STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Jasper County
The Honorable Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2011-205448

THE STATE,

Respondent,

v.

ANTONIO SCOTT,

Appellant.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

Whether the trial court reversibly erred by failing to instruct the jury with involuntary manslaughter where there was evidence in the record indicating the knife wound to the victim's neck was unintentionally caused by appellant's defensive martial arts maneuver while he was acting in self-defense?

STATEMENT OF THE CASE

On March 20-21, 2011, appellant Antonio Scott murdered Cynthia Nelson in Ridgeland, S.C. (R. pp. 28, 29, 193-97). Appellant was arrested on March 21, 2011 for Nelson's murder. (R. pp. 98-104). Appellant was subsequently indicted on April 11, 2011 by the Jasper County grand jury for murder (2011-GS-27-216). (R. pp. 1, 28, 29, 33, 34). Appellant was represented by Robert Hughes, Esquire. (R. p. 1). Appellant proceeded to trial December 5-7, 2011 before the Honorable Carmen T. Mullen and a jury. (R. pp. 1, 193-200). At the conclusion of the trial, the jury found appellant guilty of murder. (R. pp. 193-97). Judge Mullen sentenced appellant to thirty (30) years imprisonment for murder. (R. pp. 197-200).

RESPONDENT'S STATEMENT OF FACTS

On the night of March 19, 2011, the victim Cynthia Nelson ("Cynthia") called police in reference to appellant, Antonio Scott, her daughter's boyfriend and the father of Cynthia's grandchild, being outside the front door of her apartment trying to break in. (Tr. pp. 98-99). Cynthia was outside her home in her car when she witnessed appellant at the front door of her apartment and called police using her cell phone. (R. pp. 17-23, 71-73). Ridgeland City Police Officers Kevin Smith and Rob Nelson responded to the scene; however, by the time the officers arrived appellant was gone. (R. pp. 71-72). When appellant realized the victim had called police, he threw away the knife he was carrying and hid in a nearby garbage dumpster. (R. pp. 72, 75-85). At Cynthia's request, Officer Smith searched her home to make sure appellant was not in her home and it was safe for Cynthia to enter. (R. p. 72-73). Officer Smith eventually talked to appellant on the phone, and appellant admitted he had called Cynthia. (R. p. 72).

The following day, March 20, 2011, Ms. Monique Chester, a resident of Baytree Apartments, was attending a wake at a residence located behind Baytree Apartments. The wake was for appellant's cousin who had recently died. While there, Ms. Chester overheard appellant talking about what had occurred the previous evening. Appellant told a fellow family member that he had tried to kill Cynthia the night before, but she had called the police. Appellant stated he had hid in a dumpster to avoid being arrested by police, and he had thrown the knife somewhere. Appellant also stated that the next time he saw Cynthia he was going to stab her. (R. pp. 75-85).

On the same date, March 20, 2011, the victim's daughter, Akera Nelson ("Akera") and Cynthia drove to appellant's sister's (Shareema Behlin's) apartment because appellant had

requested that the victim's daughter (Akera) bring their son to him at his sister Shareema's apartment. Shareema also lived in Baytree Apartments. Akera and the child entered Shareema's apartment. Cynthia remained in the vehicle. Cynthia's daughter, Akera, saw a knife in appellant's hand when she entered Shareema's apartment and appellant got up of the couch. Appellant knew Cynthia was outside in the vehicle and stated to Akera with the knife in his hand: "Is this how you wanna do things?" "You gonna let your mom come between us?" Akera told appellant: "Its not that serious. Chill out." Akera continued to try and calm appellant down and while doing so put her son down on a chair. About one (1) minute later, Cynthia got out of the car and entered the apartment where her daughter and grandson were, and Cynthia told appellant she was not going to put up with him beating her daughter any more.1 (R. pp. 86-98, 105, 108, 115-25, 154-58, 160-161).

