STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT LEE WRIGHT,

APPELLANT,

Appellate Case No. 2014-001023

BRIEF OF RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

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II. Whether the trial judge erred in stating the defenses of accident and self-defense were appositive defenses in this case and did not charge the law of accident where South Carolina law often treats the two defenses as mutually exclusive, except with one specific situation that is inapplicable to the facts of this case, and where there was no evidence presented at trial alleging the incident was an accident?

RESPONDENT'S STATEMENT OF THE CASE

A Charleston County Grand Jury indicted Appellant, Robert Lee Wright, in September 2010 for the murder of Christopher Jenkins (Indictment Number 2010-GS-10-6153).

On February 24, 2014, Appellant's case was called to trial before the Honorable Kristi Lea Harrington. (R. p. 1). Deputy Public Defender Lorelle Proctor and Assistant Public Defender Alicia Penn represented Appellant during the trial. (R. p. 1). Assistant Solicitors Benjamin Simpson and Jessica Baldwin represented the State. (R. p. 1). On February 25, 2014, the jury returned a verdict of guilty. (R. p. 405). Judge Harrington sentenced Appellant to incarceration for forty (40) years. (R. p. 413).

On February 27, 2014, Appellant filed a motion for a new trial and a motion to reconsider the sentence. On March 25, 2014, Judge Harrington filed an order denying both motions. Appellant filed a notice of appeal with the Charleston County Clerk of Court on March 31, 2014. However, the appeal was not received by the South Carolina Court of Appeals until May 12, 2014. On May 20, 2014, Appellant filed a motion to allow for late filing of the notice to appeal. On June 16, 2014, the South Carolina Court of Appeals filed an order granting the motion. Thus, Appellant filed a timely notice of appeal.

On April 7, 2015, Appellant's counsel, Susan B. Hackett, Esquire, filed a brief pursuant to *Anders v California*, 386 U.S. 738 (1967) and petitioned to be relieved as counsel. On March 3, 2016, the Honorable Paul E. Short, Jr., of the South Carolina Court of Appeals, denied counsel's motion to be relieved and directed the parties to brief the following issue: Whether the trial court erred in ruling the defenses of accident and self-defense are mutually exclusive and whether the issue is preserved for appellate review.

RESPONDENT'S STATEMENT OF FACTS

During the early evening hours of June 10, 2010, Robert Wright, Appellant, assaulted Christopher Jenkins, the victim, by repeatedly punching and stomping him while he lay on the ground. (R. pp. 80, pp. 81, pp. 110). Victim's two nephews and one of their friends witnessed the beating. (R. p. 77, lines 3-15; R. p. 107, lines 8-18; R. p. 121, lines 19-25). The next day, Victim died as a result of the attack. (R. p. 245, line 16). The pathologist concluded that cause of death was blunt force trauma and noted that the victim had ten broken ribs and numerous external injuries. (R. pp. 226, pp. 227).

Background

Victim and Appellant's mother, Betty Scott, had dated each other on and off for several years.[1] (R. p. 163, lines 14-25; R. p. 278, lines 2-8). Betty ended the relationship but the two maintained contact with one another. (R. pp. 278-279). Thereafter, a series of events unfolded that ultimately led to the underlying incident. In March 2010, Appellant learned the Victim had recently attempted to strike Betty. (R. p. 319, lines 19-24). In April 2010, Appellant received a phone call that Victim had upset Betty and made her cry. (R. p. 323, lines 3-6). That same day, Appellant tracked down Victim and they engaged in a physical altercation. (R. p. 323, line 7-p. 324, line 20). On June 10, 2010, Appellant was told that Victim had been seen lingering around Betty's house. (R. p. 325, lines 16-20). Apparently, it was after hearing this information that Appellant decided to take action.

June 10, 2010

On June 10, 2010, Victim's two nephews, thirteen year old Robert and fourteen year old Jocqui, were playing with a friend, thirteen year old Maurice, at their home. (R.

