STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lancaster County
Honorable Brian M. Gibbons, Circuit Court Judge

THE STATE,

Respondent,

v.

JOHN MARION GHENT, JR.,

Appellant

Appellate Case No. 2016-000643.

INITIAL BRIEF OF RESPONDENT

RECEIVED
JUN 29 2017
SC Court of Appeals

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APPELLANT'S STATEMENT OF THE ISSUE ON APPEAL

I. Whether the court erred by instructing the jury that "evidence of a suicide attempt is probative of a defendant's consciousness of guilt" since this was an improper jury instruction, it was a charge on the facts, and it was highly prejudicial?

RESPONDENT'S COUNTERSTATEMENT OF THE ISSUE ON APPEAL

I. Whether the trial court's jury instruction that "evidence of a suicide attempt is probative of a defendant's consciousness of guilt" and that they "can give this evidence of a suicide attempt whatever weight, if any," they deemed it to deserve, was proper in accord with *State v. Orozco*, *infra*, given that Appellant's own testimony created a nexus between the attempt and his wife's death, and given that Appellant had self-inflicted superficial wounds on his wrists at the time of the murder?

STATEMENT OF THE CASE

Following the October 28, 2013, stabbing death of his wife Elaine, the Lancaster County Grand Jury indicted Appellant John M. Ghent, Jr. for the charges of murder and possession of a weapon during the commission of a violent crime. (R. pp. *Indictments). Appellant proceeded to a jury trial beginning March 14, 2016, with the Honorable Brian M. Gibbons presiding. (Tr. p. 1). Sixth Circuit Public Defender Mike Lifsey represented Appellant. (*Id.*). Sixth Circuit Solicitor Randy E. Newman and Deputy Solicitor Lisa Collins appeared on behalf of the State. (*Id.*).

After four days of trial, the jury returned a guilty verdict on each charge. (Tr. p. 509, lines 12-20). On March 17, 2016, Judge Gibbons sentenced Appellant to fifty-four years for murder and a consecutive five years for possession of a weapon during the commission of a violent crime. (Tr. p. 518, line 22 – p. 519, line 2). Timely notice of appeal followed on March 23, 2016. (Notice of Appeal).

STATEMENT OF FACTS

After John Ghent, Jr. killed his wife Elaine and watched her perish in their bed, he told everyone within earshot that he was responsible. (Tr. p. 177, lines 3-5; Tr. p. 187, lines 14-15; Tr. p. 262, lines 4-5; Tr. p. 266, lines 19-22; Tr. p. 375, lines 1-5; Tr. p. 385, line 5 – p. 386, line 1). Appellant, who went by Butch, stabbed Elaine in the chest with a fourteen-and-a-half inch-long filet knife at approximately 4:00 AM on October 28, 2017. (Tr. p. 179, line 23 – p. 180, line 2; Tr. p. 296, lines 21-25; Tr. p. 272, line 19-24). The knife entered her lung slightly left of center. (Tr. p. 114, line 4-20). The wound was nine-tenths of an inch long with a slight twist and was made by a single-edged knife. (Tr. p. 115, lines 8-11). Other signs of injury included two surface scratches to the back of her right hand, two bruises to the left forearm, and one bruise near the stab wound on her chest. (Tr. p. 115, lines 12-24). She bled out within minutes. (Tr. p. 120, lines 2-18).

Between 4:00 and 4:15 AM, Butch left apologetic voicemail messages for his daughter Tabitha and his sister Betsy. (Tr. p. 159, lines 1-8; Tr. p. 366, line 13 – p. 368, line 2; State's Exhibits 4 and 25). Waking up around 7:00 that morning, Tabitha listened to the message and immediately sent her husband over to her parent's house to check on them. (Tr. p. 156, line 14 – p. 157, line 9; Tr. p. 161, lines 12-23). After a minute of knocking, Butch and Elaine's son Johnathan and his wife came to the door. (Tr. p. 162, lines 11-18; Tr. p. 185, lines 12-19). They lived with Butch and Elaine along with two children of their own. (Tr. p. 163, lines 2-10). Elaine's father Roddy and sister Tressa also arrived at the house. (Tr. p. 168, lines 7-8; Tr. p. 174, lines 16-25). Johnathan rammed open the door to Butch and Elaine's locked bedroom and found Butch lying on the bed facing his bloodied, deceased wife. (Tr. p. 185, line 25 – p. 187, line 10). Immediately, "Johnathan grabbed [Butch] and took him out to the kitchen" and began

beating on him. (Tr. p. 187, lines 12-20). Other family members became sick from the gore. (Tr. p. 168, lines 13-16; Tr. p. 230, lines 10-22; Tr. p. 272, lines 13-18; Tr. p. 288, line 13 – p. 290, line 1). "After about the 20th punch [Butch] said, 'I f---- stabbed her.'" (Tr. p. 187, lines 14-15).

