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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Marion County
The Honorable D. Craig Brown, Circuit Court Judge
Appellate Case No. 2014-000390

THE STATE,

Respondent,

v.

RICHARD ALLEN WOODBURY,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Respondent concurs with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

In January 2013, the Marion County Grand Jury indicted Appellant Richard Allen Woodberry on one count of murder and one count of attempted murder arising from an altercation between Appellant and Ian Gause ("Ian"), which resulted in Ian's death and injuries to his brother, Rishawn Gause ("Rishawn").[1] The case was called for a jury trial on February 18, 2014, before the Honorable D. Craig Brown, Circuit Court Judge.

The testimony established Ian, Rishawn and Ronnie Boatwright ("Boatwright") were visiting the home of Charles Wilson ("Wilson") on September 29, 2012, and they were on the carport listening to music. At some point that night, Appellant, Ky Graham ("Graham") and Lamont Davis ("Davis") came to Wilson's house in Appellant's vehicle. Initially, Graham got out of the vehicle alone and walked up to the carport to speak with Wilson and the others. (Trial Transcript [TT], pp. 295-299; Record on Appeal [R.], pp.180-184)

Appellant followed Graham up to the group a few minutes later, and spoke to everyone except Ian, which led to a verbal confrontation between Ian and Appellant. Wilson testified Appellant walked back to the vehicle, and Ian stayed on the carport, so he thought everything was over. Appellant then began another altercation with Ian, and Wilson got between them to keep them apart. Wilson repeatedly told Appellant to leave, but he continued "trash talking" and would not leave. Wilson stepped away when he saw Ian holding a gun down by his side, but he never saw Ian point the gun at anyone.

Ian and Appellant continued to argue, and then both of them ran to the carport. Wilson heard scuffling noises, and suddenly someone ran from the carport into the

[1]Rishawn's name is spelled Rayshawn in the indictment, but spelled Rishawn in the trial transcript.

backyard. Ian then walked out the front of the carport, and told Rishawn he needed to go to the hospital. After Ian and Rishawn left for the hospital, Appellant came back to the carport from the backyard, said he had left something, and picked up a "bamboo stick" from the carport floor.[2] Then Appellant and Graham left in Appellant's vehicle.[3] (TT. pp. 303-313; R., pp. 188-198). Wilson testified Appellant had three opportunities to leave before the second altercation turned violent. (TT. pp. 299-303; R., pp. 184-188)

Boatwright testified he was at Wilson's house that night, and corroborated Wilson's account of how the first altercation between Ian and Appellant occurred. He stated the altercation broke up, and Appellant walked back to his vehicle, but then returned and started arguing with Ian again. Boatwright saw Appellant holding something by his side, but did not see Ian holding a gun. He heard Ian say "you got something" to Appellant. (TT. pp. 384-390; R., pp. 261-267).

When efforts to break up the second altercation failed, Boatwright saw Rishawn take a gun out of his car trunk and fire one shot into the air, which seemed to calm things down for a couple of minutes, and Rishawn put the gun back in the trunk. Then Boatwright saw Appellant, Ian and Rishawn run to the carport, and a few minutes later, Ian came out saying Appellant stabbed him, and Boatwright did not see Appellant. Approximately twenty minutes after Rishawn and Ian left for the hospital, Appellant returned to the house and retrieved a knife from the floor of the carport, and had another knife in his hand. (TT. pp. 390-393; R., pp.267-270).

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[2]The weapon Appellant retrieved from his vehicle was a bamboo stick encasing two hidden knives, which is a "martial arts" type weapon. (TT. pp. 437, 564; R. pp. 314, 419).

[3]Appellant's other passenger, Davis, also tried to get Appellant to leave before the second altercation, and when he would not leave, Davis left on foot.

Boatwright testified Wilson and the people who came with Appellant tried to get Appellant to leave after the first altercation. He stated Appellant had multiple opportunities to leave before the second altercation turned violent, but he "chose to stay." (TT. pp. 395-400; R., pp. 272-277).

On cross-examination, Boatwright testified Ian and Rishawn were his cousins, and agreed he was "not happy" about a family member getting killed. (TT. pp. 403; R., pp. 280) He stated he was not questioned by law enforcement after the incident, and he did not talk to law enforcement or give a statement about the incident until approximately three to four months prior to trial. (TT. pp. 404-405; R., pp. 281-282). He reiterated the first altercation was over when Appellant went to his car, "got what he got," and came back. (TT. p. 412; R., pp. 289).

