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SC Court of Appeals

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, Circuit Court Judge

Opinion No. 5943

PETITION FOR REHEARING

On August 31, 2022, this Court affirmed Appellant's convictions and sentences. State v. Chhith-Berry, Op. No. 5943 (Howard Adv. Sh. No. 31 at 62) (S.C. Ct. App. filed Aug. 31, 2022). Pursuant to Rule 221(a), SCACR, Appellant now files this petition for rehearing.

Protection of Persons and Property Act

This Court held "the record [was] sufficient for this court to determine the trial court applied the correct burden of proof." Further, this Court held "[t]he trial court clearly found that [Appellant] failed to prove by a preponderance of the evidence he was entitled to immunity pursuant to section 16-11-440(C)." Appellant respectfully requests this Court rehear this specific

determination in light of the judge's ruling indicating that he denied immunity because the evidence was inconsistent.

After hearing Appellant's testimony, the judge ruled on the request for immunity from prosecution pursuant to the Protection of Persons and Property Act. Judge Griffith had "a problem with the immunity question" because Appellant's "testimony was consistent up until he took the one blow against [Galloway] and then it's very vague and his memory is very, very, very vague from that point forward." R. 158, ll. 8-12. Thus, the judge surmised that Appellant's "proof doesn't get clear by a preponderance of the evidence that he needed to continue to defend his brother." R. 158, ll. 12-14. The judge thought "he failed to meet his burden of proof of proving he would be entitled to immunity because he only has recollection of one blow that he took to assist his brother if that's the case." R. 158, ll. 18-22. Based upon Appellant's inability to recall what happened after he stabbed Galloway, the judge determined it was "a factual question." R. 159, l. 2.

Defense counsel argued that Appellant's inability to remember what happened after the initial blow was inconsequential to the question of immunity. R. 159, ll. 5-11. Thereafter, defense counsel went through the elements of self-defense, and argued how Appellant satisfied each of them. R. 159, l. 12 – R. 160, l. 5.

> [T]he question is whether he was without fault in bringing on the difficulty. ... [T]hat's been covered. Whether he believed he was in imminent danger or his brother was, and ... he covered that. Whether a reasonably prudent man would entertain the same belief, and ... that's clear from the difference in sizes, the fact that he knew about Mr. Galloway's violent nature, that he would - - that one man would strike a fatal blow to save himself or someone else, and ... that's what he did. Now whether or not he continued to strike him or whether someone else struck him, the question is whether they had the right to, and ... that's covered - - all those points are covered.

R. 159, l. 15 – R. 160, l. 5.

The judge disagreed with trial counsel, opining that the statute required one "to prove more past the initial blow." R. 160, ll. 6-12. Later, the judge revealed even more about his decision to deny immunity. He explained that the evidence went "both ways." R. 512, ll. 23-24. Thus, he determined it was "a factual question." R. 512, ll. 24-25.

"A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard." State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013). The judge must "sit as fact-finder at this hearing, weigh the evidence presented, and reach a conclusion under the Act." State v. Cervantes-Pavon, 426 S.C. 442, 451, 827 S.E.2d 564, 569 (2019). The trial judge erred in denying immunity because the evidence "went both ways" and "was a factual matter." As the Supreme Court made clear, the judge must "sit as fact-finder at this hearing, weigh the evidence presented, and reach a conclusion under the Act." State v. Cervantes-Pavon, 426 S.C. 442, 451, 827 S.E.2d 564, 569 (2019). Judge Griffith refused to sit as fact-finder in the case and denied immunity because he determined the facts presented were susceptible to going "both ways." This Court ignored Judge Griffith's clear and unambiguous statements that he denied immunity because the evidence "went both ways," which made it "a factual matter" for the jury. Thus, Appellant respectfully requests rehearing on this specific ruling pursuant to Rule 221(a), SCACR.

This Court also held the record supported "the trial court's finding that [Appellant] was not entitled to immunity under section 16-11-440(C)." Appellant respectfully requests hearing on this ruling as well.

