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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Greenwood County
Honorable Edward W. Miller, Circuit Court Judge
Appellate Case No. 2021-000643

THE STATE,

Respondent-Petitioner,

vs.

ONTAVIOUS DERENTA PLUMER,

Petitioner-Respondent.

RESPONDENT-PETITIONER'S BRIEF OF RESPONDENT

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Did the Court of Appeals somehow err by affirming the trial judge's decision not to instruct the jury on self-defense when the evidence and testimony presented during trial did not establish any of the required elements of self-defense and, instead, established Plumer unlawfully shot his victim after pulling out a gun and attempting to rob him during the course of a drug transaction?

STATEMENT OF THE CASE

In December of 2015, Petitioner-Respondent Ontavious Derenta Plumer was arrested following an investigation into a shooting that occurred a few months earlier. In July of 2016, the Greenwood County Grand Jury indicted Plumer for attempted murder, armed robbery, and possession of a firearm during the commission of a violent crime. Prior to trial, the solicitor served timely notice on Plumer indicating the State would seek a sentence of life without parole upon conviction based on Plumer's prior conviction for a "most serious" offense. On February 6, 2017, a jury trial was commenced in the Greenwood County Court of General Sessions with the Honorable Edward W. Miller, circuit court judge, presiding. At the conclusion of the three-day trial, the jury convicted Plumer of attempted murder and possession of a firearm during the commission of a violent crime and acquitted him of armed robbery. Following the verdict, the trial judge sentenced Plumer to terms of imprisonment of life without parole for attempted murder and five years for possession of a firearm during the commission of a violent crime. Plumer then timely filed and perfected an appeal.

On appeal, the Court of Appeals issued a published decision that unanimously affirmed Plumer's convictions and vacated Plumer's five-year sentence for the firearm offense. State v. Plumer, 433 S.C. 300, 857 S.E.2d 796 (Ct. App. 2021). Thereafter, both the State and Plumer timely filed petitions for rehearing along with returns. On May 20, 2021, the Court of Appeals denied both petitions. Both the State and Plumer then filed petitions for a writ of certiorari in the Supreme Court, and, on May 17, 2022, the State's petition was granted while Plumer's petition was granted in part.

STATEMENT OF FACTS

On the evening of October 11, 2015, Oshamar Wells, who was making money at that time by selling marijuana, met up with Plumer and another man identified as "Mel" at a pre-arranged location so he could sell them one pound of marijuana, which was worth roughly $3,600.[1] (R. pp. 13-14; p. 18; p. 20; pp. 31-32; pp. 40-41; pp. 72-73). After meeting up with the men, Wells led them to his cousin's residence, which was located on Spring Woods Trail in Greenwood, South Carolina, in order to complete the transaction. (R. pp. 15-16). Once there, they parked their vehicles outside, entered the residence, and began the transaction. (R. pp. 17-20). After doing so, Wells placed a bag containing the agreed-upon pound of marijuana onto the table and waited for the men to produce his payment for it. (R. pp. 18-20; p. 132). However, instead of presenting the money, Plumer suddenly pulled out a gun and began firing it at Wells while "Mel" grabbed the bag of marijuana and fled from the home. (R. pp. 20-21; p. 43; pp. 66-67). In response, Wells quickly turned to retrieve his mother's holstered gun from a nearby cabinet, and, as he was doing so, he was hit by bullets in his back, buttocks, and legs. (R. pp. 20-24; p. 29; p. 44; p. 50; pp. 66-67; p. 70; p. 72; pp. 81-82). Wells then collapsed to the floor, but he was able to fire several shots in Plumer's direction, which caused Plumer to flee from the home so rapidly he left his vehicle's keys behind. (R. pp. 23-24; p. 41; p. 43; pp. 173-174).