[1] Throughout the trial, Betty Scott was often referred to as "Ms. Winky".

p. 72, line 10- R. p. 73, line 1). At that point in time, Victim and his two nephews lived with Mary Jenkins, Victim's mother. (R. p. 70, line 21-R. p. 71, line 25). While the children were playing, Tamika Jenkins, the mother of Robert and Jocqui and sister of Victim, asked the boys to go to the store for her. (R. p. 73, line 3). It was getting dark so Victim decided to walk with the boys. (R. p. 74, line 3). The three boys were walking a few feet in front of Victim down the sidewalk. (R. p. 76, lines 2-3). When Robert turned around to make sure Victim was still following them he saw a car pull up. (R. p. 76, lines 3-10). All three boys witnessed Appellant get out of the vehicle and walk towards Victim. (R. p. 77, lines 3-15; R. p. 107, lines 8-18; R. p. 121, lines 19-25). Before Victim could turn around completely, Appellant picked up Victim and "body slammed" him to the ground. (R. p. 79, lines 3-5). Appellant then began to punch Victim in the face, between five and ten times. (R. p. 80, lines 11-25). He then proceeded to forcefully stomp Victim's body with his feet, between five and ten times. (R. p. 81, lines 1-5). During the assault, Victim did not fight back but "was just laying there on the ground". (R. p. 110, line 5). Victim did not speak to or act violent towards Appellant leading up to or during the assault. (R. p. 83, lines 2-17; R. p. 113, line 25-R. p. 114, line 6). Robert yelled at Appellant to stop attacking his uncle. Appellant responded to Robert, "shut your retarded ass up and come do something about it". (R. p. 124, lines 5-7). Appellant then walked back to his car and drove away. (R. p. 110, lines 11-15).

After Appellant left, Victim stood up and attempted to walk with the boys the remainder of the way to the store. (R. p. 83, line 19-p. 84, line 5). Victim was unable to continue so the boys went on to the store without him. (R. p. 84, lines 6-19). Minutes later, both Victim and the boys returned home. (R. p. 85, lines 1-4). The family watched

as a bleeding and bruised Victim walked upstairs, holding his side in pain, to rest. (R. p. 85, lines 7-21; R. p. 138, lines 21-24). Sounds of moaning could be heard by everyone downstairs. (R. p. 85, line 24; R. p. 140, lines 20-24). Robert explained to Mary that Appellant had just attacked Victim and had yelled at Robert. (R. p. 155, line 15). Mary, being a concerned mother and grandmother, went to Betty's house to talk about Appellant and the incident. (R. p. 166). Betty did not know about the incident and Appellant was not there when Mary arrived. (R. p. 168, line 21).

June 11, 2010

The next day, June 11, 2010, Victim was still in excruciating pain and spent the day lying in bed. (R. p. 141, lines 2-12). Appellant and Betty came over to Victim's house to speak with Mary, not about the assault but the statement to Robert. (R. p. 141, line 16). Timeka was present and felt that Appellant was not the least bit concerned about victim. (R. p. 142, line 4). Appellant told Timeka, "he was tired of Chris disrespecting his mother and he would have did it again if he had to." (R. p. 144, lines 15-17). Appellant and Betty left soon thereafter.

A couple of hours later, Timeka decided to call EMS after her other brother went upstairs to check on Victim and witnessed Victim having two seizures. (R. p. 143, lines 9-20). At approximately 3:00 p.m., an ambulance arrived at the home and transported Victim to the hospital. (R. p. 162, line 21). Victim died at 5:54 p.m. that same day. (R. p. 245, line 16).

June 12, 2012

On June 12, 2010, Detective Barry Goldstein of the Charleston Police Department responded to Mary's home to investigate Victim's death. (R. p. 173, line 2). He spoke

with Robert and Maurice about the incident and asked if they could identify the man that had attacked their uncle. (R. p. 88, lines 4-22; R. p. 126, lines 10-25). They both positively identified Appellant out of a photo lineup. (R. p. 88, lines 4-22; R. p. 126, lines 10-25). After interviewing Robert and Maurice, the children took Detective Goldstein to the incident location. (R. p. 175, line 5). Detective Goldstein observed blood spatter and drops where Victim had been assaulted. (R. p. 175, line 20). Officer Randall Unterbrink, with the Charleston Police Department Crime Scene Unit, photographed and collected samples of the blood found on scene. (R. p. 199, lines 3-5; R. p. 201, line 10). He was able to determine that a total of forty-eight blood drops had been left at the incident location. (R. p. 208, line 21). The blood samples were positively identified as belonging to Victim. (R. p. 256, line 1). Later that day, Detective Goldstein obtained an arrest warrant for Appellant. (R. p. 176, line 23). Detective Goldstein observed Appellant did not have any bruising or injuries to his body. (R. p. 177, line 13).