Over the next couple of days, Butch volunteered confessions to nearly everyone he encountered. Law enforcement arrived on scene and found him lying on his back on the kitchen floor, nonresponsive, largely uninjured, and covered in what appeared to be flour. (Tr. p. 229, line 11 – p. 230, line 5; Tr. p. 241, lines 16-19). He had at least one laceration to a wrist but it did not required medical treatment. (Tr. p. 241, line 22 – p. 242, line 9). On a non-emergency ride to the hospital, Butch volunteered to EMS that his "son hit [him] in the face because [he had] killed [his] wife." (Tr. p. 251, line 6 – p. 253, line 6; Tr. p. 262, lines 4-5; Tr. p. 266, lines 19-22; Tr. p. 267, lines 7-17; R. p. *State's Exhibit 8, p. 2). Butch's vitals were stable and his blood pressure was near perfect, but his blood sugar was high. (Tr. p. 243, line 23 – p. 246, line 16). He showed no signs of overdose despite stating he had taken a copious amount of unknown pills. (State's Exhibit 8, p. 2). At all times he was conscious, oriented, speaking clearly, and alert to person, place and time. (Tr. p. 247, lines 15-21; Tr. p. 248, lines 21-22).

Not only did Butch repeatedly claim responsibility for his wife's murder, but he volunteered why. At the hospital, Butch told the deputy standing watch that he "killed her because she was going to leave [him]. She loved [him] but was not in love with [him]. She was staying out until 3:00 or 4:00 in the morning with her girlfriends and not coming home." (Tr. p. 374, lines 2-25). Butch expounded, saying

> he tried to slit his wrists but it didn't work so he took pills and he thought he would die but that didn't work. So he said his son drug him out of the bed and beat him. Son asked why did he do it, to kill his mama and Ghent stated because she was going to leave him.

(Tr. p. 375, lines 1-5). The deputy typed Butch's confession onto his cell phone. (Tr. p. 375, lines 9-15). They were the only two people in the hospital room. (Tr. p. 374, lines 12-16). The deputy did not ask any questions to elicit this information, Butch just volunteered it. (Tr. p. 375, lines 16-20).

The deputy standing guard later that evening allowed Butch to call his sister Betsy. (Tr. p. 383, lines 7-24). This is what this deputy heard Butch volunteer to his sister during the chaperoned phone call:

> Shortly after the conversation started Mr. Ghent began to sob and stated that he had killed his wife. He said he had been drinking for the both of them and taking pills. When his wife got home they had a confrontation that began and he at that point began to stab her. His wife begged him to stop. Ghent made the statement he had been thinking about it for three weeks. Mr. Ghent then stated he cut his own wrists and got on the bed next to his wife – next to his wife's body, told her that he would die with her. And then the next thing he realized was that his son had found them in the bed and his son began kicking him in the head and body. When he calmed down that was pretty much the extent of that conversation.

(Tr. p. 385, line 5 – p. 386, line 1). Butch was alert, aware, and speaking plainly on both occasions. (Tr. p. 376, lines 2-10; Tr. p. 382, lines 18-24).

At the hospital, Appellant required no medical treatment to the superficial abrasions on his wrists. (Tr. p. 130, line 6 – p. 131, line 12). Appellant's treating physician noted that Appellant reported experiencing pain at a "zero" on a zero-to-ten scale. (Tr. p. 133, lines 12-17). He did state that he had taken two blood pressure medications and an antidepressant, presented with low blood pressure, and was treated accordingly. (Tr. p. 134, lines 1-19). Appellant normally took high blood pressure medicine. (Tr. p. 134, lines 20-25). He was ushered from the emergency room into general admission at 11:46 AM on October 28, and discharged into the custody of law enforcement on the 30th. (Tr. p. 132, line 14 – p. 133, line 6). At all times, Appellant presented as alert and oriented. (Tr. p. 131, line 13 – p. 132, line 13; Tr. p. 135, lines

12-17).

Aside from Butch's own confessions, direct evidence linked Butch to the murder. The forensic pathologist opined that the knife recovered from the bedroom floor and brought to the autopsy likely caused the wound. (Tr. p. 116, line 3 – p. 117, line 14). A DNA analysis conducted with samples from Appellant, the victim, and that bloody knife determined that Elaine's DNA profile matched that found on the knife with a probability of 1 in 2.2 quintillion. (Tr. p. 358, line 17 – p. 359, line 3). With a probability of 1 in 4500, Butch was a minor contributor to the DNA on the knife based upon a Y-chromosome analysis. (Tr. p. 359, lines 8-22). This analysis could not exclude Butch's fraternal male relatives due to their sharing the same Y-chromosome DNA profile. (Tr. p. 359, line 23 – p. 260, line 5).