Boatwright also reiterated Appellant came back to the carport after Ian and Rishawn left for the hospital, and picked a knife up from the carport floor. He further testified Appellant wiped the knife off with his shirt after he picked it up. (TT. pp. 420-423; R., pp. 297-300).

Graham testified he had known Appellant and Davis for a couple of years prior to the incident, but he did not know Ian or Rishawn. He did know Wilson, and went to Wilson's house with Appellant and Davis that night. He got out of Appellant's vehicle first and walked up to the carport. Appellant followed a few minutes later, and he and Ian "had a little words," which got "heated," but "it calmed down after that." (TT. pp. 428-434; R., pp. 305-311).

Appellant and Graham walked back to the vehicle, and he tried to get Appellant to leave, but Appellant did not want to leave because Ian was standing in the carport "saying

a little something." Appellant then picked up the weapon, got back out of the vehicle and started having "a few words" with Ian, who had walked down the driveway when Appellant got out of the vehicle. (TT. pp. 435-438; R., pp. 312-315)

Both Graham and Davis unsuccessfully tried to get Appellant to leave, but he pulled out the weapon he retrieved from the vehicle, and Ian pulled out a gun, so they backed away. At some point, Davis left the scene. When the altercation continued in the carport, Graham could not see what happened. After Ian and Rishawn left, he saw Appellant come around the house to the carport holding a knife and there was another knife laying on the carport floor. Then he and Appellant left in Appellant's vehicle. (TT. pp. 438-448; R., pp. 315-325).

Rishawn corroborated the testimony of Wilson, Boatwright and Graham regarding events leading to the initial confrontation between Ian and Appellant. He testified things used to be "cool" between Ian and Appellant, but there appeared to be a problem between them that night. (TT. pp. 477-483, 485; R., pp. 354-360, 362).

Rishawn further testified Appellant actually left in his vehicle after the first altercation, but returned about three minutes later and got out. Appellant was "messing with his pants," and Ian said "you went and got something." When the second argument started, Rishawn got a gun out of his trunk and fired a shot in the air, "and that when they calm down." Rishawn and others tried to get Appellant to leave, but Appellant said he did not have a weapon and would just "fight" Ian. Thinking Appellant and Ian were just going to "fight" without weapons, Rishawn put his gun back in the trunk. (TT. pp. 483-490; R., pp. 360-367).

When the physical fight started on the carport, Rishawn saw Appellant "swinging wildly" and "real low," which appeared odd to him. He tried to get between Ian and Appellant to break it up, and he heard Ian say "so you're gonna cut me," and then saw "blood running down." Rishawn got cut on his back at some point while he was trying to break the fight up. Appellant ran away after Ian realized he had been stabbed, and Rishawn drove Ian to the hospital, where Ian died from the injuries inflicted by Appellant. Rishawn testified Appellant had multiple chances to leave before the fight broke out. (TT. pp. 490-500; R., pp. 367-377).

On cross-examination, Rishawn admitted he lied to the police when they talked to him at the hospital, and told them he did not know who stabbed him and Ian because he wanted to get revenge for Ian himself. He subsequently decided to let the authorities handle it, and ultimately told the police what he knew about the incident. (TT. pp. 500-506; R., pp. 377-383).

A forensic pathologist testified Ian sustained two major and two minor injuries. The first major injury was a stab wound to the upper right side of Ian's chest. This wound was fairly shallow and did not penetrate any organs. The second major injury was a stab wound centered on Ian's left nipple, which went through the chest muscle, a rib and the sack around the heart, and then punctured a main vein, which caused Ian to bleed to death. The other two wounds were a superficial cut on the back of Ian's right wrist, and a scrape on the back of his left thumb, which could have been defensive wounds. (TT, pp. 346-350; R., pp. 228-232).

During a charge conference, the State requested a mutual combat jury charge. Appellant stated if mutual combat was charged, self-defense should also be charged, "and

then the jury would decide whether or not if there's a case made out for mutual combat, whether or not it can go to self defense." After the State agreed to a self-defense charge, Appellant stated "I'm not agreeing that mutual combat should be charged," but if it was he wanted the self-defense charge. (TT, pp. 574-575; R., pp. 429-430).