Once Plumer was gone, Wells, who was gravely injured, placed a number of phone calls seeking help, including one to his mother. (R. p. 25; p. 74; p. 284). In response, Wells's mother, Wenona Wells ("Mother"), quickly responded to the scene along with several young children in her care. (R. pp. 74-75). Upon arriving, Mother found Wells on the floor in the kitchen, and her

[1] According to Wells, the drug deal was arranged by Christopher Maggiacomo, who also was known as "Jock." (R. p. 33; pp. 71-72). In the past, "Jock" had served as a middleman for Wells, but "Jock" was out of town at the time of the incident. (R. pp. 33-34).

grandson found her gun on the floor nearby. (R. pp. 75-76). After her grandson picked up the gun, Mother took it from him, secured it in her purse to keep it away from the children present, and later transferred it to the trunk of her vehicle. (R. pp. 75-76; p. 78; p. 84). Shortly thereafter, Officer Kerry Cooper of the Greenwood Police Department arrived at the residence and was directed inside to Wells's location. (R. pp. 88-90). At that point, Wells reported to the officer he had been shot by two unknown men who tried to rob him. (R. pp. 91-93; pp. 103-104). Wells was then rapidly transported to the hospital by emergency medical personnel. (R. p. 93).

At the hospital, Dr. Ricky Ladd, a board-certified emergency room physician, provided treatment to Wells, who reported he had been shot during a home invasion. (R. p. 284). During that treatment, Dr. Ladd discovered Wells's femur was broken and Wells had sustained potentially life-threatening gunshot injuries. (R. pp. 284-285; pp. 288-289).

Once Wells's condition had been stabilized, Officer Patrick Durkin of the Greenwood Police Department briefly spoke with Wells at the hospital. (R. pp. 228-229; p. 231; p. 234). During that discussion, Wells reported two unknown men entered the residence and told him to "give it up" before shooting at him. (R. pp. 228-229; p. 231; p. 234).

At the same time Wells was being treated at the hospital, officers and other law enforcement personnel began conducting an investigation into the shooting at the Spring Woods Trail residence. (R. pp. 94-95; pp. 124-125; pp. 178-180; p. 200). As part of that investigation, the officers checked the information connected to the vehicles present at the scene and discovered one of the vehicles was registered to an individual later determined to be Plumer's grandfather. (R. p. 94; p. 119; pp. 125-126; p. 128; p. 175). Additionally, the officers processed the crime scene, which was in disarray, and discovered blood spots, a number of fired and unfired bullets, multiple shell casings, numerous bullet holes, some unpackaged marijuana, a

holster, and several sets of keys, including the keys to Plumer's vehicle. (R. p. 95; p. 98; pp. 101-102; p. 136; pp. 173-174; pp. 202-203; pp. 205-208; p. 210; pp. 216-217; p. 220). Upon making those discoveries, the officers collected and secured the evidence, and a number of those items were subsequently submitted for analysis, including a swab collected from blood located on the ground outside the residence. (R. pp. 165-166; pp. 211-213).

Meanwhile, in the immediate aftermath of the shooting, Plumer, who had been shot in the leg during the incident, ran from the scene and was able to solicit a ride from Sameka Hawes, who was driving through the area in her car. (R. pp. 109-110; pp. 301-303; p. 306). Upon doing so, Plumer initially requested Hawes drive him to the hospital, but he quickly changed his mind and directed her to transport him to "his baby mom's house." (R. p. 303; p. 346). Hawes then drove Plumer to an apartment complex as directed. (R. p. 304). Thereafter, while at the apartment complex, Plumer sought assistance from several of his family members, and his cousin, VanJarvis Martin, ultimately picked him up and drove him to a hospital in Greenville, South Carolina, at his request. (R. p. 335; pp. 366-367). Subsequently, at the hospital, Deputy Andrew Reese of the Greenville County Sheriff's Office made contact with Plumer based on the fact Plumer had sustained a gunshot injury. (R. pp. 107-108; p. 112). During their conversation, Plumer claimed he was shot in the leg by a stranger as he was walking along a roadway in Greenville and was transported to the hospital by a random bystander. (R. pp. 109-110).

On the following morning, Detective Wesley McClinton and Detective William Kay of the Greenwood Police Department went to speak with Wells at the hospital in Greenwood. (R. p. 26; p. 47; pp. 115-116; p. 124; p. 130; p. 166). During the conversation, Wells, who was afraid he would get in trouble if he revealed the truth about being shot during a drug transaction,

falsely claimed two random men came to the residence, tried to rob him, and shot him when he did not have anything for them to steal.[2] (R. p. 27; p. 48; pp. 58-59; p. 117; p. 130).

