

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Nicholas Benjamin Chhith-Berry, Appellant.

Appellate Case No. 2019-000352

Appeal From Lexington County
Eugene C. Griffith, Jr., Circuit Court Judge

Opinion No. 5943
Heard February 17, 2022 – Filed August 31, 2022

AFFIRMED

Appellate Defender Susan Barber Hackett, of Columbia,
for Appellant.

Attorney General Alan McCrory Wilson, Deputy
Attorney General Donald J. Zelenka, Senior Assistant
Deputy Attorney General Melody Jane Brown, and
Senior Assistant Attorney General J. Anthony Mabry, all
of Columbia; and Solicitor Samuel R. Hubbard, III, of
Lexington, all for Respondent.

KONDUROS, J.: Nicholas Benjamin Chhith-Berry appeals his convictions for murder and possession of a weapon during the commission of a violent crime.

Chhith-Berry contends the trial court erred by (1) denying him immunity from prosecution pursuant to the Protection of Persons and Property Act; (2) prohibiting a witness from testifying about the details of the deceased shooting two people four months prior to his death; (3) refusing to give an imperfect defense jury instruction; and (4) failing to grant his motion for a mistrial due to premature jury deliberations. We affirm.

FACTS

On May 11, 2014, Adam Berry drove his girlfriend Kayla Bass and his brother Nicholas Chhith-Berry to Kathy Polk's residence in South Congaree to pick up Bass's child. When they arrived, Jamie Galloway, Polk's son and the father of Bass's child, confronted Berry about driving while intoxicated with his child in the car. According to Chhith-Berry, Galloway spit in Berry's face. Chhith-Berry exited the vehicle and told Galloway to stop disrespecting his brother. Galloway responded by punching Chhith-Berry in the face, which knocked Chhith-Berry to the ground. After Chhith-Berry got up, he pulled a knife out of his pocket and moved towards Galloway. According to Polk, she got between Galloway and Chhith-Berry and told Chhith-Berry to put the knife away. Chhith-Berry put the knife away, got back into Berry's vehicle, and left with Berry, Bass, and Bass's child.

Later that day, Berry, Bass, and Chhith-Berry took Bass's child to Bass's mother's house. After hearing about the altercation with Galloway, Bass's mother, Tonya Griffin, told the group that if they felt something was wrong they should call the police and let them handle it. According to Griffin, Chhith-Berry replied "there's no reason to call the law. The next time I see the mother[]fucker, the mother[]fucker[i]s go[ing to] be dead. He won't be breathing." Chhith-Berry also began messaging his friends asking for a burner¹ and .22 rounds. In some of the messages, Chhith-Berry stated he had to take care of a problem and specifically referenced Galloway punching him.

About a week later, Berry, Bass, and Chhith-Berry returned to Polk's house to drop off Bass's child. According to Polk, she apologized for the way Galloway acted.

¹ A burner is an item, typically a weapon or phone, that cannot be traced back to the user.

Polk recalled that Chhith-Berry responded, "I'm not worried about it. I['ve] got [Galloway]."

On May 19, 2014, Berry, Bass, and Chhith-Berry picked up Kaysha Fontenot² and went to her residence in the Pine Ridge area of Lexington County. The four began socializing and drinking alcohol. Later, the mother of Berry's children, Haley Stone,³ arrived at Fontenot's house but remained sober. Fontenot also invited Galloway over without telling him the others were there.

Katie Leavitt, who described Galloway as a "good friend," drove Galloway to Fontenot's house. Leavitt parked in the driveway and remained in the car while Galloway walked up to Fontenot's house. Galloway briefly entered Fontenot's house then walked back outside. Fontenot followed Galloway out of her house, and the two tried to have a conversation in the driveway; however, Bass interrupted and physically confronted Galloway. After Berry separated Bass from Galloway and Fontenot, Bass began verbally harassing Leavitt. Eventually, Leavitt exited her car and began fighting Bass; Fontenot then began fighting Leavitt. When the fight ended, Leavitt got into her car and drove away.

Galloway became angry with Bass because she caused Leavitt to leave, and Bass physically confronted Galloway again. Galloway asked Berry to intervene, but Berry declined to do so. Galloway eventually pushed Bass away from him, which caused her to fall to the ground. Berry then confronted Galloway, and Galloway responded by punching Berry in the face. Berry retaliated and the two exchanged a couple of punches each while wrestling their way onto Fontenot's porch.