The circuit court sent the State and Appellant the jury charges to review overnight, and the charge conference continued the next morning. At that time, Appellant requested charges on prior inconsistent statements, spoilation of evidence, involuntary manslaughter, voluntary intoxication, the right to act on appearances, difference in size and age, no duty to retreat if doing so would increase the danger of being killed or harmed, and if the actions are justified by self-defense or defense of others, the person is justified in continuing the actions until the danger has completely ended. The circuit court granted the requests regarding prior inconsistent statements, the right to act on appearances, no duty to retreat and continuing action until danger ends, but found an involuntary manslaughter charge was not warranted by the evidence. There was no objection or discussion relating to the mutual combat charge. (TT, pp. 576-594; R., pp. 431- 449).

The jury charge included the law on the mutual combat. After the charge, the court asked if there were any objections or additions to the jury charges as given. The State requested a transferred intent charge, to which Appellant agreed. Appellant did not object to the charges as given, or request any additional charges. (TT, pp. 638-669; R., pp. 492-523).

The jury began deliberations shortly after noon. When the court returned from lunch, the jury sent a note seeking additional explanation of assault and battery of a high

and aggravated nature. With consent of the State and Appellant, the court wrote on the note it had instructed on the law of that offense, and sent the note back to the jury. (TT, pp. 671-672, Court's Exhibit 3; R., pp. 525-526, 540).

At some point thereafter, the jury sent out another note asking what would happen if they could not agree on a verdict. Again with the consent of the State and Appellant, the court wrote "please continue to deliberate" on the note and returned it to the jury. (TT, pp. 672-673, Court's Exhibit 4; R., pp. 526-527, 541).

The jury returned with a verdict at 3:17 p.m., finding Appellant guilty of voluntary manslaughter as to Ian, but acquitting him of the charges related to Rishawn, and the court sentenced him to thirty years incarceration. (TT, pp. 673-676, 689; R., p. 527-530, 539). This appeal followed.

ARGUMENT

I. The circuit court properly charged the law of mutual combat.

Appellant contends the circuit court erred in charging the jury on the law of mutual combat because there was no evidence to support the charge, it limited his ability to claim self-defense, and it improperly shifted the State's burden to disprove self-defense to Appellant. As a threshold matter, this issue is not preserved for appellate review. Even if properly before this Court, however, the evidence supported each element of mutual combat. Finally, any error in giving the charge was harmless beyond a reasonable doubt.

"The trial court is required to charge only the current and correct law of South Carolina." Barber v. State, 393 S.C. 232, 236, 712 S.E.2d 436, 438 (2011). "The law to be charged must be determined from the evidence presented at trial," and a charge is proper if there is **any evidence** to support it. State v. Condrey, 349 S.C. 184, 562 S.E.2d 320, 325 (Ct. App. 2002) (emphasis added) (citing State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 [1999]); State v. Knoten, 347 S.C. 296, 555 S.E.2d 391, 394 (2001). "In reviewing jury charges for error, [appellate courts] must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." State v. Mattison, 388 S.C. 469, 697 S.E.2d 578, 583 (2010).

A. Preservation

The parties must have an opportunity to object to the giving or failure to give an instruction, and any objection must "**state distinctly the matter objected to and the grounds for objection.**" Rule 20, SCRCrimP (emphasis added). "Failure to object in accordance with this rule **shall** constitute a waiver of objection." *Id.* (emphasis added);

see also State v. Whipple, 324 S.C. 43, 476 S.E.2d 683, 688 (1996) ("failure to object to the charge as given, or to request an additional charge when given an opportunity to do so constitutes a waiver of [defendant's] right to complain on appeal").

Appellant claims counsel objected to the mutual combat charge during the charge conference. A cursory review of the record, however, reveals there was no such objection then, or at any time thereafter.

When the State requested a mutual combat charge during the charge conference, Appellant merely stated if mutual combat was charged, self-defense should also be charged, and "the jury would decide whether or not if there's a case made out for mutual combat, whether or not it can go to self-defense." He then stated he was not agreeing mutual combat should be charged, but significantly, he did **not** state any objection to the charge. (TT, pp. 574-575; R., pp. 429-430).

The circuit court provided copies of the jury charges, which included the mutual combat charge, to the State and Appellant overnight, and the charge conference continued the next morning. During an extensive discussion about the charges, Appellant made multiple requests for additional jury charges, however, he did **not** even mention, much less object to, the mutual combat charge. (TT, pp. 576-594; R., pp. 431-449).