Appellant started arguing with Cynthia. At this point, Akera could no longer see the knife in appellant's hand. Akera then witnessed appellant strike Cynthia one (1) time in the face/neck area with his fist. Appellant's sister, Shareema, testified at trial that appellant struck the victim in the face/neck area with the open part of his hand. Neither woman saw appellant and Cynthia wrestling or tussling before appellant struck Cynthia. They were just arguing. After appellant struck Cynthia, Cynthia then staggered forward and collapsed on the couch in the living room unable to speak. Blood was pouring from Cynthia's neck It was subsequently discovered that appellant had not just struck Cynthia with his fist but had actually stabbed her with the knife. The knife wound penetrated Cynthia's neck approximately two (2) and one half (½) inches and was stopped by a bone in her neck. The knife wound severed an artery in

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1 Appellant was on probation at the time of trial for CDV 2nd Offense. Akera was the victim in that offense.

Cynthia's neck resulting in a severe loss of blood, cardiac arrest, and eventual death.2 (Tr. pp. 114-26, 135, 138, 145-55, 85-89, 91-92).

Cynthia's daughter, Akema, then went in the kitchen, obtained a mop handle and swung it at appellant because he had attacked her mother. When Akera stopped swinging at appellant with the handle, appellant took off his shirt and used it to try to stop the bleeding from Cynthia's neck. Appellant then fled the scene going behind Baytree Apartments in the direction of where the wake had been the day before. Akera followed appellant but did not leave the scene. (R. pp. 86-98).

Appellant's sister, Shareema, called 911. (State's Ex. 1, 1st call, R. pp. 38-44). On the 911 tape, appellants' sister can be heard telling someone to the effect "you better get out of here." (State's Ex. 1, 1st call). Appellant's sister was asked by the 911 operator what happened to the victim and Sharema stated *someone stabbed her in the neck.* (State's Ex. 1, 1st call). When appellant's sister was specifically asked who stabbed the victim, she did not answer. She then stated she needed to walk outside the home. Sharema then became belligerent with the 911 operator. (State's Ex. 1, 1st call).3

The victim's daughter, Akema, then called 911. (State's Ex. 1, 2nd call, R. pp. 38-44). She informed the 911 operator her boyfriend, appellant Antonio Scott, had struck her mother with his fist but she did not know what he had in his hand at the time. She informed the 911

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2 The victim, Cyntia, was first taken by E.M.S. to a local hospital and then, because of her condition, she was transported to a hospital in Savannah, Georgia. She died there on March 21, 2011 as a result of the stab wound to her neck just below the ear. (Tr. pp. 72-86, 140-55).

3 When police responded one (1) of the officers was wearing a body camera that showed the jury exactly what occurred when police arrived at the scene. (State's Ex. 2, Video). Police attempted to interview appellant's sister Shareema but she was not cooperative in the initial investigation. The victim's daughter, Akera, was present at the scene and was cooperative and related to police how appellant had attacked her mother. (State's Ex. 2, Video).

operator that her mother was bleeding profusely. She also gave police a description of appellant and where he had run to. (State's Ex. 1, 2nd call). (R. pp. 86-98, 105, 108, 115-25, 154-58, 160-61)

When police arrived at the scene, appellant had already fled behind the apartment. Officer Rob Nelson went behind the apartment looking for appellant. When he approached a group of people behind the apartment complex [appellant's family] asking if they had seen appellant and where he had fled, the individuals told Officer Nelson to leave. The murder weapon, the knife, was never found. (R. pp. 86-98, 105, 108, 115-25, 154-58, 160-61).4

Appellant was subsequently arrested on March 21, 2011 and charged with attempted murder.5 He was interviewed by police. Appellant claimed the victim, Cynthia, came to the apartment with a knife and attempted to stab him, whereupon he used, for lack of a better word, a martial arts move to block the attempted stab, which resulted in the victim stabbing herself in the face / neck with the knife. Appellant asserted that as the victim came at him with her knife, he side-stepped her and pushed her elbow up and she stabbed herself with the knife still in her hand. (R. pp. 95-104). Investigator Daniel Litchfield testified that appellant stated as follows:

> He [appellant] told us he was there. He had an altercation, a verbal argument with Cynthia Nelson. During this argument, he stated that Cynthia Nelson pulled something shiny and silver out of her pocket, went towards him, and he stepped to the side and did a - - for lack of a better term, a martial arts move, pushing her elbow up, causing her to stab herself in the throat.
>
> Q: Now, did he physically show you how this occurred?
>
> A: Yes, sir.