Eventually, Galloway got on top of Berry in the corner of Fontenot's porch, and the two continued to exchange blows. While Galloway was on top of Berry, Chhith-Berry took his knife out of his pocket and stabbed Galloway. Fontenot called 911 and performed CPR on Galloway, but he bled to death. An autopsy revealed Galloway sustained twenty-five stab wounds from an object with a sharp edge: twenty-one to his back, two to the back of his head, one just below his right ear, and one to the front of his upper left arm.

² Fontenot also had a child with Galloway.

³ To clarify, Galloway had children with Bass and Fontenot, Berry was dating Bass and had children with Stone, and Chhith-Berry was Berry's brother.

Berry and Chhith-Berry got into Berry's vehicle and attempted to leave Fontenot's house, but a patrol officer for Pine Ridge responding to Fontenot's 911 call arrived and prevented Berry and Chhith-Berry from leaving. The officer exited his vehicle, drew his gun, and ordered Berry and Chhith-Berry to get out of the vehicle and lay face down in front of it. Berry complied immediately, but Chhith-Berry told the officer to "go ahead and shoot [me]" before he complied with the officer's orders. The officer then placed Berry and Chhith-Berry in handcuffs, and paramedics treated them at Fontenot's residence.

One paramedic noted Chhith-Berry had "dried blood covering [his] face, neck, arms, lower legs[,] and clothes"; however, the only wounds he located on Chhith-Berry were two lacerations at the base of his little fingers. Chhith-Berry initially told paramedics he was sober before he admitted that he had consumed five shots, a few liquor drinks, marijuana, and "a bar-and-a-half" of Xanax. Chhith-Berry also initially stated he did not know how his fingers had been cut before he claimed he sustained the injuries defending himself and Berry from a knife attack by Galloway. Officers read Chhith-Berry his *Miranda*⁴ rights and transported him to Lexington County Medical Center for further medical treatment. Unsolicited, Chhith-Berry told the officer detaining him that Galloway was fighting Berry and he was defending his brother.

Once investigators arrived at the hospital, they reread Chhith-Berry his *Miranda* rights and recorded their conversation. Chhith-Berry's story had several inconsistencies and changed several times. Investigators stopped the interview and went to talk to Berry; when they returned to Chhith-Berry's room, they woke him up and resumed questioning him. Chhith-Berry continued to change his story and contradict himself and other witnesses' accounts of events at both Polk's residence and Fontenot's residence. After interviewing Berry again, officers placed Chhith-Berry under arrest for murder and transported him to Lexington County Detention Center.

While in jail, Chhith-Berry called his mother and spoke to her and Berry. During the recorded phone call, Chhith-Berry said he was not going to "watch[his] brother get his ass kicked," expressed his dislike for Galloway for "think[ing] he was all hard and shit," bragged that he "fucked that boy up," and stated that he believed Galloway deserved to be dead. Berry told Chhith-Berry that he did not need to

⁴ *Miranda v. Arizona*, 384 U.S. 436 (1966).

stab Galloway and that "it didn't need to go that far." In November 2014, a grand jury indicted Chhith-Berry for murder and possession of a weapon during the commission of a violent crime; his jury trial began on December 12, 2016.⁵

At a pretrial hearing, Chhith-Berry moved for immunity from prosecution pursuant to section 16-11-440(C) of the South Carolina Code (2015).⁶ During his immunity hearing, Chhith-Berry testified that he was scared when Galloway arrived at Fontenot's residence because he was much smaller than Galloway,⁷ and Galloway had previously beaten him up at Polk's residence. Chhith-Berry also testified he feared Galloway because he knew Galloway was out on bond for two attempted murder charges for shooting two people. Chhith-Berry claimed Galloway liked to brag about his charges and told Chhith-Berry he "just wanted to shoot someone."

Regarding the night Galloway died, Chhith-Berry recalled that Galloway took his shirt off and began hitting Berry after the fight between the girls ended, but he could not recall what instigated the fight between Galloway and Berry. Chhith-Berry testified that he believed Berry was in danger of losing his life or sustaining great bodily injury because Berry's face was bleeding, Galloway continued to hit Berry, and Berry was "trapped on the porch." Chhith-Berry admitted he stabbed Galloway once in the shoulder blade with his knife to defend Berry and stated Galloway collapsed to the side, which allowed Berry to stand up.