After speaking with Wells, Detective McClinton went to speak with Plumer's grandfather at his home in Starr, South Carolina, along with Lieutenant Mike Dixon, who was the supervisor of the investigations unit at the Greenwood Police Department. (R. p. 174; p. 176; p. 178). During that conversation, Plumer's grandfather initially claimed his car had been stolen. (R. p. 177; p. 182). However, he eventually acknowledged his car was not actually stolen and, instead, was loaned to Plumer. (R. p. 175; p. 177; p. 182). Plumer's grandfather further admitted he was initially untruthful because his vehicle had been "involved in something." (R. p. 183).

On the following day, Detective McClinton and Detective Kay returned to the hospital to speak with Wells again, and Wells again claimed to have been shot during an attempted robbery. (R. p. 48; pp. 60-61; p. 131; p. 167). However, after being confronted about the implausibility of his account and speaking with a family member, Wells eventually told the truth and revealed he was shot during the course of a drug transaction. (R. p. 27; p. 49; pp. 116-117; pp. 131-132; p. 157). Additionally, Wells revealed he shot at Plumer during the incident, but he consistently indicated he only fired his weapon after Plumer first began shooting. (R. pp. 116-117; p. 133; pp. 148-149; pp. 164-165). Wells also revealed his mother was currently in possession of the gun he used to defend himself, which enabled Detective McClinton to retrieve the gun from Mother a short time later. (R. pp. 78-79; p. 84; pp. 133-134). Furthermore, Detective McClinton

[2] In addition to being involved in a drug transaction, Wells also had prior convictions for possession of marijuana and possession of marijuana with intent to distribute, so he could not lawfully possess a firearm. (R. p. 31; p. 68). Notably, prior to the shooting, Plumer had been convicted of a violent felony. (R. p. 429; p. 444). Therefore, Plumer *also* could not lawfully possess a firearm at the time of the incident. See S.C. Code Ann. § 16-23-500(A) ("It is unlawful for a person who has been convicted of a violent crime, as defined by Section 16-1-60, that is classified as a felony offense, to possess a firearm or ammunition within this State.").

showed a photographic lineup to Wells, and Wells immediately identified Plumer from that lineup as the person who shot him. (R. pp. 27-28; pp. 118-119; pp. 121-122; pp. 132-133).

Thereafter, the investigating officers obtained an arrest warrant for Plumer in connection to the shooting, but they were initially unable to locate him despite searching "quite a few places." (R. p. 183; pp. 345-346). However, a few months later, Plumer was finally apprehended and arrested. (R. p. 184). Following his arrest, Plumer was brought before a judge for a bond hearing, and, during the hearing, Plumer acknowledged he was present at the scene of the shooting while asserting he had also been shot. (R. pp. 184-185; p. 195). Furthermore, a sample of Plumer's DNA was collected for comparative purposes, and, upon analysis, Plumer's DNA profile was conclusively matched to the DNA profile developed from the blood recovered at the crime scene. (R. pp. 213-214; pp. 271-276).

Subsequently, Plumer was indicted for attempted murder, armed robbery, and possession of a firearm during the commission of a violent crime, and he elected to proceed forward to trial. (R. pp. 3-4; pp. 438-443). During the course of trial, the officers and other witnesses who responded after the shooting testified about the events that followed it and the ensuing investigation that culminated in Plumer's arrest. (R. pp. 74-75; pp. 87-88; pp. 115-116; pp. 124-125; pp. 178-179; p. 184; p. 200; pp. 228-229; pp. 252-254; pp. 270-271). Likewise, Dr. Ladd testified about Wells's injuries after the shooting, and, during his testimony, he indicated Wells "more than likely" fell when he was shot and would not have been able to bear weight on his leg after his femur was broken. (R. p. 289; p. 291; p. 297). However, he specifically noted he had no idea which of Wells's injuries was caused first or last. (R. p. 297).