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4 Police interviewed the victim's daughter, Akera, at the scene and she gave police a statement regarding what had occurred. Appellant's sister, Shareema, would not give police a statement. (State's Ex. 2).

5 The victim died later that day and the charge was upgraded to murder. (R. pp. 95-104, 110-25).

OFFICER LITCHFIELD: Be okay, Judge?

THE COURT: Sure.

A: Now, mind you, he was handcuffed, but he said he was standing there. She reached into her pocket, and when she went towards him, he said he did this and this. In other words, her arm went by him and he pushed the arm and she stabbed herself in the neck. That was his statement.

(R. p. 99, ln. 22 - p. 100, ln. 15). Investigator Litchfield further testified appellant admitted he and the victim exchanged words before she was killed. (R. p. 100). And, appellant was confronted with what Ms. Chester had related he had said at the wake the day before Cynthia's murder. Investigator Litchfield related appellant denied he had ever threatened the victim before, but admitted that he and the victim had argued before and they did not like each other. (R. p. 101). Investigator Litchfield further testified that police interviewed others regarding Cynthia's death but they were unable to find anyone to corroborate his claim that Cynthia was the aggressor in the incident. (R. p. 101).6

At the close of the trial, based on the evidence, Judge Mullen charged the jury on the crimes of murder and the lesser included offense of voluntary manslaughter. The trial judge also charged the jury on the complete defense of self-defense. Judge Mullen also instructed the jury that they could return a verdict of not guilty if the State failed to meet their burden of proof. The trial judge did not charge the jury on the *offense of* involuntary manslaughter or the *defense of* accident finding they were not applicable under either the factual scenario testified to by the

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6 Appellant did not testify at trial. After the State rested, appellant presented no evidence. (R. p. 138). Akera also testified appellant, prior to trial, attempted to persuade her give false testimony that he was trying to stab her, Akera, and her mother jumped between them and was accidentally stabbed. Akera refused to testify falsely for appellant.

State or appellant's version of events. (R. pp. 134-36, 138-54).7 On appeal, appellant only challenges the trial judge's declining to instruct the jury on involuntary manslaughter.

ARGUMENT

Judge Mullen did not err in declining to charge involuntary manslaughter, where taking the evidence in the light most favorable to the defendant, the victim always had the knife in her possession and appellant was acting in self-defense when he blocked the victim's knife with a defensive move causing the victim to stab herself with the knife that was always in her hand.

At trial, given the evidence in the record, Judge Mullen appropriately charged the jury on the defense of self-defense. Appellant asserts on appeal that Judge Mullen erred in refusing to charge the jury on *involuntary* manslaughter. Appellant is wrong. Judge Mullen did not err in refusing to instruct the jury on involuntary manslaughter.

What Occurred Below

The charge conference took place over the last two (2) days of trial. (R. pp. 134-36, 138-54). Appellant requested a charge of involuntary manslaughter arguing the jury could find he acted recklessly or negligently while acting in self-defense.8 Appellant's counsel eventually admitted his request for an involuntary manslaughter instruction was based on the fact that the trial judge was going to instruct the jury on murder, voluntary manslaughter, and not guilty (based on self-defense) and counsel believed the jury would compromise on voluntary

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7 Appellant admitted below the defense of accident was not applicable to the facts of this case and withdrew his request for a charge on the defense of accident. (R. p. 145, ll. 9-25).