⁵ Berry was unavailable to testify because one of Galloway's friends murdered him.

⁶ That portion of the Protection of Persons and Property Act states the following:

A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be . . . has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person

§ 16-11-440(C).

⁷ At the time of Galloway's death in 2014, Chhith-Berry estimated he was five feet and three inches tall and weighed 115 pounds. Chhith-Berry estimated Galloway was "probably close to 200 pounds, if not more," and "basically double [his] size." Galloway's autopsy indicated he was five feet and seven-and-a-half inches tall and weighed about 170 pounds.

Chhith-Berry explained his memory of what happened after he stabbed Galloway was "just kind of a blur." Chhith-Berry recalled that Galloway stopped fighting but also testified Galloway was still moving and could have gotten up to fight. Chhith-Berry also stated Berry hit Galloway when he stood up but could not remember whether Berry stabbed Galloway. Chhith-Berry could not account for the other twenty-four stab wounds.

After hearing Chhith-Berry's testimony, which was the only evidence presented at the immunity hearing, the trial court denied his motion for immunity.⁸ The trial court ruled that Chhith-Berry did not prove "by a preponderance of the evidence that he needed to continue to defend his brother . . . [because] he was consistently not clear about what happened [after] the first blow" The trial court elaborated the "unclear picture" after Chhith-Berry's initial blow to Galloway "ma[d]e[] it a factual question."

Chhith-Berry argued it was irrelevant whether he was responsible for all the stab wounds and asserted "the question is[,] . . . when he struck that first blow[,] whether he was acting in accordance with the protections of the statute" Chhith-Berry maintained "the fact that he has no memory of what happened [after the first blow] should not affect whether or not he had the right to intervene and strike the . . . blow he did and he admits to striking." The trial court disagreed, reiterating that section 16-11-440(C) required Chhith-Berry "to prove more past the initial blow" and it had "not heard anything about what happened after that."

The State then moved in limine to exclude testimony about the facts that led to Galloway's two attempted murder charges. The State argued the testimony was not relevant unless Chhith-Berry testified about his own knowledge of the charges. Chhith-Berry asserted the testimony was relevant because it affected whether his fear of death or great bodily injury was reasonable and proffered testimony from Leavitt and Fontenot that they were aware Galloway had been charged with two counts of attempted murder. The trial court ruled the testimony was inadmissible because Leavitt also testified she was not aware of Galloway's reputation for violence and neither Leavitt nor Fontenot witnessed the incident that led Galloway's charges.

⁸ Chhith-Berry renewed his motion for immunity at the directed verdict stage and posttrial; the trial court properly denied both.

During the State's case-in-chief, the bailiff told the trial court that the jury had been participating in premature deliberations. The trial court gave the following instruction to the jury:

Now this is important. We're still taking testimony, we're still hearing evidence. You-all are not allowed to discuss the case in any fashion among one another[,] even on breaks. I kind of caught wind of that. I don't know what was being discussed, but you can't do it because there's more witnesses coming, we don't have all the parts it takes to decide on whether it's the case or not, there's more to it. But it's important, it's part of your oath. You need to follow the instructions of the [c]ourt and my instructions are to not discuss the case until you get all of the testimony, all the evidence in the record and my instructions on the law because I haven't told you what the law is; that the law says this, this and this. I haven't given it to you yet, and that's important. So don't discuss the case. You can talk about the weather, you can talk about [the bailiff], you can talk about him, whatever you like, but not about the case.

The trial court then excused the jury for lunch. The record indicates Chhith-Berry did not object to the instruction or move for a mistrial. At the conclusion of the State's case-in-chief, Chhith-Berry moved for a directed verdict and renewed several motions that the trial court had previously denied, none of which were a motion for a mistrial.