According to this Court, and conceded by Appellant, he "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." This Court remarked that the trial judge denied immunity because Appellant failed to prove that he needed to continue to defend his brother past the first blow. Then,

this Court held that "even if [Appellant] was entitled to intervene on behalf of [his brother], he was not entitled to continue stabbing Galloway after Galloway stopped fighting." Finally, this Court held the record contained evidence that supported the trial judge's denial of immunity.

The record does not support this Court's contention that Appellant "continue[d] stabbing Galloway after Galloway stopped fighting." Appellant testified that after he stabbed Galloway, his "brother got up" and his brother "was hitting him." R. 113, ll. 17-22; R. 144, ll. 11-17. Appellant recalled stabbing Galloway only once. R. 113, ll. 22-24. In fact, Appellant testified that after he stabbed Galloway, the knife fell out of his hand. R. 143, ll. 3-6. Furthermore, there was no evidence of the number of stab wounds Galloway received. As this Court noted, Appellant was the only witness during the immunity hearing. Appellant did not testify regarding the number of stab wounds to Galloway. The number of stab wounds alleged inflicted upon Galloway was only revealed through questions posed by the solicitor. R. 146, ll. 1-9. Questions asked by lawyers during a trial are not evidence. The evidence in the record – from Appellant, the only witness at the pre-trial hearing – was that he stopped striking Galloway when Galloway stopped hitting his brother. R. 158, ll. 3-4.

Pursuant to the Protection of Persons and Property Act, a person is entitled to immunity from prosecution when "[a] person who uses deadly force as permitted by the provisions of this article or another applicable provision of law." S.C. Code Ann. § 16-11-450(A).

> A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including, but not limited to, his place of business, 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 or to prevent the commission of a violent crime as defined in Section 16-1-60.

S.C. Code Ann. § 16-11-440(C).

Recently, the Supreme Court explained that it had interpreted "another applicable provision of law" found within section 16-11-450(A) to include the common law of self-defense. State v. Glenn, 429 S.C. 108, 117, 838 S.E.2d 491, 496 (2019) (citing State v. Scott, 424 S.C. 463, 473, 819 S.E.2d 116, 120 (2018)). "This means a defendant may seek immunity from prosecution under the Act by 'demonstrating the elements of self-defense to the satisfaction of the trial court by a preponderance of the evidence.'" Id. at 118, 838 S.E.2d at 496 (quoting Curry, 406 S.C. at 372, 752 S.E.2d at 267). During the pretrial hearing, a defendant must set out "a valid case of self-defense," excluding the duty to retreat prong, "and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity." State v. Curry, 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013).

The Court explained that "a trial court should first consider whether the defendant has proved the elements of self-defense by a preponderance of the evidence." Glenn, 429 S.C. at 118, 838 S.E.2d at 496. "If the defendant has failed to meet the elements of reasonable fear or the duty to retreat, the court should then determine whether section 16-11-440(A) or (C) is applicable." Id. Where section 16-11-440(C) is applicable, "it replaces the duty to retreat element required to establish self-defense." Id. "In determining whether a defendant satisfies section 16-11-440(C), the circuit court must analyze whether, at the time of the incident, he was engaged in an unlawful activity and was attacked in another place where he had a right to be." Id.

To establish self-defense, four elements must be present: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would

have entertained the same belief, or if the defendant was actually in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life; and (4) the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in the particular instance. State v. Hendrix, 270 S.C. 653, 657-658, 244 S.E.2d 503, 505-506 (1978); see also State v. Davis, 282 SC. 45, 46, 317 S.E.2d 452, 453 (1984).

Additionally, not only does the Act contemplate immunity when a person acts in defense of another, but the defense of others is a common law doctrine that falls within the ambit of "another applicable provision of law" found within section 16-11-450(A). "Under 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); see also Douglas v. State, 332 S.C. 67, 73, 504 S.E.2d 307, 310 (1998). When a person acts in defense of another, the person "is in the same situation and upon the same plane as those who act in defense of themselves." State v. Hewitt, 205 S.C. 207, 207, 31 S.E.2d 257, 258 (1944). Only those facts "which excuse the killing in defense of self likewise excuse a killing in defense of [another]." Id.; see also, State v. Harvey, 110 S.C. 274, 96 S.E. 399, 400 (1918) (noting that "[w]hile a man may take life in defense of himself or another, yet the slayer, or the person in whose behalf the slayer strikes, must not only be without fault in provoking the difficulty, but there must be a necessity to kill"); State v. Norris, 253 S.C. 31, 38, 168 S.E.2d 564, 567 (1969) (holding "[t]he right of the father to defend his daughter is coextensive with the right of the daughter to defend herself").