After the court charged the jury, the State and Appellant had the opportunity to state any objections. The State raised an issue regarding transferred intent, and the court agreed to bring the jury back to charge that issue. Appellant did not object to the mutual combat charge, and after the court charged the jury on transferred intent, Appellant stated he had "nothing further." (TT, pp. 662-669; R., pp. 516-523).

"Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide [appellate courts] with a platform for meaningful appellate review." Herron v. Century BMW, 395 S.C. 461, 719 S.E.2d 640, 465 (2011); State v. Byers, 392 S.C. 438, 710 S.E.2d 55, 58 (2011) (to be preserved for appellate review, the objection must be made with sufficient specificity to inform the trial court of the point being urged by the objector); *see also* I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716, 724-25 (2000) (the preservation requirement enables the lower court to rule properly after it has considered all relevant facts, law, and arguments, and prevents a party from keeping an ace card up his sleeve in the hope that an appellate court will accept that ace card and give him another opportunity to prove his case);. Further, a party cannot raise one ground in the lower court, and a different ground on appeal. State v. Freiburger, 366 S.C. 125, 620 S.E.2d 737, 741 (2005); State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989) (issue not preserved for appeal where one ground is raised below and another ground is raised on appeal).

Appellant never objected to the mutual combat charge in this case, and even if stating he did not agree the charge was appropriate could somehow be construed as an objection, he never stated any grounds for it, and specifically did not assert it improperly shifted the burden of proof. Consequently, under Rule 20(b) and the preservation rules, Appellant waived any objection to the mutual combat charge.

B. Propriety of Charge

Even if the issue is somehow preserved, there was evidence to support a mutual combat charge. In reviewing jury charges for error, the appellate court reviews the charge in light of the evidence and issues presented at trial, and a jury charge is correct if

it adequately explains the law when read as a whole. State v. Brandt, 393 S.C. 526, 713 S.E.2d 591, 603 (2011); State v. Drayton, 411 S.C. 533, 769 S.E.2d 254, 260 (Ct. App. 2015).

There must be "'mutual intent and willingness to fight' to constitute mutual combat." State v. Taylor, 356 S.C. 227, 589 S.E.2d 1, 3 (2003) (*quoting* State v. Graham, 260 S.C. 449, 196 S.E.2d 495, 495 [1973]). The required mutual intent can be inferred from the parties' acts and conduct, and the circumstances of the combat. *Id.* Mutual combat also requires an "antecedent agreement to fight," and the parties must be armed with deadly weapons. *Id.* at 4.

1. Mutual Intent and Willingness to Fight

The State presented evidence both Appellant and Ian had a mutual intent and willingness to fight, particularly after Appellant retrieved the weapon from his vehicle and started the second altercation with Ian. Graham, who came to the house with Appellant and did not know Ian, testified Appellant walked away from the initial confrontation with Ian, went to his vehicle and got the weapon. In spite of Graham and others telling Appellant to leave, Appellant started arguing with Ian again. According to Graham, during the second altercation, Appellant pulled out the weapon and Ian then pulled out a gun. (TT, pp. 437-440; R., pp. 314-317).

Rishawn, Ian's brother, testified Ian was offended because Appellant did not shake his hand, and they got into a shouting match. Appellant left in his vehicle, but returned a few minutes later. When Appellant got out of the vehicle, he was "messing with his pants," and Ian said, "you went and got something."

In an effort to prevent further escalation of the situation, Rishawn got his firearm, which was legally registered, out of the trunk of his car and fired a shot in the air. He testified Appellant then stated "I will fight—he said something like, I'll fight you." Thinking Appellant and Ian were just going to fight, Rishawn returned the firearm to his trunk, and as he walked up to Appellant and Ian, "they were both tangling, going at it, whatever." He saw Ian back up, and Appellant was "swinging wildly," in a way Rishawn had never seen anyone fight. (TT, pp. 483-490; R., pp. 360-367).[4]

This testimony provided direct evidence Appellant and Ian had a mutual intent and willingness to fight. While there may not have been intent and willingness during the first verbal altercation, the situation clearly changed after Appellant retrieved his weapon from the vehicle and initiated the second altercation, which quickly turned physical and violent.

2. Pre-existing ill will or conflict

In asserting there was no evidence of pre-existing ill will or conflict, Appellant relates the events of September 29, 2012 as one, continuous altercation. This assertion ignores the uncontroverted testimony of four eye witnesses indicating there was an initial verbal confrontation, which ended when Appellant walked away. Subsequently, Appellant returned with the weapon and started a second altercation.