After the trial court denied Chhith-Berry's motions, the State stated that it believed Chhith-Berry was going to call witnesses to testify about the facts that led to Galloway's attempted murder charges. The State maintained those facts were not admissible because Chhith-Berry was not aware of them and they did not correlate to the facts that led to Chhith-Berry's trial. Chhith-Berry admitted he planned to call one of the individuals Galloway shot, Orville Edwards, to testify about the facts that led to Galloway's attempted murder charges. Chhith-Berry maintained Edwards's testimony was admissible because he had firsthand knowledge of a specific instance of conduct that led to Galloway's reputation as a violent

individual. The State emphasized Galloway was never convicted and informed the trial court it had a witness that would contradict Edward's testimony.

The trial court indicated it did not "want to try two cases to just get one done" but allowed Chhith-Berry to proffer Orville Edwards's testimony. Edwards testified he was working at a Columbia bar in January 2014 when an upset young woman came in and said her boyfriend had beaten her up in the parking lot. Edwards and two other men went outside and told Galloway he needed to leave or they would call the police. Galloway initially left but shortly returned, and Edwards went back outside with the two other men to confront Galloway. As Edwards approached Galloway, someone yelled "he's got a gun." Edwards stated he and the two other men grabbed Galloway and tried to wrestle him to the ground in order to get the gun. However, Edwards was inconsistent on whether he struck Galloway and whether Galloway was ever wrestled to the ground. Edwards testified that Galloway shot him in the leg, his friend in the chest, and fired several more rounds into a crowd that had been watching. Galloway then got in his car and sped away.

The trial court expressed concern that Edwards's testimony would "confuse the jury." The trial court noted that it had already admitted evidence that Galloway was out on bond for two counts of attempted murder and was wearing an ankle monitor at the time of his death, Galloway "had a propensity to not be one to fight with," and Galloway had previously struck Chhith-Berry. The trial court explained the specific facts that led to Galloway's attempted murder charges could confuse the jury by getting into factual issues in a separate case. The trial court also determined the facts of Galloway's attempted murder charges were too far attenuated from his death to be admissible. However, the trial court stated it would not "restrict [Chhith-Berry] from calling a witness [to] say[Galloway] had pending charges."

During Chhith-Berry's case-in-chief, he testified that when Galloway arrived at Fontenot's house, he knew that Galloway had two pending attempted murder charges for shooting two people. Chhith-Berry also testified Galloway was bigger than him and had previously beaten him up, which made him so afraid that he urinated on himself. Chhith-Berry admitted he stabbed Galloway "at least one time" because he was afraid Galloway was going to beat Berry to death. However, Chhith-Berry could not account for Galloway's additional twenty-four stab wounds; he claimed he could not "recall anything after the first initial stab." Chhith-Berry did not repeat his immunity hearing testimony that he knew

Galloway bragged about shooting two people and heard Galloway claim he "just wanted to shoot someone."

Following Chhith-Berry's case-in-chief, the trial court held a charge conference. Chhith-Berry requested the following jury instruction:

If you find that the [d]efendant believes he or another person was in danger of serious injury or death and believes that deadly force was necessary to avoid this danger but that you also find that either of these beliefs was not reasonable then you should consider whether the threat constituted adequate legal provocation as that term is used in defining the crime of [v]oluntary [m]anslaughter.

The trial court declined to give this instruction but gave a voluntary manslaughter instruction. Chhith-Berry objected to the trial court's decision not to give his requested jury instruction "about mistaken belief in the need for deadly force," but the trial court maintained its "charge as a whole [was] appropriate."

The jury began deliberating at 3:50 p.m. and returned guilty verdicts for murder and possession of a weapon during a violent crime at 4:14 p.m. The trial court sentenced Chhith-Berry to concurrent sentences of fifty years' imprisonment for murder and five years' imprisonment for possession of a weapon during a violent crime.

At a posttrial motions hearing, Chhith-Berry argued his rights to a fair trial and due process had been violated because the jury participated in premature deliberations. Chhith-Berry maintained the jury returning guilty verdicts after deliberating for less than thirty minutes following a three-day trial with fifty exhibits and thirty witnesses was evidence he was prejudiced by premature deliberations. Chhith-Berry asserted the trial court erred by denying his motion for a mistrial and renewed that motion; again, nothing in the record indicates Chhith-Berry made a contemporaneous objection or moved for a mistrial regarding premature jury deliberations or the insufficiency of the trial court's curative instruction.