Furthermore, regarding the shooting itself, Wells consistently and unwaveringly testified Plumer produced a gun during the course of the drug transaction and shot him when he reached

for his own gun, which was stored nearby for defensive purposes, solely to defend himself from Plumer's actions. (R. pp. 20-21; p. 25; pp. 43-44; p. 50; pp. 66-67; pp. 70-71). Similarly, the officers who spoke with Wells after the shooting testified about his various out-of-court accounts of the incident, and, in those accounts, Wells never indicated he reached for his own weapon at any point before Plumer and his confederate either attempted to rob him or pulled out a gun. (R. p. 103; pp. 116-117; p. 130; p. 132; pp. 148-149; pp. 164-165; p. 232).

Beyond that testimony and evidence, Plumer elected *not* to testify during trial and, thus, did not personally offer an alternative version of events that could have supported a conclusion he acted in self-defense during the incident. (R. p. 365). However, testimony was presented establishing Plumer made claims at different times after the shooting he either was shot by a stranger while walking along a roadway in an entirely different city or was present at the time of the incident and was *also* shot during it. (R. pp. 108-110; p. 195). Notably, in neither of those accounts did Plumer assert he acted in self-defense. (R. pp. 108-110; p. 195).

At the conclusion of the evidentiary phase of trial, the trial judge asked the parties if they had any requests for jury instructions, and defense counsel responded by requesting a charge on self-defense based on the fact Plumer "may have been shot at [the] incident location." (R. p. 369; pp. 371-372). However, the solicitor noted nothing had been presented during trial to establish Plumer acted in self-defense, and the trial judge indicated he agreed. (R. p. 372). In response, defense counsel alleged "a good bit of evidence" had been presented establishing Plumer was not the individual who fired the first shots, and the trial judge asked defense counsel to identify the specific evidence supporting that particular contention while noting the only evidence of how the shooting occurred had come from Wells. (R. p. 372). At that point, defense counsel incorrectly claimed Dr. Ladd testified Wells would not have been able to shoot when his

femur was broken, and both the trial judge and the solicitor immediately responded Dr. Ladd had not, in fact, testified in that fashion. (R. p. 372). The trial judge then denied defense counsel's request for a self-defense instruction after having been presented with nothing to justify such a charge. (R. p. 373).

Subsequently, the trial judge instructed the jury on the applicable law. (R. pp. 410-420). In doing so, the trial judge—consistent with his earlier ruling—did not present a jury instruction on self-defense. (R. pp. 410-420). Once the trial judge finished his jury instructions, the case was submitted to the jury, and, after just over two hours of deliberations, the jury convicted Plumer solely of attempted murder and the firearm charge. (R. p. 420; pp. 425-426). The trial judge then sentenced Plumer to an aggregate sentence of life without parole as required. (R. pp. 429-430).

Following that, Plumer appealed while raising four distinct issues, including one concerning the trial judge's decision not to instruct the jury on self-defense. (App. Br. p. 1; pp. 9-12). On appeal, the Court of Appeals affirmed Plumer's convictions. State v. Plumer, 433 S.C. 300, 304, 857 S.E.2d 796, 797 (Ct. App. 2021). In doing so, the Court of Appeals found the trial judge committed no error by declining to instruct the jury on self-defense "because the record contain[ed] no evidence that Plumer was without fault for bringing on the difficulty." Id. at 310, 857 S.E.2d at 801.

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). On appeal, an appellate court reviewing a trial judge's jury charge must view the charge as a whole and in light of the evidence and issues from trial. State v. Simmons, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009); see Todd v. State, 355 S.C. 396, 402, 585 S.E.2d 305, 308 (2003) ("[J]ury charges should be examined in their entirety and not in isolation[.]"). Significantly, the appellate court will only reverse a trial judge's decision regarding jury instructions when that decision constituted a prejudicial abuse of discretion. See Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000) ("An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion."). Meanwhile, if the jury instructions presented were substantially correct and covered the applicable law, the trial judge's decision will not be reversed on appeal. See State v. Ezell, 321 S.C. 421, 425, 468 S.E.2d 679, 681 (Ct. App. 1996) ("A jury charge which is substantially correct and covers the law does not require reversal."); see also State v. Rye, 375 S.C. 119, 123, 651 S.E.2d 321, 323 (2007) ("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.").