> The right of one to justify a slaying on the ground that it was necessary in defense of another person stands upon the same plane or footing as, and is coextensive with,

> the right of the person to whose aid he or she goes, under the existing circumstances of the particular occasion; or as is sometimes stated, the right to justify killing in defense of another depends upon the same conditions as would be necessary to excuse such other person under the plea of self-defense.

40 Am.Jr.2d Homicide § 168 (2014). In other words, "[t]he right is commensurate with self-defense, and every fact requisite to excuse a killing in the defense of self must be present in order to excuse a killing in defense of another." Id.

An individual who provokes or initiates an assault may not assert self-defense. State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999). "Any act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars his right to assert self-defense as a justification or excuse for a homicide." Id.

Also, in Hendrix, 270 S.C. at 659-660, 244 S.E.2d at 506, the Court held the second and third elements of self-defense were easily met as "the conclusion that he was actually in immediate danger of losing his own life was inescapable." When the deceased arrived at the scene, he walked toward defendant who leveled a shotgun at the deceased and told him to "back off." Id. at 660, 244 S.E.2d at 506. The deceased then retrieved his shotgun and returned to confront the defendant. Id. Although some witnesses testified the deceased never pointed his gun at the defendant and others testified he did, the Court concluded that under *any* version of the evidence "it [was] clear that an actual, imminent danger confronted the [defendant] a danger which, unless met with an immediate response, held the promise of death for the [defendant]." Id.

Once the right to fire in self-defense arises, a defendant is not required to wait until his adversary is on equal terms or until he has fired or aimed his weapon in order to act." State v. Starnes, 340 S.C. 312, 322, 531 S.E.2d 907, 913 (2000) (citing State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978)). "Similarly, the accused doesn't have to wait until his assailant gets the drop on him, he has the right to act under the law of self-preservation and prevent his assailant

[from] getting the drop on him." Id. (citing State v. Rash, 182 S.C. 42, 50, 188 S.E. 435, 438 (1936)). "[I]f it is apparent, or reasonably apparent his assailant is taking steps to get the drop on him, he must take steps first to prevent such assailant from getting the drop on him." Rash, 182 S.C. at 42, 188 S.E. at 438.

Furthermore, an individual has the right to act on appearances. State v. Starnes, 340 S.C. 312, 531 S.E.2d 907 (2000); see also State v. Jackson, 277 S.C. 271, 87 S.E.2d 681 (1955). The Court held the trial judge erred in failing to instruct the jury that the defendant had the right to act on appearances concerning one of the shootings. Starnes, 340 S.C. at 320, 531 S.E.2d at 912. In Starnes, one of the potential drug buyers, Wellborn, pointed a gun at the defendant, cursed him, and questioned where he was going. Id. The Court held the defendant was entitled to an appearances charge. Id. at 321, 531 S.E.2d at 912. The pertinent fact noted by the Court was that "[i]mmediately prior to the shooting, [the defendant] observed Champlin hold a gun to [another]'s head and threaten to shoot him, apparently because the intended drug deal, which [the defendafnt] had arranged, had gone awry." Id. The Court held the defendant was entitled to an appearances charge even though the defendant did not testify that he thought he saw a weapon in Champlin's hand at the time of the shooting. Id.; see also State v. Scott, 424 S.C. 463, 472-473, 819 S.E.2d 116, 120 (2018) (explaining that what the defendant "knew in the heat of the moment" controlled whether the defendant was in actual imminent danger or reasonably believed he was).

Additionally, "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." Hendrix, 270 S.C. at 661, 244 S.E.2d at 507. In Douglas v. State, 332 S.C. 67, 72-73, 504 S.E.2d 307, 309-10 (1998), the Court noted the judge had charged that if the defendant was justified in firing the first shot he was justified in continuing to shoot until any danger to his life and body had ceased.