8 Appellant's counsel argued, although he did not know, there might have been a different defensive move his client could have used rather than the one described by appellant to police; therefore, he was recklessly acting in self-defense and was entitled to an involuntary manslaughter charge. (R. p. 150, ll. 1-8). However, there was no testimony at trial that there was some alternative defensive move or maneuver appellant could have used. (R. pp. 134-200). Further, there was no testimony appellant had any formal training or was an expert in martial arts. In fact, the only testimony was his father, who was a black belt, had taught him some martial arts moves.

manslaughter if they were not given a 4th option of involuntary manslaughter as well. (R. p. 147, ll. 5-12, R. p. 150, ll. 16-22). The Solicitor pointed out to the Court that jury instructions must be based on the evidence in the record and not on defense counsel's strategic concerns about what the jury might or might not do with only three (3) choices. (R. p. 152, ln. 20 - p. 153, ln. 3). Judge Mullen even recessed overnight so she could study the matter further and so counsel could provide her with any authority supporting a charge on involuntary manslaughter. The following day, after receiving authority, reviewing the same, conducting further research, and hearing further argument on the issue, Judge Mullen determined charging involuntary manslaughter on this record would not be appropriate. (R. pp. 148-54). Judge Mullen thereafter instructed the jury on murder, voluntary manslaughter, and self-defense. As previously stated, the jury convicted appellant of murder.

The Lack of Merit of this Issue

Standard of Review

The conduct of a criminal trial is left largely to the discretion of the trial judge, and this Court will not interfere unless the rights of the appellant were prejudiced. State v. Bridges, 278 S.C. 447, 448, 298 S.E.2d 212, 212 (1982). Therefore, this Court reviews errors of law only and is bound by the trial court's factual determinations unless they are clearly erroneous. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). In criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied. State v. Rye, 375 S.C. 119, 123, 651 S.E.2d 321, 323 (2007). If the instructions given to the jury afford the proper test for determining the issues, the

failure to give one side's requested instructions is not prejudicial. State v. Hughey, 339 S. C. 439, 452, 529 S.E.2, 721, 728 (2000).

Jury Charges

"The law to be charged must be determined from the evidence presented at trial." State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 512 (2000). In determining whether the evidence requires a charge of manslaughter, the Court views the facts in the light most favorable to the defendant. State v. Byrd, 323 S.C. 319, 321, 474 S.E.2d 430, 431 (1996). For a court to refuse to charge a jury on manslaughter, there must be no evidence in the record tending to reduce the crime from murder to manslaughter. State v. Dickey, 380 S.C. 384, 669 S.E.2d 917 (Ct. App. 2008). However, "[a]n instruction should not be given unless it is justified by the evidence." State v. Moultrie, 273 S.C. 532, 534, 257 S.E.2d 730, 731 (1979). "Only the law applicable to the case should be charged to the jury." State v. Blurton, 352 S.C. 203, 208, 573 S.E.2d 802, 804 (2002). "If a jury instruction is provided that does not fit the facts of the case, it may confuse the jury." Id. Furthermore, a trial judge must be cautious in charging a lesser included offense. If a trial judge improperly charges the jury on a lesser included offense that is not supported by the facts, and the jury returns a verdict of guilty on the lesser included offense, then upon reversal of the conviction of the lesser included offense, the Double Jeopardy clause prevents retrial of the defendant on the greater offense. *See* Price v. Georgia, 398 U.S. 323 (1970); Gill v. State, 346 S.C. 209, 552 S.E.2d 26 (2001)(discussing fact that prosecution on retrial of greater offense than that for which defendant was convicted would constitute a violation of the Double Jeopardy Clause); Bozeman v. State, 307 S.C. 172, 414 S.E.2d 144 (1992)(finding trial counsel ineffective for falsely informing defendant he could be convicted of murder on retrial if he appealed and

succeeded in vacating his manslaughter conviction). This Court will not reverse the trial court's ruling regarding jury instructions unless the trial court abused its discretion. State v. Williams, 367 S.C. 192, 195, 624 S.E.2d 443, 445 (Ct. App. 2005). When the record contains no evidence to support a lesser included offense, a charge on the lesser included offense should not be given. *See* State v. Smith, 363 S.C. 111, 609 S.E.2d 528 (Ct. App. 2005), *referencing* State v. Cooley, 342 S.C. 63, 67-68, 536 S.E.2d 666, 668-69 (2000).