Still other evidence indicated that Appellant contemplated the murder. Johnathan and Tressa's daughter Raylee usually slept with Butch and Elaine, but that night Butch said she had to sleep with her own parents, and slammed the door shut before going to bed. (Tr. p. 182, lines 10-25). When Butch and Elaine were discovered, there was a note taped to the outside of the bedroom door that said "DON'T LET RAYLEE COME IN. HOPE YOU ARE HAPPY NOW!! SORRY!! SELL HOUSE AND SPLIT WITH SISTER!" (Tr. p. 237, line 25 – p. 238, line 15; R. p. *State's Exhibit 7). A handwriting analyst opined that Butch wrote the note. (Tr. p. 343, lines 3-18). Butch consented to the production of twenty-five handwriting samples used for the comparative analysis. (Tr. p. 320, line 15 – p. 321, line 5).

The victim's family and friends corroborated Butch's confessed reasoning. It seemed that everybody knew that she wanted to leave him. (Tr. p. 151, line 24 – p. 152, line 13; Tr. p. 206, lines 17-23; Tr. p. 212, lines 16-20; Tr. p. 217, lines 3-5). Elaine had financially supported Butch, who had been out of work for ten years. (Tr. p. 151, lines 8-18). When Elaine could not

afford their mortgage and her car, Elaine's father assisted. (Tr. p. 151, lines 19-23; Tr. p. 167, line 24 – p. 168, line 6). Butch would charge odds and ends against Elaine's credit account at work. (Tr. p. 211, lines 20-25). Tired of paying his way, she had asked him to leave, but he refused. (Tr. p. 174, lines 1-3). When Elaine got into a car accident a few months before her death, she began caring more for herself, changed her hairstyle, began an affair, and was described as being "happy for the first time in a long time." (Tr. p. 172, line 17 – p. 173, line 10; Tr. p. 219, lines 21-22). Elaine's co-workers and friends knew that Elaine was actively looking for a new place to live. (Tr. p. 214, lines 1-9; Tr. p. 217, lines 10-19). It was her paramour who saw her last: they met up when Elaine got off work around midnight and stayed together until about 2:00 or 3:00 in the morning. (Tr. p. 218, lines 6-10; Tr. p. 220, line 23 – p. 221, line 3). Elaine went home and texted her lover that she made it there safely. (Tr. p. 223, lines 10-11). She texted him that night at about 2:45 or 3:00 AM. (Tr. p. 223, lines 12-15). No one but Butch heard from her after. (Tr. p. 184, lines 6-22; Tr. p. 203, lines 1-9).

According to Butch, who testified at trial, Elaine fell victim during a struggle over the knife Butch was going to use to kill himself. He had been thinking about the prospect of suicide for three or four weeks as a response to the prospect of Elaine planning to leave him. (Tr. p. 400, line 22 – p. 401, line 1; Tr. p. 436, line 21 – p. 437, line 2). He had previously spoken to his daughter Tabitha about killing himself. (Tr. p. 159, lines 14-16). The day before the early-morning incident, October 27, was Butch's birthday. (Tr. p. 400, lines 8-11). When Elaine came home from work in the early morning hours, Butch initiated a conversation with Elaine to see if "she was really serious about leaving." (Tr. p. 402, lines 3-5; Tr. p. 402, lines 19-25). He could not "remember whether she even answered [him] or not," (Tr., p. 403, lines 4-6), but he "picked up the knife [he] had beside the bed because [he] was already planning on cutting [his] wrists

and all and . . . [she must have] seen the knife in [his hand.]" (Tr. p. 402, lines 11-16).

A struggle ensued over the knife wherein, according to Butch, Elaine grabbed his arm trying to get him to let it go. (Tr. p. 403, lines15-22). By Butch's own demonstration, he held the knife in his fist a threatening way, and not in a manner demonstrative of drawing the knife across his wrist in a suicide attempt. (Tr. p. 420, lines 4-19; Tr. p. 488, lines 6-17). By Butch's own admission, he "was standing at the foot of the bed" blocking the door to the bedroom. (Tr. p. 403, line 9; Tr. p. 450, lines 21-24). During this interaction, according to Butch, "she grabbed ahold of [his] wrist" and his "hand just slipped – arm just slipped out of her hand and went straight into her chest." (Tr. p. 404, lines 3-7). Panicking, he guessed he pulled the knife out "and throwed it down or ripped it out." (Tr. p. 404, lines 10-17). Then, Butch testified,

> I just let her lay down and I put her to bed. I just let her lay the way she fell. I got up and went in and washed the blood off my hands and stuff and I went and sat on the bed, that's when I got the pills, I tried to cut my wrists first. . . . [B]ut something wouldn't let me cut my wrists. . . . Then I got up and went and looking around trying to see what kind of pills I could take to see what I had. I know she had blood pressure pills and stuff . . . I just swallowed all of them. And then I went back to the bed and I thought about my granddaughter, I didn't want her to come and see us so I wrote the note to not let her come in. I called my sister and my daughter, told them I was sorry . . . I was planning on being dead when they found us and I just wanted to let them know I was sorry.