The trial court ruled its curative instruction was "sufficient and appropriate" and declined to grant Chhith-Berry a new trial. The trial court also declined to grant

Chhith-Berry's motion for a new trial on the following grounds: (1) Chhith-Berry's immunity claim under section 16-11-440(C); (2) the exclusion of Edwards's testimony; and (3) Chhith-Berry's requested imperfect self-defense jury instruction. However, the trial court granted Chhith-Berry's motion to reconsider his sentence and reduced his sentence to forty years' imprisonment. This appeal followed.

ISSUES ON APPEAL

I. Did the trial court err by denying Chhith-Berry immunity from prosecution pursuant to the Protections of Persons and Property Act?

II. Did the trial court err by prohibiting Edwards's testimony?

III. Did the trial court err by failing to instruct the jury on the doctrine of imperfect defense?

IV. Did the trial court err by failing to grant Chhith-Berry's motion for a mistrial due to premature jury deliberations without a hearing?

STANDARD OF REVIEW

"The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed in the absence of a prejudicial abuse of discretion." *State v. Reyes*, 432 S.C. 394, 401, 853 S.E.2d 334, 337-38 (2020) (quoting *State v. Bryant*, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007)). "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." *Id.* at 401, 853 S.E.2d at 338 (quoting *Bryant*, 372 S.C. at 312, 642 S.E.2d at 586).

LAW/ANALYSIS

I. Immunity under the Protection of Persons and Property Act

Chhith-Berry argues the trial court erred by denying him immunity from prosecution pursuant to the Protections of Persons and Property Act (the Act) because the evidence showed he satisfied the common law elements of defense of others and section 16-11-440(C). We disagree.

"Section 16-11-450 provides immunity from prosecution if a person is found to be justified in using deadly force under the Act." *State v. Cervantes-Pavon*, 426 S.C. 442, 449, 827 S.E.2d 564, 567-68 (2019) (quoting *State v. Curry*, 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013)); S.C. Code Ann § 16-11-450(A) (2015) ("A person who uses deadly force as permitted by the provisions of [the Act] or another applicable provision of law is justified in using deadly force and is immune from criminal prosecution and civil action for the use of deadly force"). "A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which [an appellate court] reviews under an abuse of discretion standard of review." *State v. Jones*, 416 S.C. 283, 290, 786 S.E.2d 132, 136 (2016) (quoting *Curry*, 406 S.C. at 370, 752 S.E.2d at 266). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Id.* "In other words, the abuse of discretion standard of review does not allow [an appellate] court to reweigh the evidence or second-guess the [trial] court's assessment of witness credibility." *State v. Oates*, 421 S.C. 1, 13, 803 S.E.2d 911, 918 (Ct. App. 2017) (quoting *State v. Douglas*, 411 S.C. 307, 316, 768 S.E.2d 232, 237-38 (Ct. App. 2014)).

"[T]he [trial] court's [immunity] ruling must be based solely on the evidence presented at a pretrial hearing, while the jury's verdict must be based solely on the evidence presented at trial, which may be considerably different." *Cervantes-Pavon*, 426 S.C. at 452-53, 827 S.E.2d at 569 (quoting *Sifuentes v. State*, 746 S.E.2d 127, 131 n.3 (Ga. 2013)). "[J]ust because conflicting evidence as to an immunity issue exists does not automatically require the [trial] court to deny immunity; the [trial] court must sit as the fact-finder at this hearing, weigh the evidence presented, and reach a conclusion under the Act." *Id.* at 451, 827 S.E.2d at 569. "[T]he relevant inquiry is . . . whether the accused has proved an entitlement to immunity under the Act by a preponderance of the evidence." *State v. Andrews*, 427 S.C. 178, 181, 830 S.E.2d 12, 13 (2019). "While the Act does not require a written order upon an immunity determination," *Cervantes-Pavon*, 426 S.C. at 452 n.4, 827 S.E.2d at 569 n.4, "the [trial] court, in announcing its ruling, should at least make specific findings on the elements on the record," *State v. Glenn*, 429 S.C. 108, 123, 838 S.E.2d 491, 499 (2019).