At trial, there were two (2) versions of what occurred between the appellant and the victim. The State's version was appellant had threatened the victim the night before, had stalked her, and on the date in question, appellant stabbed her one (1) time in the face/neck area with the knife he had in his possession when the victim and her daughter arrived at his sister's residence. Appellant's version was that *the victim* brought the knife to his sister's apartment, tried to stab him with it, and he used a defensive move and blocked the knife thrust resulting in the victim stabbing herself with the knife she always possessed. In the State's version of how the crime occurred, appellant always had the knife and stabbed the victim intentionally with it. In appellant's version of what occurred, the victim always had the knife, and he blocked it while acting in self-defense, and she stabbed herself. As a result, appellant was not entitled to a charge of involuntary manslaughter.

While self-defense and involuntary manslaughter are not mutually exclusive, as Judge Mullen correctly found, the facts of this case did not entitle appellant to an instruction on involuntary manslaughter. According to the State's evidence, appellant was guilty of murder. According to appellant's version of events, appellant was entitled to an acquittal under the theory of self-defense. However, under neither version of events was appellant entitled to an instruction

on involuntary manslaughter.

These facts would not entitle appellant to an instruction on involuntary manslaughter under South Carolina law and only supported murder, voluntary manslaughter, or self-defense. State v. Wharton, 381 S.C. 209, 672 S.E.2d 786 (2009); State v. Reese, 370 S.C. 31, 36, 633 S.E.2d 898, 900-01 (2006), *overruled on other grounds by* State v. Belcher, 385 S.C. 597, 685 S.E2d 802 (2009); State v. Cabrera-Pena, 361 S.C. 372, 381, 605 S.E.2d 522, 526-27 (2004)(finding defendant is not entitled to a charge on involuntary manslaughter where no evidence exists to support the charge). Under South Carolina law, involuntary manslaughter is the killing of another without malice and unintentionally while engaged in either: (1) *an unlawful act* not amounting to a felony and not naturally tending to cause death or great bodily harm; or (2) a lawful act with *reckless disregard* for the safety of others. State v. Smith, 391 S.C. 408, 706 S.E.2d 12 (2011); State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996). There is nothing in the record which would have entitled Appellant to an instruction on involuntary manslaughter because he does not fit in either of these two (2) categories.

First, under the State's version, appellant intentionally stabbed the victim with a knife that he had in his possession when the victim and her daughter arrived at the apartment. State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007)(defendant not entitled to involuntary manslaughter instruction where after altercation with his grandfather he obtained shotgun, returned to his grandparents room and shot them, even though he claimed involuntary intoxication from Zoloft); Cabrera-Pena, 361 S.C. at 381, 605 S.E.2d at 526 (involuntary manslaughter instruction not warranted where accused was "engaged in unlawful, felonious and harmful conduct" at the time