(Tr. p. 404, line 19 – p. 405, line 25).

ARGUMENT

I. The trial court charged the jury that evidence of a suicide attempt is probative of consciousness of guilt in conformity with *State v. Orozco, infra*, and properly did so, given that Appellant's own testimony created a nexus between the attempt and his wife's death, and given that Appellant had self-inflicted superficial wounds on his wrists at the time of the murder.

"The law to be charged to the jury is determined by the evidence presented at trial." *State v. Hill,* 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). "A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied." *State v. Wharton,* 381 S.C. 209, 213, 672 S.E.2d 786, 788 (2009). "When reviewing a jury charge for error, an appellate court considers the charge as a whole; the charge must be prejudicial to the appellant to warrant a new trial." *State v. Stukes*, 416 S.C. 493, 498, 787 S.E.2d 480, 482 (2016), *reh'g denied* (July 15, 2016).

The trial court instructed the jury on the offenses of murder, voluntary manslaughter, and involuntary manslaughter, as well as on the defense of accident. (Tr. p. 500, line 5 – p. 504, line 13). Immediately thereafter, the trial court instructed the jury that:

> Evidence of a suicide attempt is probative of the defendant's consciousness of guilt, and you ladies and gentlemen of the jury can give this evidence of a suicide attempt whatever weight, if any, you think it deserves.

(Tr. p. 504, lines 14-17).

The State requested this instruction. (Tr. p. 463, lines 9-23). Appellant objected on the basis that it was "an impermissible charge on the facts," though opined that it was a correct statement of law. (Tr. p. 464, lines 2-7). The court ruled that the charge was "a reasonable statement and . . . a statement of the law." (Tr. p. 465, lines 18-24). Furthermore, the court reasoned that it would instruct the jury on both accident and suicide out of fundamental fairness, opining that the construction of the accident charge constituted a similar comment on the facts.

(Tr. p. 465, line 25 – p. 466, line 4). Appellant renewed his objection at the conclusion of the jury instructions. (Tr. p. 508, lines 1-3).

The admissibility of Applicant's suicide attempt is not at issue as Appellant contends throughout the majority of his brief, which states that this issue is presently pending before the South Carolina Supreme Court in *State v. Cartwright,* App. Case No. 2016-000005 (S.Ct. argued Mar. 22, 2017). (Br. of Appellant, pp. 8-10). *Cartwright* involves the admissibility of evidence of a suicide attempt, not the propriety of a jury instruction on that evidence. *State v. Cartwright, supra* (Br. of Pet., Issue I, filed Dec. 9, 2016). No such jury instruction was given in *Cartwright. See id.* The admissibility of Appellant's suicide attempt was never contested in the present case. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party may not argue one ground at trial and an alternate ground on appeal."). To that end, the authorities Appellant cites which are reflective only of the admissibility of evidence of a suicide attempt are not persuasive to the disposition of the case at bar. (Br. of Appellant, pp. 8-10).

a. The trial court issued an appropriate jury instruction that identified the current law of our State, did not comment on the facts, and enlightened the jury on the permissible consideration related to the suicide attempt, which Appellant relied upon in support of his own defense.

The propriety of the jury instruction related to the uncontested evidence of Appellant's suicide attempt constitutes the proper issue before this court. *See State v. Dunbar, supra.* The instruction in this case was indeed reflective of the status of the law of our State. *State v. Orozco*, 392 S.C. 212, 219, 708 S.E.2d 227, 230 (Ct. App. 2011), *petition for writ of certiorari withdrawn State v. Orozco*, App. Case No. 2011-192226 (Mot. to Dismiss granted Sept. 5, 2013). This Court has held "that evidence of a suicide attempt is probative of a defendant's consciousness of guilt and is generally admissible for whatever value the jury decides to give it."

Id. at 220, 708 S.E.2d at 231. "[T]he same principle that deems evidence of flight by one accused of a crime as probative of consciousness of guilt" served as the foundation for this Court's holding, which went on to state that evidence of a suicide attempt is relevant when the accused has knowledge of the charges against him and when a nexus exists between the suicide attempt and those charges. *Id.* at 219–21, 708 S.E.2d at 230–32; *see* 29 Am.Jur.2d Evidence § 547 (noting a number of jurisdictions in agreement).