Turning first to the defense of others, as required by the Supreme Court, Appellant satisfied each element of the defense. First, brother was not at fault in bringing on the difficulty. The evidence showed Galloway struck brother first. According to the undisputed evidence, Galloway removed his shirt, showing a willingness to fight. He then punched brother in the face. Thus, brother was not the initial aggressor and was not at fault in bringing on the difficulty.

Second, brother was in actual imminent danger of losing his life or sustaining serious bodily injury or actually believed he was in such danger. Appellant's undisputed testimony showed Galloway was steadily punching brother. Although brother was defending himself with an occasional punch, he spent most of his time trying to block Galloway's fists and retreat from the onslaught. Appellant saw brother was bleeding profusely from his face as he endured Galloway's assault. Galloway was enormous, especially in comparison to brother and Appellant. Thus, a reasonable inference – and the only inference to be gleaned from the undisputed testimony – was that brother was in actual imminent danger of losing his life or sustaining serious bodily injury or actually believed he was in such danger.

Third, to the extent brother's fear was based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. Galloway's unrelenting barrage of punches to brother, particularly to his face, would lead a reasonably prudent man to believe he was in imminent danger of losing his life or sustaining serious bodily injury. To the extent brother was in actual fear of imminent danger, the circumstances required a man of ordinary prudence, firmness, and courage to strike back in self-defense. Galloway was beating brother ruthlessly and single-mindedly. Galloway attacked brother in the front yard showing he had little regard for anyone else, including the laws governing our society. In light of Appellant's knowledge

of Galloway's prior attempt to kill two people and Galloway's brutal assault on brother, a reasonably prudent man in the same situation would have struck back in self-defense.

Thus, Appellant established by a preponderance of the evidence that he acted in the defense of his brother. Judge Griffith expressed a "problem with the immunity question" because Appellant was unable to show he "needed to continue to defend his brother" after the first blow. This Court agreed with Judge Griffith's conclusion. This finding ignored controlling case law. "[W]hen 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. Hendrix, 270 S.C. 653, 661, 244 S.E.2d 503, 507 (1978).

Even if this Court were to determine that Appellant is not entitled to immunity under the Act pursuant to his satisfaction of the elements of the defense of others, Appellant was entitled to immunity under the Act because he satisfied the elements section 16-11-440(C). First, both brother and Appellant were in a place where they had a right to be. Brother and Appellant were visiting the homeowner. It was undisputed that Galloway punched brother first. Therefore, Adam was attacked. As discussed supra, Galloway's vicious assault would lead any reasonable person to believe it was necessary to meet force with force. Appellant admitted that he was consuming alcohol underage and abusing prescription drugs at the time. However, the state did not argue – and could not argue – that Appellant's illegal conduct was the proximate cause of Galloway's death. In fact, Appellant's illegal use of alcohol and prescription drugs was not even connected to Galloway's unprovoked and merciless attack on brother. Therefore, Appellant satisfied each of the elements of the immunity statute as well. The trial judge and this Court erred in denying immunity to him.

Deceased's character

This Court affirmed the trial court's erroneous conclusion that admitting specific facts that led to Galloway's attempted murder charges would confuse the jury. Primarily, this Court, and the trial court, relied upon the solicitor's unsupported claim that Galloway was acting in self-defense and the solicitor would present a witness to attest to such. Appellant respectfully requests rehearing as this Court overlooked the fact that the solicitor failed to present evidence of his claim.

When the judge excluded testimony from witnesses based upon the state's argument that the witnesses did not have "firsthand knowledge" of Galloway trying to kill two people, defense counsel wanted to call one of the victims of Galloway's deadly attack. Still, the state objected, but changed its tactic.