ARGUMENT

The Court of Appeals correctly affirmed the trial judge's decision not to instruct the jury on self-defense because the evidence and testimony presented during trial did not establish any of the required elements of self-defense and, instead, established Plumer unlawfully shot his victim after pulling out a gun and attempting to rob him during the course of a drug transaction.

Plumer contends the Court of Appeals erroneously affirmed the trial judge's decision not to instruct to the jury on self-defense. In support of that contention, Plumer maintains the evidence and testimony presented during trial warranted such a jury instruction, and he points to a variety of things he alleges support an inference his victim—Wells—first produced a gun during the incident. To the contrary, the testimony and evidence presented during trial established Plumer attempted to rob Wells at gunpoint during the course of a drug transaction and unlawfully shot him when Wells turned to retrieve his own gun to protect himself, and Plumer neither testified in his own defense nor offered anything else to established an alternative versions of events occurred in which he lawfully acted in self-defense. Therefore, because no testimony or evidence was presented to establish the required elements of self-defense, the trial judge properly declined to instruct the jury on self-defense, and the Court of Appeals correctly affirmed that ruling on appeal. Plumer's convictions should be affirmed.

In South Carolina, four elements must be present in order for the defense of self-defense to be established. State v. Bryant, 336 S.C. 340, 344, 520 S.E.2d 319, 321 (1999). Specifically, the required elements of self-defense are: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must either have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury or have actually been in imminent danger; (3) if the defense is based on the belief of imminent danger, the belief must have been the same as one that would have been entertained by a reasonably prudent person of ordinary firmness and

courage in the same situation; if the defendant was in actual imminent danger, the circumstances must have been such that would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to prevent serious bodily injury or loss of life; and (4) there was no other probable manner of avoiding the danger than to act as the defendant did in the situation. State v. Goodson, 312 S.C. 278, 280, 440 S.E.2d 370, 372 (1994). Critically, it is axiomatic all four elements of self-defense must be established in order for that defense to apply. State v. Bixby, 388 S.C. 528, 554, 698 S.E.2d 572, 586 (2010).

When determining whether the issue of self-defense should be submitted to the jury, the trial judge must look to the evidence actually introduced during trial because "[t]he law to be charged to the jury is determined by the evidence presented at trial." Goodson, 312 S.C. at 280, 440 S.E.2d at 372. If any evidence of self-defense is presented, the trial judge should instruct the jury on self-defense when asked to do so. State v. Hill, 315 S.C. 260, 261, 433 S.E.2d 848, 849 (1993); see Stone v. State, 294 S.C. 286, 287, 363 S.E.2d 903, 904 (1988) ("Upon request, a defendant is entitled to a jury instruction on self-defense *if he has produced evidence tending to show the four elements of that defense*." (emphasis added)). Conversely, if no evidence is presented to support the issue of self-defense, the trial judge should *not* present a self-defense instruction to the jury. State v. Slater, 373 S.C. 66, 69, 644 S.E.2d 50, 52 (2007).

In the case sub judice, the testimony and evidence presented during trial did not establish all the required elements of self-defense. Specifically, regarding the first element, both Wells's trial testimony and the testimony regarding Wells's out-of-court accounts of the shooting established Plumer pulled out a firearm during the course of an attempt to rob Wells, and no testimony was presented to establish a contrary version of events in which Plumer was not the person responsible for the gunfight that ensued. And, perhaps even more importantly, the