On June 12, 2010, an autopsy was performed on Victim by Dr. Nicholas Batalis. (R. p. 226, line 3). Dr. Batalis observed multiple injuries when conducting an external examination of Victim's body. (R. p. 226, line 12). Victim had a laceration to his left eye, a scrape to the lower lip, two scrapes on the left knee, and a large bruise on the upper left side of his chest. (R. p. 226, lines 12-18). During the internal examination of Victim, Dr. Batalis noted that ten of the twelve ribs on Victim's back right side were fractured in a straight line, which could only have occurred by the use of a significant amount of force. (R. p. 227, lines 8-14; R. p. 229, line 15). The pathologist conceded that forceful stomping could cause fracturing similar to Victim's injuries. (R. p. 230, lines 15-20). This fracturing caused significant bleeding into the chest cavity and bruising to the right

side of his back. (R. p. 227, lines 15-18). Dr. Batalis' ultimate finding was that Victim's cause of death was blunt force trauma to the chest. (R. p. 234, line 7).

Appellant's version

At trial, Appellant testified to his version of the facts. (R. pp. 300-331). He claimed he followed Victim so they could talk about Betty. (R. p. 327, lines 14-24). Appellant got out of his car and called out to Victim. (R. p. 328, lines 7-10). Appellant testified that Victim turned around and put his hands up to fight. (R. p. 328, lines 10-13). According to Appellant, the two then locked shoulders and Appellant flipped Victim over onto the grounds. (R. p. 313, lines 22-24; R. p. 314, lines 2-15). Appellant admitted to intentionally punching Victim three to five times. (R. p. 330, lines 22-25). Appellant then walked to his car and left the scene. (R. p. 315, line 2).

ARGUMENT

I. The trial judge did not commit error and a new trial should not be granted where the issue is procedurally barred from appellate review, the trial judge correctly held that accident and self-defense are appositive defenses, and there was no evidence presented at trial to support a charge on accident.

Appellant contends the trial court erred in not instructing the jury on the defense of accident and holding that the defenses of accident and self-defense are mutually exclusive. Respondent disagrees and submits Appellant's argument is without merit. Firstly, the present issue is procedurally barred for review because Appellant abandoned the request for an accident charge during the charge conference and then failed to make a contemporaneous objection after the instructions were read to the jury. Secondly, the trial court was correct in viewing accident and self-defense as mutually exclusive defenses in this case. Self-defense and accident do not automatically coexist as a matter of law. However, there is a recognized specific situation that allows for an instruction on both defenses. The facts of this case do not fit within that particular situation, and so both defenses could not have been charged. Lastly, counsel never asserted at trial that the incident was an accident. Neither the State nor Appellant presented any evidence that would support a defense of accident; therefore, an accident charge was not required.

Charge Conference

During the charge conference, Appellant requested a charge on the defense of accident. (R. p. 336, line 22). Before hearing from Appellant, Judge Harrington asked the State to assert its position. The colloquy was as follows:

> **The Court**: Tell me what your position is to accident.
>
> **Mr. Simpson**: Your Honor, we would not be conceding to a charge on accident. The doctrine of accident under the law, I think, applies to the act itself and whether an act is done intentionally or not, and I just don't think

there's any conceivable view or any evidence even under that standard that the charge of accident is proper in the case.

The charge of accident is different than – an allegation of accident is different than an allegation that the acts were justified. In self defense the defendant is simply saying that he is legally justified in doing an intentional act. The law of accident, it would have to be that he accidentally punched the victim, he accidentally took the victim to the ground, and I just don't see any conceivable –

The Court: Ms. Penn, tell me from the facts that I have heard make fit this for me, because I'm having a difficult time making them fit under how I understand the theory of both the State's and the defense cases.

Ms. Penn: Simply, your honor, that Mr. Wright did not intend to cause Mr. Jenkin's death. From my reading of State v Burress I believe that we must show the killing was unintentional and the defendant was acting lawfully, and, of course, that part about the weapon, which there were no weapons in this case. And I think jury could find that he was acting lawfully in defending himself and that the killing was unintentional.