of the incident);[9] State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994)(trial court did not err in refusing to instruct on involuntary manslaughter where defendant wielded knife in an intentional manner, because the intentional use of a dangerous instrumentality does not support the allegation of mere criminal negligence); Bozeman v. State, 307 S.C. 172, 177, 414 S.E.2d 144, 147 (1992)(no evidence of mere criminal negligence in use of a dangerous instrumentality because the defendant intentionally fired his weapon);[10] Gibson v. State, 390 S.C. 347, 701 S.E.2d 766 (Ct. App. 2010), *cert. granted* March 22, 2012 ("the essence of involuntary manslaughter is the involuntary nature of the killing" and because co-defendant admitted he voluntarily and intentionally fired his weapon, the trial court properly denied the instruction on involuntary manslaughter to accomplice defendant); State v. Pickens, 320 S.C. 528, 466 S.E.2d 364 (1996)(holding where defendant admitted he intentionally shot his gun, contending he was acting recklessly but lawfully in self-defense, involuntary manslaughter charge was not warranted); State v. Morris, 307 S.C. 480, 483-84, 415 S.E.2d 819, 821-22 (Ct. App. 1991)(noting that under involuntary manslaughter, the act must be unintentional and defendant intentionally shot his gun though he claimed self-defense); State v. Light, 378 S.C. 641, 664 S.E.2d 465 (2008)(finding defendant had lawfully armed himself in self defense and was entitled

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See also State v. Cooney, 320 S.C. 107, 112, 463 S.E.2d 597, 600 (1995)("no error in refusal to charge involuntary manslaughter when the defendant admitted intentionally firing the gun, but claimed only he meant to shoot over the victim's head"); Harris v. State, 354 S.C. 382, 581 S.E.2d 154 (2003)(PCR Court erred in granting relief because defendant was not entitled to involuntary manslaughter instruction where he admitted he intentionally fired gun, but meant to only fire warning shots); State v. Craig, 267 S.C. 262, 269, 227 S.E.2d 306, 310 (1976) (involuntary manslaughter charge not warranted where defendant intentionally fired his shotgun but claimed he meant to shoot over the victim's head); Douglas v. State, 322 S.C. 67, 74, 504 S.E.2d 307, 310 (1998)(involuntary manslaughter charge not warranted where defendant admitted he intentionally fired gun into a crowd in self-defense despite testimony that defendant had been rushed by a group of people during a fight).

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Under South Carolina law, a deadly weapon is generally defined as any article, instrument, or substance which is likely to produce death or great bodily harm. State v. Davis, 374 S.C. 581, 649 S.E.2d 132 (Ct. App. 2007), *referencing* State v. Bennett, 328 S.C. 251, 262, 493 S.E.2d 845, 850-51 (1997). A knife is a deadly weapon or dangerous instrumentality. State v. Smith, 315 S.C. 647, 446 S.E.2d 411 (1994).

to instruction on involuntary manslaughter where there was evidence the gun *unintentionally* discharged); State v. Brayboy, 387 S.C. at 181-82, 691 S.E.2d at 486 (holding although unlawful to point and present a firearm, when defendant lawfully armed himself in self defense his failure to immediately disarm himself when the threat subsided did not amount to unlawful pointing and presenting a firearm and evidence suggesting gun *accidentally* discharged was sufficient to warrant instruction on involuntary manslaughter). *See also* State v. Tyler, 348 S.C. 526, 560 S.E.2d 888 (2002)("An unintentional killing resulting from an unlawful assault and battery, **not of a character of itself to cause death**, is involuntary manslaughter...") *quoting* State v. Chatman, 336 S.C. 149, 152-53, 519 S.E.2d 100, 101 (1999), *citing* C.J.S. Homicide Section 40 (1991), *other citations omitted* (emphasis added).11 State v. Davis, 374 S.C. 581, 649 S.E.2d 132 (Ct. App. 2007)(defendant was not entitled to a jury instruction on involuntary manslaughter where striking someone in the head with a five-pound sledgehammer would naturally tend to cause death or great bodily injury *and* there was no evidence defendant handled sledgehammer with reckless disregard for the safety of others but *intentionally struck the victim on the head* with the weapon). Under the State's version of what occurred, appellant would not be entitled to an instruction on involuntary manslaughter.

