. Appellant hurriedly left the scene of the crime and discarded and tried to hide the murder weapon. Appellant also discarded and tried to hide a box of .22 ammunition by throwing it into a neighbor's yard. Appellant attempted to blame the murder on another person, an unknown intruder, which was a false statement to conceal his crime. Appellant then tried to assert the ridiculous story that his wife was trying to commit suicide while sitting on the toilet going to the bathroom. Appellant later admitted this story was also a lie. Appellant then admitted he was angry with the victim when he armed himself with the loaded cocked pistol. Appellant admitted he went into the bathroom with the loaded gun to scare or intimidate the victim with the gun. Appellant then claimed he was close to the victim when the fatal shot was fired, when the physical evidence showed the gunshot wound was a distant gunshot wound. The evidence showed the victim was shot in a completely helpless position, sitting on the toilet with her pants and panties down and a piece of tissue paper clasped in her hand. Appellant shot the victim in the base of the skull while she was sitting on the toilet going to the bathroom.

The evidence was extremely strong and appellant's guilt was conclusively proven. "[A]n insubstantial error not affecting the result of the trial is harmless where 'guilt' has been conclusively proven by competent evidence such that no other rational conclusion can be reached." Pagan, 369 S.C. at 212, 631 S.E. 2d at 267 (*quoting* State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989)); State v. Adams, 354 S.C. 361, 381, 580 S.E.2d 785, 795 (Ct. App. 2003). The admission of the photographs, even if erroneous, was an insubstantial error at most and did not contribute to the verdict. In this case, no other rational conclusion could have been reached by the jury given the evidence of appellant's guilt.

Additionally, the evidence was not as prejudicial as appellant contends. Appellant explained to police in one of his statements that the holes were made in the wall on a prior occasion several months before the date of the murder. Appellant explained, and the jury heard, that these holes were made by appellant when no one else was in the home. Appellant explained to police that the victim's daughter would corroborate his statements regarding the holes in the walls. The testimony was not that prejudicial given appellant's explanation to police. Furthermore, the evidence was cumulative to other evidence of appellant's hatred or ill will toward the victim which he expressed to his friend Guerrero shortly before the murder. And, the photographs were cumulative to other testimony regarding the holes in the walls that was not objected to. (R. 189, Tr. p. 307). "There is no reversible error in the admission of evidence that is cumulative to other evidence properly admitted." State v. Griffin, 339 S.C. 74, 77-78, 528 S.E.2d 668, 670 (2000).

There was abundant evidence in the record appellant was guilty of murder. State v. Mitchell, 286 SC. 572, 336 S.E.2d 150 (1985) (admission of hearsay testimony harmless given abundant evidence in the record from which jury could have found the appellant guilty); "Error in a criminal

prosecution is harmless when it could not reasonably have affected the result of the trial." State v. Sherard, 303 S.C. 172, 175, 399 S.E.2d 595, 596 (1991). The admission of this evidence, if erroneous, was harmless given the overwhelming evidence of appellant's guilt. State v. Myers, 359 S.C. 40, 596 S.E.2d 488 (2004)(in murder prosecution, admission of anger management questionare was harmless given overwhelming evidence of defendant's guilt). This ground of appellant's appeal must be denied and dismissed.

CONCLUSION

For the above stated reasons, the above entitled appeal should be dismissed and appellant's convictions and sentences affirmed.

Respectfully submitted,

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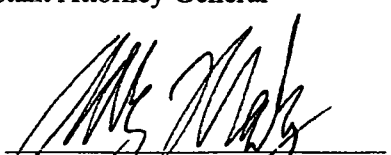
BY: 

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September 14, 2010

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County
Thomas G. Cooper, Circuit Court Judge

THE STATE,

Appellant,

v.

JOSE HERRERA,

Respondent.

CERTIFICATE OF COMPLIANCE

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

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September 14, 2010

CERTIFICATE OF SERVICE

I, Anthony Mabry, hereby certify that I have served the ***Final Brief of Respondent*** in the foregoing action by depositing copies in the Interagency Mail to Robert M. Dudek, Chief Attorney for Capital Appeals, Division of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, SC 29201 this 14th day of September, 2010.

J. ANTHONY MABRY
Assistant Attorney General

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Jose Herrera, Appellant.

Appeal From Beaufort County
G. Thomas Cooper, Jr., Circuit Court Judge

Unpublished Opinion No. 2011-UP-354
Heard April 4, 2011 – Filed June 30, 2011

AFFIRMED

Chief Appellate Defender Robert M. Dudek, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General Anthony Mabry, all of Columbia;

found her in the bathroom, and then noticed . . . a small caliber gunshot wound." Bromage took Herrera into custody and spoke to him again that night at the Bluffton Police Station where he repeated that he discovered Katherine dead in the bathroom.