testimony presented during trial *indisputably* established Plumer intentionally brought a loaded, concealed, and illegally-possessed firearm to a prearranged drug transaction. Under those circumstances, the evidence and testimony presented only supported a conclusion Plumer brought about the difficulty that transpired, which meant Plumer could not validly raise a claim of self-defense. Cf. State v. Williams, 427 S.C. 246, 254, 830 S.E.2d 904, 908 (2019)[3] ("Williams' actions proximately caused the difficulty as a matter of established law because his act of *taking a loaded, unlawfully-possessed pistol into an illegal drug transaction* was not 'merely incidental' to the act of arming himself in self-defense." (emphasis added and footnote omitted)); State v. Santiago, 370 S.C. 153, 160, 634 S.E.2d 23, 27 (Ct. App. 2006) (finding a self-defense jury instruction was not warranted where the evidence presented did not support a finding Santiago was without fault for bringing about the difficulty). Furthermore, due to the absence of any testimony from Plumer regarding his account of the shooting, there was no evidence or testimony presented establishing Plumer shot Wells in order to defend himself from imminent danger of losing his life or sustaining serious bodily injury. See Williams, 427 S.C. at 249, 830 S.E.2d at 906 (instructing South Carolina law on self-defense "places the burden on the defendant to produce some evidence to support the existence of each element"); see also State v. Soukup, 656 N.W.2d 424, 432 (Minn. Ct. App. 2003) ("[Soukup] did not testify, nor did he present other witnesses on his behalf. Though a defendant may still raise self-defense without testifying, the lack of testimony makes it difficult for a defendant to meet the burden of production necessary to go forward with a claim of self-defense." (citations omitted)); State v. Stephani, 369 N.W.2d 540, 546 (Minn. Ct. App. 1985) ("A defendant claiming self-defense is

[3] Tellingly, Plumer never at any point in his brief discusses, attempts to distinguish, or even acknowledges the existence of this Court's decision in Williams even though he does not appear to be disputing the fact he knowingly and intentionally brought a loaded firearm with him to a drug transactions that—predictably—ended in gunfire. (Pet.-Resp.'s Pet. Br. pp. 1-14)

hampered to some extent if he does not testify."); State v. Bruno, 322 S.C. 534, 536, 473 S.E.2d 450, 452 (1996) ("Bruno was not entitled to a self-defense charge, because he presented no evidence that he believed he was in imminent danger of losing his life or sustaining serious bodily injury."). Because no testimony or evidence was presented that established those required elements of self-defense, Plumer was simply not entitled to a jury instruction on that defense. See Goodson, 312 S.C. at 280, 440 S.E.2d at 372 (finding the trial judge committed no error by declining to instruct the jury on self-defense where no evidence was presented establishing several of the required elements of self-defense).

In arguing to the contrary, Plumer first contends a charge on self-defense was supported by the fact Wells had a gun nearby at the time of the drug transaction and was willing to use it. However, Wells's act of keeping a holstered gun in close proximity for defensive purposes in no way constituted evidence *Plumer* was acting in self-defense at the time he shot Wells as individuals can unquestionably arm themselves for protection. See, e.g., State v. Burriss, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999) (recognizing "a person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting").

Additionally, Plumer maintains a charge on self-defense was warranted because some testimony, including the testimony establishing Wells would have fallen when his femur was broken, could have supported a conclusion Wells reached for his gun before he was shot. Importantly though, the testimony presented during trial only established Wells reached for his gun *after* Plumer pulled out his own gun and tried to rob him. In light of that testimony, Wells's act of reaching for his gun—even if it occurred before he was actually shot—could not have justified Plumer shooting Wells in self-defense since Wells was only responding to an unlawful

provocation from Plumer when he reached for his own weapon. See Bryant, 336 S.C. at 345, 520 S.E.2d at 322 (explaining an individual who provokes or initiates an assault cannot escape criminal liability by invoking self-defense); cf. Santiago, 370 S.C. at 160, 634 S.E.2d at 27 ("Even assuming, as Santiago testified, that [the victim] reached for the gun while in Santiago's hands, he did so after Santiago brought about the difficulty by removing the shotgun from the trunk and aiming it at [him].").

Next, Plumer contends a charge on self-defense was warranted because Wells allegedly conspired to hide the gun he used during the incident with Mother. However, notwithstanding the fact no testimony was actually presented to establish Wells conspired with his mother for any purpose, Wells's actions after the shooting—even if they were designed to conceal or minimize his own criminal responsibility—simply did not constitute evidence of Plumer's actions during the shooting and could not have justified a charge on an otherwise unsupported theory of self-defense. See Barber v. State, 393 S.C. 232, 236, 712 S.E.2d 436, 438-439 (2011) (recognizing speculation based on the possibility "the jury may believe some of the evidence and disbelieve other evidence" is not sufficient to warrant a jury instruction); State v. Funchess, 267 S.C. 427, 430, 229 S.E.2d 331, 332 (1976) (explaining the presence of evidence "determines whether [an issue] should be submitted to the jury and the 'mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice' " (citation omitted)).