In State v. Graham, 206 S.C. 449, 196 S.E.2d 495 (1973), the testimony established the defendant and victim "met in town shortly before the shooting and engaged in a heated discussion, during which appellant waved a pistol in the face of the deceased." Thereafter, the victim drove home, retrieved a pistol, and drove back to the

[4]Rishawn physically demonstrated for the jury what he meant by "swinging wildly," but unfortunately there is no video of his demonstration. (TT, p. 491; R., p. 368).

scene with the pistol in his hand. As the victim exited his vehicle, the defendant "walked into the street, placing himself in a position where an encounter with the deceased could be expected." In affirming the trial court's decision to give a mutual ~~consent~~ combat charge, the Supreme Court found "there was ill-will between the parties," it was inferable they armed themselves to settle their differences at gun point, and they were engaged in mutual combat at the time of the killing. *Id.* at 496.

This case is factually similar to Graham. Contrary to Appellant's assertion, there was evidence of some animosity between Ian and Appellant prior to the day of Ian's death. In addition to Appellant's refusal to acknowledge Ian when he spoke to everyone else there, and Ian's reaction, Rishaun testified there must have been a problem between the two men, since at "one point they were cool." (TT, pp. 485-486; R., pp. 362-363).

Finally, Appellant actually removed himself from the situation by walking back, unmolested, to his vehicle. Appellant then returned to the scene of the prior conflict with a weapon. Thus, just as in Graham, Appellant created a situation where an encounter could be expected.

The jury could infer from the evidence presented Appellant and Ian had a pre-existing ill-will prior to the night of September 29, 2012, and certainly prior to the second altercation. They clearly had the intent and willingness to engage in mutual combat when Appellant returned with his weapon that night.

3. Each Knew the Other was Armed

The evidence also indicated Ian knew Appellant returned from his vehicle with a weapon he was trying to hide in his pants, and he pulled a gun out in response. Even though he did not aim it at Appellant, it is inferable from the testimony of by-standers

who saw the gun that Appellant saw it before the physical altercation started. Rishawn testified Appellant was messing with something in his pants when he came back from the vehicle, and Ian said "oh you got something," indicating he knew Appellant had armed himself. Given the uniqueness of Appellant's weapon, Ian may not have known exactly what type of weapon Appellant retrieved prior to the second confrontation, but it was clear he knew Appellant had a weapon. Thus, as in Graham, Ian could see Appellant was armed, and Appellant knew Ian was armed.

The State presented evidence to support each element of the mutual combat charge. Accordingly, the circuit court properly charged the jury on the law of mutual combat.

C. Harmless Error

Even if it was error to charge mutual combat, the error was harmless beyond a reasonable doubt. Contrary to Appellant's contention the charge obviated his self-defense claim, the undisputed evidence completely undermined Appellant's claim, and the mutual combat charge did not change that evidence.

Whether an error is harmless depends on the circumstances of the particular case, and no definite rule of law governs this finding, but the materiality and prejudicial character of the error must be determined from its relationship to the entire case. State v. Tapp, 398 S.C. 376, 728 S.E.2d 468, 475 (2012). An error is harmless when it could not reasonably have affected the result of the trial. State v. Hamilton, 286 S.C. 572, 336 S.E.2d 150, 151 (1985). "Errors, including erroneous jury instructions, are subject to harmless error analysis." State v. Belcher, 385 S.C. 597, 685 S.E.2d 802, 809 (2009)

A defendant must meet four prongs to justify using deadly force in self-defense:

(1) The defendant was **without fault** in bringing on the difficulty;

(2) The defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger;

(3) If the defense is based upon the defendant's actual belief of imminent danger, a reasonable prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life; and

(4) The defendant had **no other probable means of avoiding the danger** of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

State v. Dickey, 394 S.C. 491, 716 S.E.2d 97, 101 (2011) (emphasis added). In this case, Appellant's self-defense claim clearly fails on the first and fourth prongs.

Assuming, for purposes of argument only, Ian initiated the first verbal altercation, it ended when Appellant walked away and to his vehicle, completely unmolested by Ian or anyone else there that night. Appellant's companions, and others, begged him to leave, and there is no evidence Ian attempted to stop him from leaving. Rather than take the opportunity to avoid any further conflict entirely, however, Appellant got the weapon out of his vehicle, and purposely started another altercation with Ian.