Additionally, "[u]nder the theory of defense of others, one is not guilty of taking the life of an assailant who assaults a friend, relative, or bystander if that friend, relative, or bystander would likewise have the right to take the life of the assailant

in self-defense." *State v. Long*, 325 S.C. 59, 64, 480 S.E.2d 62, 64 (1997). "[I]n cases where the defendant has not proved the duty to retreat element by a preponderance of the evidence, the court should then consider whether section 16-11-440(C) is applicable because that provision was enacted to extend the protections of the Castle Doctrine to '[]other place[s] where he has a right to be.'" *Glenn*, 429 S.C. at 118-19, 838 S.E.2d at 496 (second and third alterations in original) (quoting *State v. Scott*, 424 S.C. 463, 475, 819 S.E.2d 116, 121 (2018)).

A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be . . . has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he *reasonably believes it is necessary* to prevent death or great bodily injury to himself or another person

§ 16-11-440(C) (emphasis added).

Further, "when a person is justified in firing the first shot, he is justified in continuing to shoot until it is apparent that the danger to his life and body has ceased." *State v. Marin*, 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016) (quoting *State v. Hendrix*, 270 S.C. 653, 661, 244 S.E.2d 503, 507 (1978)). However, "[a] person who fatally wounds another, even in self-defense, is not entitled to hasten the victim's death by continuing to pump bullets into the victim's body." *Id.* (quoting 40 C.J.S. *Homicide* § 189 (2014)).

Here, the record is sufficient for this court to determine the trial court applied the correct burden of proof. The trial court clearly found that Chhith-Berry failed to prove by a preponderance of the evidence he was entitled immunity pursuant to section 16-11-440(C). See *Andrews*, 427 S.C. at 181, 830 S.E.2d at 13 ("[T]he relevant inquiry is . . . whether the accused has proved an entitlement to immunity under the Act by a preponderance of the evidence."). The record also supports the trial court's finding that Chhith-Berry was not entitled to immunity under section 16-11-440(C). Chhith-Berry had the burden of proving by a preponderance of the evidence that he reasonably believed his actions were necessary to prevent death or great bodily injury; his testimony was the only evidence he presented at the immunity hearing. Chhith-Berry testified that he stabbed Galloway once in the shoulder and that caused Galloway to fall off of Berry and stop fighting. Despite

Chhith-Berry's testimony that Galloway stopped fighting after the first stab wound, Galloway sustained another twenty-four unaccounted-for stab wounds.

Because of Chhith-Berry's inability to explain Galloway's twenty-four additional stab wounds, the trial court ruled that Chhith-Berry was not entitled to immunity under section 16-11-440(C) because he failed to prove "by a preponderance of the evidence that he needed to continue to defend [Berry.]" Indeed, even if Chhith-Berry was entitled to intervene on behalf of Berry, he was not entitled to continue stabbing Galloway after Galloway stopped fighting. Consequently, the record contains evidence the trial court applied the correct burden of proof and made findings that supported its denial of immunity. Accordingly, we affirm the trial court's finding that Chhith-Berry was not entitled to immunity. *See Andrews*, 427 S.C. at 182, 830 S.E.2d at 14 ("[W]hile the [trial] court may not have set forth every detail of its analysis in the record, the record [wa]s nevertheless adequate for a reviewing court to determine that the [trial] court applied the correct burden of proof and made findings that supported its denial of immunity consistent with a correct application of [our supreme court's] precedent.").

II. Prohibited Testimony

Chhith-Berry contends the trial court erred by prohibiting Edwards's testimony about the specific facts that led to Galloway's attempted murder charges. Chhith-Berry maintains the probative value of Edwards's testimony was not substantially outweighed by the danger of confusing the jury. We disagree.⁹

⁹ Chhith-Berry also asserts Edwards's testimony should have been admitted because it established Galloway's character for violence through a specific instance of conduct that related directly to Chhith-Berry's reasonable fear of Galloway and was essential to Chhith-Berry's self-defense claim. *See* Rule 405(b), SCRE ("In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may . . . be made of specific instances of that person's conduct."); *State v. Day*, 341 S.C. 410, 419-20, 535 S.E.2d 431, 436 (2000) ("In the murder prosecution of one pleading self-defense against an attack by the deceased, evidence of other specific instances of violence on the part of the deceased are not admissible unless[,] . . . if [they were] directed against others, [they] were so closely connected at point of time or occasion with the homicide as reasonably to indicate the state of mind of the deceased at the time of the homicide,

Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. "'Probative value' is the measure of the importance of that tendency to the outcome of a case. It is the weight that a piece of relevant evidence will carry in helping the trier of fact decide the issues." *State v. Gray*, 408 S.C. 601, 610, 759 S.E.2d 160, 165 (Ct. App. 2014). "[T]he more essential the evidence, the greater its probative value." *Id.* (alteration in original) (quoting *United States v. Stout*, 509 F.3d 796, 804 (6th Cir. 2007)). "Thus, a court analyzing probative value considers the importance of the evidence and the significance of the issues to which the evidence relates." *Id.*

The trial court did not abuse its discretion in finding the danger of confusing the jury substantially outweighed the probative value of Edwards's testimony. While testimony about the specific facts of Galloway's attempted murder charges was probative of his violent nature, its probative value was limited because it would have been cumulative to evidence the trial court deemed admissible. The trial court admitted evidence that Galloway was out on bond for attempted murder charges at the time of his death for shooting two people; additionally, Chhith-Berry testified that he knew Galloway was out on bond for attempted murder for shooting two people and that Galloway had previously struck him.¹⁰ This evidence sufficiently conveyed Galloway's violent nature.

More importantly, the testimony at issue was disputed and could have easily confused the jury. Edwards's testimony itself was inconsistent, and the State was prepared to rebut Edwards's testimony with a witness who would have testified

or to produce reasonable apprehension of great bodily harm."). We do not address this argument because, even assuming the testimony of Galloway's shooting was admissible as evidence of a specific instance of conduct under Rule 405(b), SCRE, the trial court did not abuse its discretion in determining the testimony's probative value was substantially outweighed by the danger of confusing the jury.

¹⁰ While not prohibited, Chhith-Berry did not present to the jury his immunity hearing testimony that he knew Galloway bragged about shooting people and heard Galloway state that he returned to the bar because he "just wanted to shoot someone." That does not affect the trial court's ruling that Edwards's testimony was inadmissible because it would have confused the jury.

Galloway acted in self-defense. The jury would have had to grapple with disputed facts in a separate and untried self-defense case in which Galloway, the victim in Chhith-Berry's trial, was the defendant. The trial court aptly recognized Chhith-Berry and the State presenting conflicting testimony about the specific facts of Galloway's attempted murder charges would have required it to "try two cases to just get one done." Subjecting the jury to conflicting testimony about the facts of Galloway's attempted murder charges likely would have confused the jury, and that danger substantially outweighed any probative value the testimony could have provided. Therefore, the trial court did not abuse its discretion by admitting evidence of Galloway's attempted murder charges but prohibiting witness testimony about the specific facts. Accordingly, we affirm the trial court's decision to prohibit the testimony.

III. Imperfect Defense Jury Instruction

Chhith-Berry asserts the trial court erred by refusing to give his requested imperfect defense¹¹ jury instruction. Chhith-Berry maintains this instruction would have allowed the jury to convict him of voluntary manslaughter rather than murder if it determined he unreasonably believed Berry was in danger of losing his life or sustaining serious bodily injury. We disagree.

"[T]he trial court is required to charge only the current and correct law of South Carolina." *Marin*, 415 S.C. at 482, 783 S.E.2d at 812 (alteration in original) (quoting *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011)). "[T]o warrant reversal, a trial [court]'s refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." *Id.* (quoting *Brandt*, 393 S.C. at 550, 713 S.E.2d at 603).

"South Carolina has not expressly adopted the doctrine of imperfect self-defense." *State v. Sams*, 410 S.C. 303, 315, 764 S.E.2d 511, 517 (2014). However, "the view taken in most treatises and jurisdictions that have discussed the imperfect self-defense doctrine is that it serves to reduce a charge of murder to voluntary manslaughter" *Id.* at 315-16, 764 S.E.2d at 517. Accordingly, "even if [South Carolina] were to accept the doctrine of imperfect self-defense . . . it would, at

¹¹ Because Chhith-Berry claims deadly force was necessary to prevent Berry's serious injury or death, the doctrine is more appropriately termed imperfect defense rather than imperfect self-defense.

most, entitle [defendants] to an instruction on voluntary manslaughter" *Id.* at 316, 764 S.E.2d at 517.