Furthermore, Plumer maintains self-defense should have been charged because there was evidence establishing he retreated at some point. While unquestionable the evidence established Plumer fled after the shooting, the fact Plumer fled did not establish he attempted to retreat *before* shooting Wells or otherwise acted in self-defense *before* taking flight. See, e.g., Santiago, 370 S.C. at 161, 634 S.E.2d at 27 ("If the defendant provokes or initiates the assault, he cannot

invoke self-defense; however, he may restore his right to self-defense *if he withdraws from the conflict and communicates that decision to his adversary*." (emphasis added)). Therefore, the evidence of Plumer's escape from the area after the shooting did not constitute evidence of any of the required elements of self-defense [4] See Bryant, 336 S.C. at 345, 520 S.E.2d at 322 ("A robber, who is met with such violent resistance by his victim that he has no opportunity to convince the victim that he has abandoned his criminal intentions and only wants to withdraw, may not claim self defense if he injures or kills his victim." (citations, brackets, and internal quotations omitted)).

Finally, Plumer maintains his acquittal for the armed robbery charge somehow warranted a jury instruction on self-defense. Critically though, the jury's verdict on the armed robbery charge neither was evidence of anything for the jury to consider nor converted the actual evidence presented during trial into evidence of self-defense when it otherwise was not such evidence.[5] See State v. Desirey, 909 S.W.2d 20, 31 (Tenn. Crim. App. 1995) ("An acquittal is

[4] In fact, Plumer's actions in fleeing to another county after the shooting and then lying to a law enforcement about how he had been shot were actions strikingly *inconsistent* with him having actually acted in self-defense during the incident. See People v. Hernandez, 247 P.3d 167, 177 (Cal. 2011) ("Defendant's flight from the scene was . . . inconsistent with self-defense."); State v. Tassin, 129 So. 3d 1235, 1248 (La. Ct. App. 2013) (explaining the defendant's acts of failing to report the shooting after it occurred and fleeing from the scene were inconsistent with a claim of self-defense); see also Jenkins v. Anderson, 447 U.S. 231, 240-241 (1980) (determining it was not unconstitutional for Jenkins, who claimed during trial he had acted in self-defense, to be impeached with evidence establishing he remained silent about fatally stabbing his victim for the roughly two-week period that elapsed between the killing and his arrest).

[5] Beyond that, the jury's verdict on the armed robbery charge did not—as Plumer seems to believe—establish he was factually innocent of that charge or even establish the jury necessarily believed he was factually innocent when rendering its verdict. See United States v. Watts, 519 U.S. 148, 156-157 (1997) (recognizing a verdict of acquittal does *not* mean a defendant is actually innocent of a charged offense); Lewis v. Frick, 233 U.S. 291, 302 (1914) ("[T]he acquittal under the indictment was not equivalent to an affirmative finding of innocence, but merely to an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused."); see also Butler v. State, 435 S.C. 96, 98, n. 2, 866 S.E.2d 347, 349, n.

normally not considered for evidentiary purposes to equate with factual innocence, only with the existence of a reasonable doubt."); cf. State v. Minor, 171 S.C. 120, __, 171 S.E. 737, 737 (1933) ("The fact that [Minor] was acquitted on [one] charge does not now make the evidence incompetent, and cannot result in a reversal of her conviction on the other charge of having in possession."). Therefore, the jury's verdict, which was not and could not have been evidence in Plumer's case, did not establish Plumer was entitled to a jury instruction on self-defense. See State v. Gaines, 380 S.C. 23, 31, 667 S.E.2d 728, 732 (2008) ("The law to be charged to the jury is determined by *the evidence presented at trial*." (emphasis added)).