Accordingly, the trial court issued a proper jury instruction reflective of the correct and current law of our State when it instructed that "evidence of suicide attempt is probative of the defendant's consciousness of guilt." (Tr. p. 504, lines 14-17). The required nexus exists in this case. Direct and circumstantial evidence links Appellant's admitted suicide attempt to the accusations which engendered the current convictions. The record indicates that Appellant was aware that his actions resulted in his wife's death—he confessed to the killing on multiple occasions. (Tr. p. 177, lines 3-5; Tr. p. 187, lines 14-15; Tr. p. 262, lines 4-5; Tr. p. 266, lines 19-22; Tr. p. 375, lines 1-5; Tr. p. 385, line 5 – p. 386, line 1). The evidence further gives rise to the circumstantial inference that Appellant attempted suicide as a means of evading criminal responsibility for the act committed. Appellant's testimony, along with that of the EMS responder and his treating physician, signaled that Appellant staged a suicide attempt by making it appear that he slit his wrists after the murder. The wounds were classified as abrasions requiring no medical treatment. (Tr. p. 241, line 22 – p. 242, line 9; Tr. p. 243, line 23 – p. 246, line 16; Tr. p. 404, lines 19-23; R. p. *State's Exhibit 8). He also admitted to taking a number of pills, including high blood pressure medication and an antidepressant, as an attempt to overdose. (Tr. p. 134, lines 1-3; R. p. *State's Exhibit 8). But Appellant, who regularly took high blood pressure medication, had stable vitals immediately after the incident, and only later received

limited treated at the emergency room. (Tr. p. 134, lines 1-25; Tr. p. 243, line 23 – p. 246, line 16; Tr. p. 375, lines 1-3). The results of a urinalysis showed no other signs of an overdose. (Tr. p. 135, lines 1-11).

Alternatively, Appellant testified to the rationale that he "didn't want to live without her," (Tr. p. 402, lines 19-25), which permitted the jury to infer that Appellant's suicide attempt resulted from despair caused by an accidental death or an otherwise unintended result. Appellant's defense relied upon the evidence of a suicide attempt as a means of pleading that Elaine's death was accidental.

In addition to a duty to instruct the jury on correct statements of law, a jury instruction should be designed to "enlighten the jury and aid it in arriving at a correct verdict." *State v. Stukes*, 416 S.C. at 498, 787 S.E.2d at 482. An instruction regarding evidence of an attempted suicide and consciousness of guilt does serve to enlighten the jury and it does so in a permissible manner. The charge at issue is influential in a jury's assignment of criminal intent to the potential verdicts before it. "It would be illogical to assume the jury would not consider the setting in which the charged crime occurred in coming to its conclusion whether a crime occurred at all." *State v. Bergstrom*, 413 N.W.2d 206, 210 (Minn. Ct. App. 1987). This Minnesota court held, in a prosecution for destruction of property, that the trial court could have expanded its jury instruction "to allow the jury on the question of guilt or innocence, to consider whether the defendant was attempting suicide in deciding her intent." *Id.* New Jersey has held that the jury indeed should be instructed on the permissive use evidence of a suicide attempt. *State v. Mann*, 132 N.J. 410, 424, 625 A.2d 1102, 1108-09 (N.J. 1993).[1] A Massachusetts court has upheld an

[1] "The jury should be instructed that it first must find that an actual suicide attempt had occurred. It should then consider whether that attempt was made to avoid the burdens of

instruction that "if they found beyond a reasonable doubt that the defendant attempted to commit suicide, it could be considered as evidence of the defendant's consciousness of guilt." *Com. v. Sheriff*, 425 Mass. 186, 199, 680 N.E.2d 75, 83 (Mass. 1997). That court also noted that "a judge is not required to point out to a jury a potentially innocent explanation for the act alleged to imply consciousness of guilt." *Id.* at 200, 690 N.E.2d at 84.[2]

Appellant's jury was instructed on murder, manslaughter, involuntary manslaughter and the defense of accident, and therefore had to determine whether Appellant intended the result. "Intent is not ordinarily susceptible of direct proof, and must be established by circumstantial evidence." *State v. Bergstrom, supra.* The facts and circumstances surrounding Appellant's suicide attempt could provide circumstantial proof of criminal intent. Similarly, the circumstances surrounding the suicide attempt, and Appellant's rendition of the facts surrounding the impetus for his wife's death, could provide proof of the absence of criminal intent. Accordingly, it was proper to instruct the jury that they may assign such evidence whatever weight they found appropriate.

Of course, our jurisdiction employs a constitutional provision barring the trial judge from commenting on matters of fact. S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."). But the charge in this case is distinguishable from other jury instructions deemed improper commentary on the facts of a case.

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prosecution and punishment. The jury should also determine whether [it] demonstrated consciousness of guilt. The trial court should instruct the jury that if it credits any alternative explanation offered by the defendant, it may not infer consciousness of guilt from the evidence of a suicide attempt." *Id.*

[2] The trial court also instructed the jury that "a defendant's conduct following or around the time of a crime may be motivated by factors which are fully consistent with innocence," and that they were "permitted, but [were] not required to find that by his conduct the defendant has displayed some consciousness of guilt." *Id.* at n.16.