Chhith-Berry's contention the trial court erred by declining to give his requested jury instruction has no merit. The trial court is required to charge only the current and correct law, and South Carolina has not adopted the doctrine of imperfect defense. Moreover, our supreme court has noted the doctrine of imperfect defense would entitle a defendant to a voluntary manslaughter instruction, which Chhith-Berry received. Imperfect defense is simply not the law of South Carolina; even if it were, Chhith-Berry received a voluntary manslaughter instruction. Accordingly, the trial court did not err by refusing to give Chhith-Berry's requested jury instruction on imperfect defense.

IV. Premature Jury Deliberations

Chhith-Berry asserts the trial court erred by failing to grant his motion for a mistrial because he was prejudiced by premature jury deliberations. We disagree.

"[A] jury should not begin discussing a case, nor deciding the issues, until all of the evidence, the argument of counsel, and the charge of the law is completed." *State v. Aldret*, 333 S.C. 307, 311, 509 S.E.2d 811, 813 (1999) (alteration in original) (quoting *State v. McGuire*, 272 S.C. 547, 551, 253 S.E.2d 103, 105 (1979)). "Ordinarily, juror testimony concerning juror misconduct is not admissible unless the allegations of misconduct pertain to external influences." *Ethier v. Fairfield Mem'l Hosp.*, 429 S.C. 649, 654, 842 S.E.2d 355, 358 (2020). However, "premature jury deliberations may affect 'fundamental fairness' of a trial such that the trial court may inquire into such allegations and may consider affidavits in support of such allegations." *Aldret*, 333 S.C. at 312, 509 S.E.2d at 813.

Nevertheless, our supreme court "ha[s] routinely held that a party must object at the first opportunity to preserve an issue for review." *Id.* ("In light of [the defendant's] failure to call the alleged juror misconduct to the trial court's attention at his first opportunity to do so, we hold he is procedurally barred from raising the issue."); *see also State v. Vang*, 353 S.C. 78, 85, 577 S.E.2d 225, 228 (Ct. App. 2003) (finding that the defendant failed to preserve for appellate review his contention that the trial court should have questioned each juror to determine whether premature deliberations had occurred because he did not object to the trial

court's ruling or contemporaneously request individual questioning of the jurors). Additionally, "appellate court[s] will not consider any fact which does not appear in the [r]ecord on [a]ppeal." Rule 210(h), SCACR.

Chhith-Berry failed to preserve this issue for appellate review. Chhith-Berry knew premature jury deliberations had allegedly taken place because the trial court gave a curative instruction,¹² yet Chhith-Berry did not object to the trial court's curative instruction, request that the trial court question the jury regarding premature deliberations, or move for a mistrial. Instead, Chhith-Berry waited until after the jury submitted its guilty verdict to raise the issue in a posttrial motion. The record does not support Chhith-Berry's assertion that he contemporaneously objected to the trial court's curative instruction and moved for a mistrial. Based on the record before us, Chhith-Berry first raised this issue in a posttrial motions hearing. Accordingly, Chhith-Berry did not preserve this issue for appellate review.

CONCLUSION

The trial court properly denied Chhith-Berry's immunity request, prohibited Edwards's testimony, and declined to give Chhith-Berry's requested imperfect defense jury instruction. Additionally, Chhith-Berry failed to preserve for appellate review his contention that he was prejudiced by premature jury deliberations. Accordingly, Chhith-Berry's convictions for murder and possession of a weapon during the commission of a violent crime are

AFFIRMED.

WILLIAMS, C.J. and VINSON, J., concur.

¹² In *Aldret*, our supreme court set forth a *suggested* procedure for trial courts to follow when allegations of premature deliberations arise. 333 S.C. at 315, 509 S.E.2d at 815. "If such an allegation arises during trial, the trial court should conduct a hearing to ascertain if, in fact, such premature deliberations occurred, and if the deliberations were prejudicial." *Id.* (emphasis and footnote omitted). The trial court was not required to follow this procedure, and our supreme court made clear that "allegations [of premature jury deliberations] must be raised at the first opportunity in order to be preserved for review." *Id.* at 315 n.6, 509 S.E.2d at 815 n.6.