All the witnesses, including Appellant's companion, testified Appellant had multiple opportunities to leave that night, but refused to do so. The altercation Appellant initiated ultimately escalated to physical violence, resulting in Ian's death from stab wounds Appellant inflicted with the weapon's two knives.

Given the overwhelming evidence Appellant was at fault in bringing on the altercation that led to Ian's death, and he had ample opportunity to avoid any danger from Ian, Appellant's self-defense claim was not legally sustainable, even without the mutual

combat charge. Therefore, any error in charging mutual combat was harmless beyond a reasonable doubt.

II. The circuit court properly denied Appellant's request for an involuntary manslaughter jury charge because the evidence did not support the requested charge.

Appellant asserts he was acting lawfully in self-defense, but because he was "swinging wildly" with two knives during the altercation, his actions were "reckless conduct" warranting an involuntary manslaughter jury charge. This assertion is premised primarily on **two words** during a witness' testimony, and virtually ignores all other evidence indicating Appellant **intentionally** stabbed Ian with the knives he specifically retrieved from his vehicle for that purpose.

"The law to be charged to the jury is to be determined by the evidence presented at trial." State v. Lee, 398 S.C. 362, 364, 380 S.E.2d 834, 835 (1989). "The 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, 446 S.E.2d 411, 412-13 (1994) (citing Casey v. State, 305 S.C. 445, 409 S.E.2d 391 [1991]).

"Involuntary manslaughter is defined as the unintentional killing of another without malice while engaged in (1) an unlawful activity not naturally tending to cause death or great bodily harm or (2) a lawful activity with reckless disregard for the safety of others." Sullivan v. State, 407 S.C. 241, 754 S.E.2d 885, 887 (Ct. App. 2014). "To warrant a jury charge on involuntary manslaughter under either definition, there must be some evidence that the killing was unintentional." *Id.*

Even viewing the evidence in the light most favorable to Appellant, the circuit court properly refused to charge the lesser-included offense of involuntary manslaughter

in this case. Contrary to Appellant's assertions, there was no evidence he acted unintentionally, or merely with reckless disregard for the safety of others.

Appellant does not dispute he intentionally swung the knives, but contends he was acting in self-defense, and was merely swinging wildly with reckless disregard for the safety of others. There is no evidence, however, from which it can even be inferred Appellant did not intend to stab Ian with the knives. Even assuming for argument only that Appellant was acting in self-defense, which the State disputes, his **intent** to use the knives to stab Ian alone distinguishes this case from the cases Appellant cites as support for an involuntary manslaughter charge.[5] *Compare* Sullivan, 754 S.E.2d at 887 ("whether [Appellant] was engaged in a lawful activity is of no consequence if he intentionally fired the gun"), *and* Douglas v. State, 332 S.C. 67, 504 S.E.2d 307, 310 (1998) ("involuntary manslaughter is at its core an unintentional killing," and defendant was not entitled to an involuntary manslaughter charge where he intentionally shot into a group of people in self-defense), *and* State v. Pickens, 320 S.C. 528, 466 S.E.2d 364 (1996) (defendant was not entitled to an involuntary manslaughter charge where he intentionally shot into a group of people in self-defense), *and* State v. Craig, 267 S.C. 262, 227 S.E.2d 306 (1976) (defendant was not entitled to an involuntary manslaughter charge where he admitted to intentionally firing a gun, but claimed he only meant to shoot over the victim's head), *and* State v. Gibson, 390 S.C. 347, 701 S.E.2d 766 (Ct. App. 2010) (defendant was not entitled to an involuntary manslaughter charge where he intentionally fired multiple shots into the air and the victim was killed by a stray bullet),

[5] Significantly, the knives are encased inside the weapon, and Appellant had to pull the weapon apart to expose them. Thus, rather than keep the weapon together and simply hit Ian with it, Appellant intentionally took affirmative action to ensure the most deadly result possible.

with State v. Light, 378 S.C. 641, 664 S.E.2d 465 (2008) (involuntary manslaughter charge warranted by evidence defendant took loaded gun away from victim who was threatening him, and the gun fired almost immediately), *and* State v. Burris, 378 S.C. 641, 664 S.E.2d 465 (1999) (involuntary manslaughter charge warranted by evidence the defendant drew a gun after he was attacked by two men and the gun discharged accidentally).