Mr. Simpson: May I respond?

The Court: Ms. Penn, maybe I'm having difficulty understanding your analysis. Tell me the difference between accident and self defense in this particular case. I think that's where I'm having a hard time distinguishing the two because if he's claiming self defense he's acting lawfully under the defense, correct?

Ms. Penn: Yes, ma'am.

The Court: I mean, that's your position?

Ms. Penn: It is.

The Court: And he intended to do that act of defending himself. If you want me to charge accident in my mind even if the facts did fit those are two appositive defenses, meaning you can't act in self defense and it be an accident.

Ms. Penn: Yes ma'am.

The Court: Maybe you could reconcile that for me or have I –

Ms. Penn: I'm probably not that good, Your Honor, but if the court is telling me that it's one or the other in that case we would ask for self defense.

The Court: I'm saying that's how I see it. I want to charge the accurate statement of law based upon the facts as presented. I don't know in this scenario how it could be both.

Ms. Penn: Yes, ma'am. In that case we would just ask for self defense.

The Court: Do you need a moment to talk with Ms. Proctor?

Ms. Penn: No, ma'am.

The Court: I will not be charging accident. I will charge self defense.

(R. p. 336, line 12-R. p. 339, line 15).

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). A trial court is required to charge the current and correct law of South Carolina. *State v. Rayfield*, 369 S.C. 106, 119, 631 S.E.2d 244, 251 (2006). The law to be charged must be determined from the evidence presented at trial. *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001); *State v. Holland*, 385 S.C. 159, 165, 682 S.E.2d 898, 901 (Ct. App. 2009). If any evidence supports a jury charge, the circuit court should grant the request. *State v. Brown*, 362 S.C. 258, 262, 607 S.E.2d 93, 95 (Ct. App. 2004). "An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) (citing *State v. Pittman*, 373 S.C. 527, 647 S.E.2d 144 (2007)). "To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." *Mattison*, 388 S.C. at 479, 697 S.E.2d at 58.

A. A new trial is not proper on a failure to instruct on accident because the issue is not preserved for appellate review. Appellant withdrew his initial request for an accident instruction during the charge conference and then failed to contemporaneously object to the jury charges after they were given.

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").

"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).

Appellant initially requested a jury charge on the defense of accident during the charge conference. (R. p. 336, line 22). A review of the record reveals Appellant did not object when Judge Harrington decided not to charge the law on accident. In fact, it

appears that Appellant agreed with the Judge in not charging the defense of accident. The Judge asked Appellant to explain the request for an accident charge. Ms. Penn responded, "I'm probably not that good, Your Honor, but if the court is telling me that it's one or the other in that case we would ask for self defense." (R. p. 339, lines 2-4). The Judge stated she did not see how accident was applicable to the case at hand and Ms. Penn consented, "Yes, ma'am. In that case we would just ask for self defense". (R. p. 339, lines 9-10). Appellant's decision to ask for only a self-defense charge was as an abandonment of the initial request for an accident charge. In *State v. Rios*, the Court ruled that the Defendant had waived his appellate argument on a jury charge request when he withdrew his request during the charge conference, and thus was not preserved for review. 388 S.C. 335, 341, 696 S.E.2d 608, 612 (Ct. App. 2010) "Defendant abandoned his request for jury charges on involuntary manslaughter and self-defense when he acquiesced and asked the trial court to charge voluntary manslaughter, accident, and murder." *Id.*; *see also State v. McMillian*, 319 S.C. 331, 335, 461 S.E.2d 43, 45 (1995) (a party cannot acquiesce to an issue at trial and then complain on appeal).

Additionally, Appellant waived any challenge to the jury instructions. When the trial court completed giving her instructions, she asked "Any motions, matters, additions, corrections to the charges read...?" (R. p. 400). Appellant's counsel responded: "Not from the defense." (R. p. 401). As a result, Appellant waived any objection to the charge. *See Rios*, 388 S.C. at 342, 696 S.E.2d at 612 ("Even after the trial court specifically asked if there were any objections to the charges given, Rios responded, 'None.' By failing to contemporaneously object to the jury charges, Rios has waived his right to allege error on appeal.").