2. Herrera's Second Version of Events

Two days later, on September 18, 2006, Bromage spoke with Herrera again at the Beaufort County Law Enforcement Center. Bromage informed Herrera that the police found a box of ammunition in the woods and showed him a picture of the gun that was found.[2] At this point, Herrera changed his explanation of what happened. Herrera said that he and Katherine were arguing and she became angry when he told her he wanted to leave. According to this version of events, Katherine grabbed Herrera's pistol and pointed it at her head. Herrera explained, "I went to reach for it. When I reached up to get it, [it] just accidentally shot itself." He said, "She pointed at her head . . . . That's when I went in because I didn't want my wife doing anything like that. I love my wife. She--when I reached in, she let go of it. When she let go, I guess my hand went on the trigger." Herrera said he "panicked" and called 911 and threw the gun away. He told Bromage that the shooting "was not intentional."

3. Herrera's Third Version of Events

Later in the afternoon on September 18, 2006, Bromage interviewed Herrera a third time. In this interview, Herrera relayed a third version of events. Herrera explained, "I just wanted to scare her. It was an accident, sir. I didn't mean it." He said Katherine pushed him and tried to hit him. "And that's when it pissed me off. And I did grab the pistol." Herrera said he "went in [the bathroom] to try to scare her." He testified, "And I slipped. . . . I slipped, my hand hit her shoulder or something. And that's when the trigger went off."

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[2] Herrera's neighbor testified that she found a box of bullets on her side of the fence about five feet away from the fence surrounding Herrera's yard. Sergeant Jeff Lauver, a K-9 officer with the Beaufort Sheriff's Office, testified that his search dog found a weapon near Herrera's home.

lawful act with reckless disregard for the safety of others. State v. Light, 378 S.C. 641, 647, 664 S.E.2d 465, 468 (2008) (internal citations omitted); Burris, 334 S.C. at 265, 513 S.E.2d at 109 (1999). For a homicide to be excusable on the ground of accident, it must be shown the killing was unintentional, the defendant was acting lawfully, and due care was exercised in the handling of a weapon. Burris, 334 S.C. at 259, 513 S.E.2d at 106 (citing State v. Goodson, 312 S.C. 278, 280, 440 S.E.2d 370, 372 (1994)).

As to involuntary manslaughter, the trial court explained,

> [I]t seems to me that either pointing or presenting a loaded or unloaded firearm is a violation of the statute. As a matter of fact, it's a felony. And the involuntary charge is defined as the killing of another without malice and unintentionally while engaged in either an unlawful act not amounting to a felony – which we don't have here – or an unlawful act with reckless disregard. I mean, involuntary is the killing of another almost like an accident.

As to accident, Herrera argued "that he tripped. So there's evidence in the record that the jury could find it was an accident, and that [he is] entitled to an accident charge." Herrera argued that he was lawfully in possession of the gun in his own home pursuant to Burris. The trial court ruled:

> The facts are so much different than Burris than they are here, not that that is dispositive. But Burris is a self-defense case. And self-defense is not an unlawful act. And Burris possessed a pistol in that case. And I just think that is not what we have here. Here we have a pointing and presenting, regardless of how the defendant characterizes it, which is a felony. . . . I think this case needs to go to the jury on

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789 (2009); State v. Brayboy, 387 S.C. 174, 180, 691 S.E.2d 482, 485 (Ct. App. 2010);.

"The relevance, materiality, and admissibility of photographs are matters within the sound discretion of the trial court and a ruling will be disturbed only upon a showing of an abuse of discretion." State v. Shuler, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003). We find that it was within the trial court's discretion to admit the photographs as evidence of a previous quarrel between Katherine and Herrera. See State v. Braxton, 343 S.C. 629, 636, 541 S.E.2d 833, 836-37 (2001) ("In homicide cases, evidence of previous quarrels and ill feelings is admissible to show that animus probably existed between the parties at the time of the homicide.").

AFFIRMED.

THOMAS and KONDUROS, JJ., concur.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Beaufort County
Perry M. Buckner, Circuit Court Judge

JOSE ANGEL HERRERA,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001119

CERTIFICATE OF SERVICE

I certify that a true copy of the supplemental appendix in this case has been served on Ashleigh R Wilson, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Mr. Jose Angel Herrera #333836 Lieber Correctional Institution this 11th day of June, 2014.

David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 11th day
Of June, 2014..

Rhonda Denise Foxworth (L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021.