See State v. Stukes, 416 S.C. at 499-500, 787 S.E.2d at 482-83 (holding that the instruction derived from S.C. Code Ann. § 16-3-657 placed an inappropriate emphasis on the victim's testimony and created confusion when given in conjunction with the trial court's standard charge on witness credibility). In particular, this case is also distinguishable from *State v. Grant*, 275 S.C. 404, 408, 272 S.E.2d 169, 171 (1980), which declared a jury charge on "the law of flight" improper. The charge in *Grant* was far more instructive than the instruction in this case. Its language was mandatory. It read: "In this case the State has claimed flight. Attempts to run away have always been regarded as some evidence of guilty knowledge and intent." *Id.* at 406, 272 S.E.2d at 170.

Unlike *Grant*, the jury in this case was instructed merely that "evidence of a suicide attempt is probative of a defendant's consciousness of guilt." (Tr. p. 504, lines 14-15). The jury was not instructed that the State alone presented that evidence for a particular purpose, or that such an attempt has "always been regarded" as a portrayal of guilt. *State v. Grant* at 406, 272 S.E.2d at 170. Instead, the instruction in this case included ameliorating language alerting the jury that they may give the suicide evidence whatever weight, *if any*, they deemed it to deserve. (Tr. p. 504, lines 15-17). Moreover, in this case, the suicide attempt was relevant to both parties. Both the State and Appellant presented evidence of the attempt, each promoting that evidence in favor of their desired outcome. The State presented the suicide evidence because one could infer that Appellant staged a suicide attempt as a means of covering up the murder. (Tr. p. 487, lines 15-25; *see* Tr. p. 472, lines 1-4). In contrast, Appellant's defense heavily relied upon the same evidence as a means of excusing the homicide on the ground of accident. (*See* Tr. p. 472, lines 4-8). But, as pointed out by the Supreme Judicial Court of Massachusetts, the judge need not

instruct on potentially innocent explanations for the facts presented.[3] *Com. v. Sheriff*, 425 Mass. at 200, 680 N.E.2d at 84.

Given the totality of the facts presented at trial, the challenged instruction did not comment on the particular facts of the case, but rather equipped the jury with the necessary legal toolkit to interpret the facts in relation to the potential charges. The remainder of the jury instruction is reflective of the same type of instructional toolkit. The jury was instructed that they had to choose a verdict of murder, manslaughter, involuntary manslaughter, or not guilty by way of accident. (Tr. p. 500, line 6 – p. 504, line 13). They were also instructed on any special assessment applicable to types of evidence presented throughout the trial. In addition to that of suicide, they were instructed on the allowable assessments related to expert testimony, inconsistent statements, statements made by the accused, and the requirement of finding criminal intent. (Tr. p. 497, line 5 – p. 500, line 5). The challenged instruction does not compete with any other instruction given, nor does it ask the jury to assign more weight to any particular evidence. It allows the jury to elect to apply whatever weight it deems fit. (Tr. p. 504, lines 14-17). In fact, the instruction did not comment on the facts of the case any more than the subsequent charge on possession of a weapon during the commission of a violent crime[4] or the preceding charge on accident.[5] After all, "[t]he law to be charged to the jury is determined by the evidence presented at trial." *State v. Hill, supra.*

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[3] Rather, as was conducted in this case, the judge must instruct the jury as to the presumption of innocence, the burden of proof, and the elements of the crimes charged and defenses pled. (Tr. p. 490, line 18 – p. 507, line 21).

[4] ". . . A knife is an instrument or tool with a sharp cutting blade whether or not fastened to a handle which would be used to inflict a cut, slash, or wound. A knife is considered to be a weapon. . . ." (Tr. p. 504, line 17 – p. 505, line 9).

[5] ". . . An act may be excused on the ground of accident if it is shown that the act was unintentional, that the defendant was acting lawfully . . . ." (Tr. p. 504, lines 5-13).

b. If found in error, the jury instruction is harmless because the totality of the evidence, including Appellant's numerous pre-trial admissions, indicates the presence of malice aforethought.

Erroneous jury instructions are subject to harmless error analysis. *State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014). In conducting this analysis, the inquiry "'is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered.' Thus, whether or not the error was harmless is a fact-intensive inquiry." *Id.* (quoting *State v. Kerr*, 330 S.C. 132, 144-45, 498 S.E.2d 212, 218 (Ct. App. 1998)). Given the evidence in this case, there is no indication that the jury based their verdict on suicide portion of the charge for two reasons.