Appellant argues that if the Court finds that the issue is not preserved for review, which it is not, then the "doctrine of futility" should apply. Under this doctrine, a failure to object to an issue will be excused if it would have been futile to raise the objection to the trial judge. *State v. Passmore*, 363 S.C. 568, 584, 611 S.E.2d 273, 282 (Ct. App. 2005); *See also State v. Pace*, 316 S.C. 71, 74, 447 S.E.2d 186, 187 (1994). The doctrine of futility applies in situations where raising an objection would place the defendant "in a perilous posture". *State v. Higgenbottom*, 337 S.C. 637, 640, 626 S.E.2d 250, 251 (Ct. App. 1999), *overruled on other grounds by State v. Higgenbottom*, 344 S.C. 11, 542 S.E.2d 718 (2001).

Appellant contends that further argument with Judge Harrington would have been futile because the request had been made fully and rejected. However, the trial record clearly proves otherwise. The judge specifically asked Appellant for further explanation on the law on accident and how it was applicable to the case. (R. p. 338, line 10-R. p. 339, line 8). Furthermore, before her decision to not charge the defense, she gave trial counsel the opportunity to discuss the issue further with co-counsel to ensure that they wanted to withdraw their request for the charge. (R. p. 339, lines 11-12). Counsel declined this offer and proceeded on the request to charge only self-defense. (R. p. 339, line 13). Thus, the doctrine of futility is inapplicable to the case at hand when the judge explicitly welcomed further input from Appellant before she made her ruling and Appellant refused the opportunity.

Therefore, Respondent submits the issue is not preserved for review and the Court should not excuse the failure and grant a new trial.

B. The trial judge did not err in stating the defenses of accident and self-defense were appositive defenses in this case where South Carolina law often treats the two defenses as mutually exclusive, except with one specific situation that is inapplicable to the facts of this case. Furthermore, the trial judge did not err in not charging the law on accident since there was no evidence presented at trial alleging the incident was an accident.

Accident and self-defense do not automatically co-exist as a matter of law

Appellant argues that the defenses of accident and self-defense are not mutually exclusive. This is an incorrect statement of the law in South Carolina. Accident and self-defense are generally treated as mutually exclusive defenses. *State v. Williams,* 400 S.C. 308, 317, 733 S.E.2d 605, 610 (Ct.App.2012) (noting that self-defense and accident charges are often mutually exclusive).

For a homicide to be excusable on the ground of accident, it must be shown that (1) the harm was unintentional; (2) the defendant was acting lawfully; and (3) due care was exercised in the handling of the weapon. *State v. Brown,* 205 S.C. 514, 32 S.E.2d 825 (1945); *State v. Goodson*, 312 S.C. 278, 280, 440 S.E.2d 370, 372 (1994). The elements of self-defense are significantly different from those of accident, especially the *mens rea* element.[2] It is axiomatic that a defendant may claim and be entitled to a jury charge on self-defense only if there is evidence in the record that he acted intentionally in self-

[2] Four elements must exist for a defendant to be entitled to a self-defense charge:
(1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, defendant must show that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that he was actually in imminent danger and that the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or the loss of his life; and (4) the defendant had no other probable means of avoiding the danger. *State v. Day*, 341 S.C. 410, 416, 535 S.E.2d 431, 434 (2000)(citation omitted).

defense. *See State v. Light*, 378 S.C. 651, 649, 664 S.E.2d 470, 469 (2008). "Because of the intentional nature of the act involved in self-defense, defenses of accident and self-defense generally are not both involved in a case." 40 Am. Jur. 2d Homicide § 139; *see also State v. McDaniel*, 68 S.C. 304, 47 S.E. 384, 389 (1904) ("It is distinguishable from self-defense as a plea, which admits an intentional killing, and sets up as justification a necessity to kill in order to save the accused from death or serious bodily harm, whereas a defense of homicide by accident denies that the killing was intentional."). Accordingly, the defense of accident is only applicable in cases where there is a lack of criminal intent to inflict harm.