Nor was appellant entitled to an involuntary manslaughter instruction under his version of events. Under appellant's version of events, the victim brought the knife with her to the apartment, she removed the knife from her pocket, she attempted to stab him with the knife, and

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See also Smith v. Padula, 444 F.Supp. 531 (D.S.C. 2006)(habeas corpus petitioner failed to show S.C. Supreme Court unreasonably applied United States Supreme Court precedent in reversing PCR Court's grant of relief on ineffective assistance of counsel for failing to preserve trial judge's refusal to charge involuntary manslaughter where S.C. Supreme Court determined Petitioner was not entitled to involuntary manslaughter instruction under S.C. law).

he blocked her stabbing thrust with his hand, resulting in the victim accidentally stabbing herself in the neck with the knife that was still in her hand.12 Under appellant's version of events, he was not acting recklessly but in self-defense. If the jury believed appellant's version of events, he was entitled to an acquittal but would not have been entitled to be convicted of the offense of involuntary manslaughter.13 As a result, appellant was entitled to an instruction on the absolute defense of self-defense, which he received, but not a jury instruction on involuntary manslaughter.

CONCLUSION

For the above stated reasons, appellant's conviction and sentence must be affirmed.

Respectfully submitted,

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Contrary to Appellant's assertion on appeal, the record reveals there was no struggle over the knife. According to appellant's version of events, the victim always had the knife in her hand and in her complete possession. Appellant simply sidestepped the victim and blocked her stabbing thrust by pushing her arm resulting in the victim stabbing herself. If appellant's version is true, he should not be subject to three (3) years in prison for such lawful and non-reckless conduct. Further, those cases cited by appellant on appeal are not apposite to the facts of this case. Tisdale v. State, 378 S.C.122, 125, 662 S.E.2d 410 (2008) and Casey v. State, 305 S.C. 445, 447, 409 S.E.2d 391 (1991) both involve *the struggle over a firearm* that allegedly accidentally discharged. Further, a case not cited by appellant, State v. Gorey, 235 S.C. 301, 111 S.E.2d 560 (1959), is not apposite or helpful to appellant. In Gorey, the Court found involuntary manslaughter was warranted where the testimony showed the defendant was negligent in voluntarily engaging in a friendly tussle with a friend while he, the defendant, had an open pocket knife in his, the defendant's, hand which ultimately ended up causing the victim's death. Further, Gorey was under the old law in which one could be convicted of involuntary manslaughter based on simple negligence not recklessness. And, in State v. Light, the appellant had taken a gun away from his girlfriend, stumbled backwards with the firearm in his hand, and he claimed it accidentally discharged killing her. The facts of this case are simply not the same.

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Another way to appropriately analyze this issue is to imagine the State had requested an involuntary manslaughter instruction, appellant had objected, the jury was instructed on the same, the jury had returned a verdict of involuntary manslaughter, and appellant had been sentenced to prison. On appeal, appellant would have been entitled to vacation of his conviction of involuntary manslaughter because under his version of what occurred he was acting in complete self-defense and was not acting with recklessness by sidestepping and blocking a knife thrust by the victim resulting in her stabbing herself with her own knife. This appellate ground must be dismissed.

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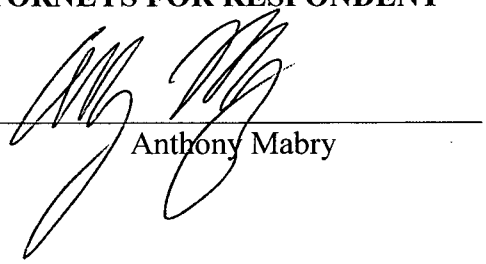
By: 
Anthony Mabry

June 5, 2013

STATE OF SOUTH CAROLINA
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Appeal from Jasper County
The Honorable Carmen T. Mullen, Circuit Court Judge

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THE STATE,

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Appellant.

CERTIFICATE OF COMPLIANCE

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

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June 5, 2013

CERTIFICATE OF SERVICE

I, Anthony Mabry, hereby certify that I have served the ***Final Brief of Respondent*** in the foregoing action by depositing copies in the Interagency Mail to Breen R. Stevens, Appellate Defender, Division of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, SC 29201 this 5th day of June, 2013.

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