First, the affirmative defense of accident did not apply to the evidence presented at trial. In order for accident to serve as a defense, the defendant had to have been acting lawfully and had to have been exercising due care in his handling of the knife. *State v. Wharton,* 381 S.C. at 216, 672 S.E.2d at 789. Viewing the totality of the evidence in the light most favorable to the defendant, and giving explicit weight to his trial testimony, the record is void of any indication that Appellant was exercising due care when a struggle ensued over the knife. (Tr. p. 402, line 3 – p. 404, line 17 ("I . . . was going to talk to her and she said she wanted to leave me. I got the knife . . . ."). Any struggle over the knife appears reckless, or at least negligent. The knife was there because Appellant planned to attempt suicide. (Tr. p. 402, lines 11-16). Even if Appellant was not attempting suicide, the struggle at least ensued as a result of his confronting his wife about whether or not she was going to leave him. (Tr. p. 402, line 19 – p. 404, line 6). He was standing at the foot of the bed with the knife in his hand during the confrontation. (Tr. p. 403, line 9; Tr. p. 450, lines 21-24). Appellant himself demonstrated at trial that he was "hiding" the knife behind his back and then lifted it up in a confrontational manner. (Tr. p. 420, lines 4-19; Tr.

p. 488, lines 6-17). None of these facts surrounding Appellant's possession of the knife indicates the use of due care. Furthermore, Appellant's holding a filet knife during a planned confrontation with his wife does not indicate that Appellant was acting lawfully at the time. *See* S.C. Code Ann. § 16-25-20 and 16-25-65 (defining crime of domestic violence in varying degrees).

Second, ample evidence of premeditation exists such that the jury's finding of malice is supported by the record and such that no other lesser-included verdict could be reached. *See* S.C. Code Ann. §§ 16-3-10, -50, -60 (defining murder, manslaughter, and involuntary manslaughter). Appellant was initially forthcoming about the reason for his wife's death. He issued a number of confessions in this case prior to making any claim of accident. Immediately upon discovery he told his family that he stabbed her. (Tr. p. 187, lines 14-15). In total, Appellant told his son, his sister, EMS, and two sheriff's deputies that he killed his wife. (Tr. p. 177, lines 3-5; Tr. p. 262, lines 4-5; Tr. p. 266, lines 19-22; Tr. p. 375, lines 1-5; Tr. p. 385, line 5 – p. 386, line 1). Speaking precisely to malice, Appellant told his sister that he had been thinking about stabbing her for three weeks. (Tr. p. 385, lines 5-25). The victim's friends and family took turns testifying that they knew the victim wanted to leave Appellant and was actively looking for a new place to live. (Tr. p. 151, line 24 – p. 152, line 13; Tr. p. 206, lines 17-23; Tr. p. 212, lines 16-20; Tr. p. 214, lines 1-9; Tr. p. 217, lines 3-5). This repeated testimony lent motive to opportunity. Appellant even told the deputy standing watch in his hospital room that he "killed her because she was going to leave." (Tr. p. 374, lines 2-25).

Circumstantial evidence of premeditation can also be found in the record. Appellant did not allow his granddaughter to sleep in his bedroom that night, breaking with their usual practice. (Tr. p. 182, lines 10-25). To ensure that Raylee did not see the gruesome scene inside, he taped a note to the door saying "DON'T LET RAYLEE COME IN. . . ." (Tr. p. 237, line 25 – p. 238,

line 15; R. p. *State's Exhibit 7). He never called for help after the stabbing. He never told his family that it was an accident when he called his daughter and sister to apologize. (State's Exhibits 4 and 25). Appellant's own testimony establishes that he planned to confront his wife about her intention to leave him on this particular night. (Tr. p. 402, lines 3-5; Tr. p. 402, lines 19-25). During the confrontation, he was standing at the foot of the bed with the knife in his hand, blocking the door and the victim's escape route. (Tr. p. 403, line 9; Tr. p. 450, lines 21-24). He testified that he could not "remember whether she even answered [him] or not," indicating that he was not looking for an answer from his wife or engaging her in an attempt at reconciliation, but rather was determined to act as he had planned. (Tr. p. 403, lines 4-6). Then, he claimed that his hand "just slipped." (Tr. p. 404, lines 3-7). But the inference drawn from the forensic pathologist's testimony was that the victim's stab wound required force and was not indicative of an accident—her lung was punctured by the long blade and a bruise was located just inches away from the entry wound. (Tr. p. 114, line 16 – p. 115, line 24). Moreover, Appellant himself indicated during cross-examination that rather than hold the knife as one would in an effort to slit his own wrists, Appellant demonstrated that he handled the knife in a confrontational manner. (Tr. p. 420, lines 4-19; Tr. p. 488, lines 6-17).