Nevertheless, the two defenses can coincide with one another and be considered not mutually exclusive in a very specific situation. As explained above, the defendant can only assert the defense of accident if they are acting lawfully. Courts have found that this can apply to situations where one is acting lawfully in self-defense and accidently harms another, particularly in cases of unintentionally discharging a firearm. *State v. Wharton*, 381 S.C. 209, 216, 672 S.E.2d 786, 789 (2009); *Tisdale v. State*, 378 S.C. 122, 126, 662 S.E.2d 410, 412 (2008); *State v. Cameron*, 137 S.C. 371, 135 S.E. 364 (1926). If the circumstances of a case show a defendant was entitled to arm himself in self-defense when the gun went off, he would be entitled to a charge of accident supposing evidence satisfies the other elements of the doctrine. *State v. Burriss,* 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999). In *State v. McCaskill*, 300 S.C. 256, 259, 387 S.E.2d 268 (1990), the Court stated that "a homicide is excused when caused by the discharge of a gun ... where the accused is lawfully acting in self-defense and the victim meets death by accident, through the unintentional discharge of a gun or the like ... . On the other hand, a

homicide is not excusable on the ground of accident or misadventure unless it appears that the act of the slayer was lawful."

Within all of the aforementioned cases, the defendants claimed to be acting lawfully in self-defense and the victim was killed by an accidental shooting. In other words, asserting they intentionally defended themselves but unintentionally shot the victim. Hence, the defense of accident applies to the act itself, not the result. The facts presented in this case do not fall within this specific category. Even if Appellant's version of the facts were true, the defense of accident and self-defense could not both be asserted. Contrary to the abundance of evidence proving otherwise, Appellant asserted he was acting in self-defense. However, unlike the above-mentioned cases, Appellant does not contend he was acting lawfully in self-defense and then accidently punched and stomped Victim, thereby causing Victim's death. In order for Appellant's case to fit within this exception, he would be required to assert that he did not intend, whatsoever, to assault Victim. That is simply not the case. Appellant admitted to intentionally flipping Victim over and punching Victim three to five times while he was on the ground. (R. p. 314, lines 2-9). Appellant testified, "There ain't no winners in fights but I didn't want to be on the bottom, sir." (R. p. 330, lines 8-9). It was no accident when Appellant used his hands and feet to brutally beat Victim to death. Consequently, Appellant's case does not fall within the narrow exception where the two defenses are not mutually exclusive.

"Undoubtedly, determining when multiple charges are appropriate turns on the facts of each case, so there is no bright-line rule that can be universally applied." *State v. Sams*, 410 S.C. 303, 314, 764 S.E.2d 511, 516 (2014), reh'g denied (Nov. 7, 2014). As explained above, Appellant could not have been intentionally acting in self-defense and

unintentionally attacking Victim, and thus, Appellant cannot allege both defenses. Therefore, based on the facts of the case, the trial court did not err in ruling that accident and self-defense are mutually exclusive defenses.

Accident charge not required because no evidence to support the defense

Putting aside the fact that self-defense and accident are mutually exclusive defenses in this case, an accident defense would still be unavailable to the Appellant. "The law to be charged is determined from the evidence presented at trial, and if any evidence exists to support a charge, it should be given." *Buriss*, 334 S.C. at 262, 513 S.E.2d at 108. Despite Appellant's contention that the evidence supported a charge on accident, Respondent submits the trial judge properly denied the requested instruction because there was absolutely no evidence presented at trial that would warrant a charge on accident. Moreover, a thorough review of the trial transcript reveals that the word "accident" was never used until the defense of accident was requested during the charge conference. Since Appellant never asserted his actions were accidental or presented evidence to support the defense, an instruction on accident was not required.

As stated above, evidence of three elements must be presented at trial to allege a defense of accident. A homicide will be excusable on the ground of accident when (1) the killing was unintentional, (2) the defendant was acting lawfully, and (3) due care was exercised in the handling of the weapon. *State v. Chatman*, 336 S.C. 149, 153, 519 S.E.2d 100, 102 (1999). The record is completely devoid of any evidence from the State or the Appellant that indicated Appellant's actions met these three requirements.

The first element, an unintentional killing, has already been discussed in detail. The testimony from multiple witnesses and the Appellant himself shows that Appellant intended to beat Victim. (R. pp. 79-81, pp. 107-109, pp. 122-124, p. 314). Appellant's knowledge of the difficulties between Betty and Victim leading up to the incident further show his desire to harm Victim. (R. p. 369-p. 371). Therefore, Appellant intentionally attacked Victim and does not satisfy the first element for an accident defense.