Accordingly, because none of the evidence and testimony presented during trial supported a conclusion Plumer was acting in self-defense at the time he shot Wells, a self-defense instruction was not warranted in Plumer's case. See Slater, 373 S.C. at 69, 644 S.E.2d at 52 ("A self-defense charge is not required unless it is supported by the evidence."); cf. Brunson v. State, 744 S.E.2d 695, 697 (Ga. 2013) (affirming the trial judge's decision to refuse a request for a jury instruction on self-defense in a case in which the defendant "did not testify, his custodial statement was not admitted into evidence, and the only evidence of his version of events was his statement that he 'didn't shoot anyone,' which is inconsistent with a justification defense"); Hunter v. State, 642 S.E.2d 668, 670 (Ga. 2007) (concluding a self-defense jury instruction was not warranted in a case in which the defendant "did not testify, no custodial statement of his was admitted into evidence, and no other evidence was placed before the jury containing any version of events from his own perspective"); Stephani, 369 N.W.2d at 546-547

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2 (2021) (recognizing there are many reasons a jury may acquit a criminal defendant); cf. United States v. Sweig, 454 F.2d 181, 184 (2d Cir. 1972) ("Acquittal does not have the effect of conclusively establishing the untruth of all the evidence introduced against the defendant. For all that appears in the record of the present case, the jury may have believed all such evidence to be true, but have found that some essential element of the charge was not proved.").

("In sum, there was no evidence to contradict [the victim's] version of the struggle and to support [Stephani]'s theory of self-defense. Without such evidence the trial court properly refused to submit a self-defense instruction to the jury."). As a result, the trial judge committed no error by declining to instruct the jury on a legal theory wholly unsupported by any of the evidence and testimony presented during trial, and the Court of Appeals correctly affirmed the trial judge's ruling on appeal.[6] See Bryant, 336 S.C. at 345-346, 520 S.E.2d at 322 ("[Bryant]'s statements fail to establish the elements of self-defense entitling [Bryant] to a self-defense charge. . . . Accordingly, [Bryant] was not entitled to a self-defense charge and the trial judge correctly refused the charge."). Plumer's convictions should be affirmed.

[6] In seeking a reversal of his convictions on certiorari, Plumer—while noting the Court of Appeals cited to an earlier decision of this Court indicating four *elements* have to be present in order for self-defense to be established in our state—maintains the Court of Appeals erred by purportedly improperly analyzing the matter and shifting the burden to him to prove self-defense. (Pet.-Resp.'s Pet. Br. pp. 10-11). Significantly though, since the elements of self-defense are critically important to any analysis of a self-defense issue, it is wholly unclear how the Court of Appeals could have shifted the burden of proof to Plumer merely by identifying and acknowledging those elements. See State v. Wiggins, 330 S.C. 538, 545, 500 S.E.2d 489, 493 (1998) (stating "self-defense is comprised of four *elements*" (emphasis added)). Beyond that, the Court of Appeals—in resolving Plumer's appeal—expressly recognized and stated a jury instruction on self-defense must be given "*[i]f* there is any evidence in the record from which it could reasonably be inferred that the defendant acted in self-defense[.]" Plumer, 433 S.C. at 309, 857 S.E.2d at 800 (emphasis added and citation and internal quotations omitted). Under such circumstances, it is clear the Court of Appeals understood and applied the correct non-burden-shifting analysis for evaluating whether a self-defense instruction should have been presented. Cf. State v. Day, 341 S.C. 410, 416-417, 535 S.E.2d 431, 434 (2000) ("If there is any evidence in the record from which it could reasonably be inferred that the defendant acted in self-defense, the defendant is entitled to instructions on the defense, and the trial judge's refusal to do so is reversible error." (citation and internal quotations omitted)). Thus, the Court of Appeals, which only affirmed the trial judge's ruling declining to instruct the jury on self-defense after finding *there was no evidence in the record* from which the jury could have inferred Plumer was acting in self-defense, faithfully adhered to South Carolina law in addressing the self-defense issue on appeal and did not impose any improper requirements or burdens upon Plumer when doing so. See Williams, 427 S.C. at 249, 830 S.E.2d at 905-906 ("If there is no evidence to support the existence of any one element, the trial court must not charge self-defense to the jury.").

CONCLUSION

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

Respectfully submitted,

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