And, when considered alongside the remainder, the evidence of a staged suicide was more powerful than Appellant's alternative reasoning. Appellant testified that he took action to kill himself only after he washed Elaine's blood from his hands. (Tr. p. 404, lines 19-23). He testified he tried to cut his wrists using the same knife. "[I]t would not go through," (Tr. p. 405, lines 1-6), but he created enough of a cut to cause some bleeding. (Tr. p. 427, line 20 – p. 428, line 12). He did not use the tip of the knife that had succeeded in killing his wife. (Tr. p. 428, lines 13-22). When that did not work for him, he said swallowed four of five bottles of pills. (Tr.

p. 405, lines 13-15). When contrasted with the treatments received by Appellant, the suicide attempt is not probative of a serious attempt at ending one's life. Emergency responders recorded the wound on Appellant's wrist as a "laceration" and testified that it was not bleeding and did not require treatment. (Tr. p. 241, line 23 – p. 242, line 9; R. p. *State's Exhibit 8). His treating physician at the hospital likewise administered no treatment to the wound. (Tr. p. 131, lines 15-25). The emergency department nurse and the medical floor nurses classified the wound as an "abrasion." (Tr. p. 131, lines 1-5). Appellant consistently reported to this doctor that he was experiencing "zero" pain. (Tr. p. 133, lines 12-17). And, although he admitted to taking a number of pills as an additional suicide attempt, the only adverse effect was the presentation of low blood pressure once admitted to the emergency room. (Tr. p. 134, lines 1-19; Tr. p. 243, line 23- p. 246, line 16). A urinalysis returned no signs of overdose. (Tr. p. 135, lines 1-11). Nothing in the record indicates that Appellant was put on suicide watch at the hospital. The totality of the evidence related to the suicide attempt indicated that he staged a suicide as a means of attempting to excuse or cover up what he did to Elaine.

The only competent conclusion established by the sum of the evidence was that Appellant lay in wait for his wife to come home the night of his birthday and was prepared to execute the plan he had been contemplating for upwards to three weeks. The evidence adduced at trial indicates an overwhelmingly intentional killing not in the sudden heat of passion or as a result of criminal negligence, but as the effect of and act committed with premeditation and a depraved heart.

CONCLUSION

For all of the foregoing reasons, the trial court instructed the jury on the correct and current law of the State. Accordingly, it is respectfully submitted that this Court affirm Appellant's convictions and sentence.

Respectfully submitted,

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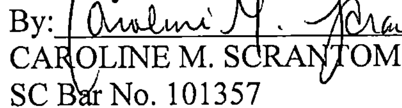
By: 
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ATTORNEY FOR RESPONDENT

June 26, 2017
Columbia, South Carolina

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lancaster County
Honorable Brian M. Gibbons, Circuit Court Judge

THE STATE,

Respondent,

v.

JOHN MARION GHENT, JR.,

Appellant

RECEIVED
JUN 29 2017
SC Court of Appeals

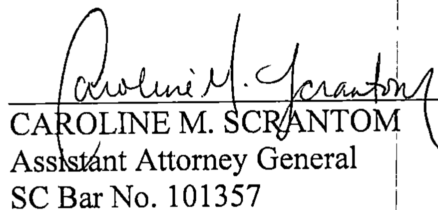
Appellate Case No. 2016-000643.

PROOF OF SERVICE

I, Caroline M. Scrantom, counsel for the Respondent, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appeal by depositing two (2) copies of the same in the United States mail, addressed to his attorney of record at:

Robert M. Dudek, Chief Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served. This 26th day of June, 2017.



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ALAN WILSON
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June 26, 2017

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JUN 29 2017
SC Court of Appeals

Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

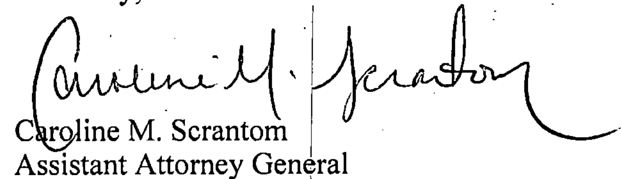
Re: The State v. John Marion Ghent, Jr.
Appellate Case No. 2016-000643

Dear Ms. Kitchings,

Enclosed please find the original and one (1) copy of the ***Initial Brief of Respondent and Designation of Matter***, dated June 26, 2017, along with proof of service, in the above-referenced case.

By copy of this letter, I am serving opposing counsel with same. Thank you for your consideration in this matter.

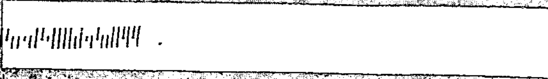
Sincerely,



Caroline M. Scrantom
Assistant Attorney General

CMS/csm
Enclosures

cc: Robert M. Dudek, Esq. (w/two copies of encls.)
The Honorable Randy E. Newman, Jr., Solicitor, 6th Judicial Circuit
Trisha Allen, Victim Services



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