Likewise, Appellant does not satisfy the second element of acting lawfully. Under both versions of the facts, Appellant was committing an assault and battery, a criminal act, at the time of the incident. In order for Appellant to claim this act was lawful, he must have been acting in self-defense. Here, Appellant initiated the contact with Victim and was not in imminent danger when he slammed Victim to the ground. (R. p. 77, lines 3-15; R. p. 107, lines 8-18; R. p. 121, lines 19-25). Appellant could have easily left to avoid any possible danger, but he continued to attack Victim as he lay helpless on the ground. (R. p. 110, line 5). Thus, Appellant was not acting lawfully in self-defense and does not meet the second element for accident.

As to the third element, exercising due care in the handling of the weapon, Appellant asserts that this requirement is not applicable because Appellant did not use a weapon. However, South Carolina has recognized that a person's hands or feet can constitute a deadly weapon. The Court in *Davis* specifically stated, "We agree with the trial judge that a hand or fist may be found by the jury to be a deadly weapon or object, depending upon the manner and means of its use, the wounds inflicted, and other relevant facts." *State v. Davis*, 309 S.C. 326, 344, 422 S.E.2d 133, 144 (1992) *overruled on other grounds by Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999). Therefore,

Appellant's use of his hands and feet to beat the Victim could be deemed as use of a deadly weapon.

Next, Appellant contends that if the Court were to find that hands or feet qualify as deadly weapons then Appellant exercised due care in handling them. This argument is without merit. It is evident from the trial record that Appellant used a substantial amount of force to inflict the deadly blows to Victim. Dr. Batalis stated multiple times that a significant amount of force would have had to been used to break Victim's ten ribs. (R. p. 229, line 15; R. p. 230, lines 9-20; R. p. 232, lines 12-14; R. p. 241, lines 19-21; R. p. 242, line 3; R. p. 247, lines 11-18; R. p. 249, lines 1-6). He explained, "The type of injuries to have in this location and this number of fractures is something we more typically see in motor vehicle accident or car accident." (R. p. 230, lines 9-12). The three children that witnessed the attack testified that Appellant body slammed Victim to the ground, then began to forcefully punch and stomp Victim while he laid there helpless. (R. pp. 79-81, pp. 107-109, pp. 122-124). Based on the severity of the Victim's injuries and Appellant's senseless acts of violence on an unarmed Victim, the only reasonable conclusion was that Appellant's hands and feet were used as deadly weapons with which he did not exercise due care.

Accordingly, Appellant does not satisfy any of the three elements for an accident defense. The law to be charged must be determined from the evidence presented at trial. *Knoten*, 347 S.C. at 296, 555 S.E.2d at 391. Appellant neither mentioned nor insinuated to a defense of accident until the charge conference. "No instruction should be given by the trial judge, at the request of the appellant, which tenders an issue which is not presented or supported by the evidence." *State v. Weaver*, 265 S.C. 130, 137, 217 S.E.2d

31, 34 (1975). Consequently, a charge on accident was not required since no evidence was presented at trial to support that defense.

In conclusion, Respondent submits the trial court did not err in holding that the accident and self-defense are appositive defenses regarding the facts of this case. Regardless, the trial court did not commit error in not charging the defense of accident since no evidence was presented at trial to justify the instruction.

CONCLUSION

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

Respectfully submitted,

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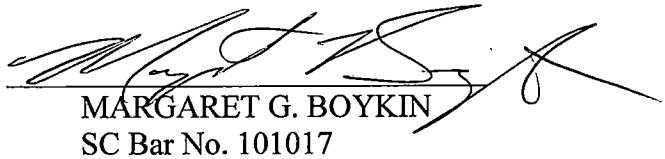
BY: 
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August 1, 2016
Columbia, South Carolina

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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT LEE WRIGHT,

APPELLANT,

Appellate Case No. 2014-001023

CERTIFICATE OF SERVICE

I, Margaret Boykin, counsel for the Respondent, certify that I have served the within Brief of Respondent on Appellant by depositing copies of the same in the United States mail, first class, postage prepaid, addressed to:

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

This 1st day of August, 2016.

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