Further, "the intentional use of a dangerous instrumentality does not support the allegation of mere criminal negligence" warranting an involuntary manslaughter charge. State v. Smith, 315 S.C. 547, 550, 446 S.E.2d 411, 413 (1994). In Smith, the Supreme Court determined a defendant was not entitled to a jury charge on involuntary manslaughter because he **intentionally** wielded a **knife** in a fight with the victim. The defendant argued an involuntary manslaughter charge was warranted because he did not intend to kill the victim. In affirming the trial court's denial of a request for an involuntary manslaughter charge, the Court found there were no facts to support the requested charge because stabbing is an unlawful act, and the defendant intentionally wielded the knife. *Id.*; *see also* Bozeman v. State, 307 S.C. 172, 414 S.E.2d 144, 147 (1992) (evidence did not support allegation of mere criminal negligence in the use of a dangerous instrumentality [gun]).

The present case is incredibly similar to Smith. Appellant intentionally wielded the knives (dangerous instrumentalities) in his altercation with Ian, which defeats his request for an involuntary manslaughter charge. Whether he wielded the knives "wildly," or with great precision, is irrelevant. Again assuming for argument purposes only

Appellant acted in self-defense, there is no evidence his actions were merely reckless such that an involuntary manslaughter charge was warranted.

In State v. Sams, 410 S.C. 303, 764 S.E.2d 511 (2014), the defendant and victim were fighting, and while the victim was face down on the floor, the defendant got on top of him and locked his arm around the victim's neck. In spite of witnesses' efforts to get the defendant to stop choking the victim, the defendant continued to choke the victim until he died. At trial, the defendant contended he was entitled to an involuntary manslaughter jury charge because "he unintentionally killed [the victim] while acting in self-defense." *Id.* at 512-514.

On certiorari, the Supreme Court affirmed the defendant's voluntary manslaughter conviction, finding the defendant's argument was "tantamount to imperfect self-defense," a doctrine which is not recognized in South Carolina.[6] The Court noted jury charges on both self-defense and involuntary manslaughter are justified "where there was evidence of the negligent handling of a loaded gun or evidence that the defendant struggled over a weapon," and concluded the defendant was not entitled to an involuntary manslaughter charge. *Id.* at 516-518; *see also* State v. Scott, 408 S.C. 21, 757 S.E.2d 533, 535 (Ct. App. 2014), *cert. granted* September 11, 2014 (defendant's claim he saw the victim taking "something shiny and silver out of her pocket," so he did "a martial arts move, pushing her elbow up, causing her to stab herself in the throat," did not support an involuntary manslaughter charge).

In this case, there was no loaded gun and no evidence Appellant and Ian struggled over the weapon Appellant retrieved from his vehicle. Even if Appellant acted in self-

[6]The Court noted that even if the doctrine applied, it would only serve to mitigate murder to voluntary manslaughter. *Id.*

defense, he intentionally, not negligently, stabbed Ian with a dangerous instrumentality.[7] Therefore, the evidence did not support an involuntary manslaughter jury charge, and the circuit court properly refused to give one.

[7]Arguably, the **sole** purpose of the weapon Appellant used is to kill or seriously injure an opponent, and Appellant intentionally used it precisely for that purpose.

CONCLUSION

Based on the foregoing, Respondent submits Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

July 17, 2015

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Marion County
The Honorable D. Craig Brown, Circuit Court Judge
Appellate Case No. 2014-000390

THE STATE,

Respondent,

v.

RICHARD ALLEN WOODBURY,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final 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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July 17, 3015

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Appellant.

PROOF OF SERVICE

I, Sally B. Ellison, certify I served the Final Brief of Respondent on Appellant by depositing two copies in the United States mail, postage prepaid, addressed to:

Lara M. Caudy
Assistant Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

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

This 17th day of July, 2015.

Sally B. Ellison

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SC Court of Appeals

July 17, 2015

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Re: The State v. Richard Allen Woodbury
Appellate Case No. 2014-000390

Dear Ms. Caudy:

Enclosed are two copies of the Final Brief of Respondent, with proof of service, in the above-referenced case.

Sincerely,

Deborah R.J. Shupe
Senior Assistant Deputy Attorney General

DRJS/sbe

Enclosures

cc: The Honorable Jenny A. Kitchings (original and 9 copies enclosed)
Victim Services (with enclosure)