The solicitor argued Appellant "had to have knowledge of the specific facts before you can go in and they had to be relevant." R. 519, l. 25 – R. 520, l. 2; R. 520, ll. 10-11 ("He has to have the knowledge of the specifics and he doesn't or it has to be related."). The state promised that there were "other witnesses who are gonna come up and say it didn't happen the way that this happened, the way that he's gonna claim that it happened." R. 520, ll. 19-21. In fact, the state had a witness under subpoena who would say "Galloway was being beaten and while in the process of being beaten he pulled a gun and shot defending himself." R. 521, ll. 17-23. However, the state never proffered this witness.

Defense counsel proffered the testimony of Orville Edwards. R. 522, ll. 13-15. In January 2014, Edwards was a bartender at The East Room. R. 523, ll. 13-17. "[A] young lady" entered the bar "crying, saying her boyfriend was beating her up out in the parking lot." R. 524, ll. 1-3. Edwards and two others went outside and told Galloway that he could either leave or the police would be called. R. 524, ll. 3-5; R. 525, ll. 8-11. Galloway left, but he returned. R. 524, ll. 7-11; R. 525, ll. 14-17.

Edwards and the two others went back outside when they learned that Galloway had returned. R. 524, ll. 17-19; R. 525, ll. 23-25. As Edwards was approaching Galloway to tell him to leave yet again, someone yelled "he's got a gun." R. 524, ll. 17-20. Upon hearing that Galloway was armed, Edwards grabbed Galloway and tried to wrestle him to the ground to get the gun. R. 524, ll. 22-24; R. 526, ll. 15-20. During this melee, Galloway shot Edwards in the leg. R. 524, l. 24. Galloway then stood up and shot Edwards' friend, Jake, in the chest "and popped off a few more rounds into the crowd as he backed up to his car and got in and sped away." R. 524, ll. 24 – R. 525, l. 2.

After the judge heard Edwards' proffered testimony, he determined the evidence would "confuse the jury." R. 530, ll. 16-17. Acknowledging there was testimony that Galloway was charged with two counts of attempted murder, that "he had a propensity to not be one to fight with," and "there was an incident in front of the car at the mother-in-law's house on Mother's Day before this incident," the judge explained he did not "want to get into more specific facts of that conduct because of [his] concern of confusing the jury over the factual issue because this [was] getting into trying a second case and Mr. Berry's case is Mr. Berry's case." R. 530, l. 20 – R 531, l. 5. Additionally, the judge surmised that the East Room incident that occurred four to five months prior to the deceased's death was "too far removed to be allowed." R. 531, ll. 8-12; R. 531, ll. 19-22.

This Court held that although testimony about the specific facts of Galloway's attempted murder charges was probative of his violent nature, its probative value was limited because it was cumulative to evidence already admitted, including that Galloway was out on bond for attempted murder at the time of his death and that Galloway had previously struck Appellant. However, more important to this court was the solicitor's unsupported claim that "the testimony at issue was disputed." This Court relied heavily upon the solicitor's assertion that he was prepared to rebut Edwards' testimony with a witness who would have testified that Galloway acted in self-defense.

According to this Court, "[t]he jury would have had to grapple with disputed facts in a separate and untried self-defense case in which Galloway, the victim in [Appellant]'s trial, was the defendant." Accordingly, this Court concluded that Appellant and the state presenting conflicting testimony about the specific facts would have required the jury to try two cases to get just one done. This would have likely confused the jury and this danger substantially outweighed the probative value of the testimony in this Court's view. Appellant respectfully requests rehearing.

Most importantly, there is no evidence that Galloway acted in self-defense. The only mention of such was by the solicitor when he claimed that Galloway did so. Such a claim is disingenuous at best because his very office was prosecuting Galloway for two counts of attempted murder. At worst, the solicitor was violating the Rules of Professional Conduct by prosecuting Galloway for attempted murder when he knew the charges were not supported by probable cause. Rule 3.8(a), RPC, Rule 407, SCACR. Certainly, the solicitor was not maintaining criminal charges against a man he knew had acted in self-defense. Nevertheless, what is most important to analyzing the issue presented is that the state never presented any actual evidence that Galloway acted in self-defense. The solicitor did not even name his alleged witness or offer any specifics as to what the supposed witness's testimony would have been. This Court's reliance on the solicitor's unsupported claim must not stand, and Appellant requests this Court rehear the matter.

When looking at Rule 403, SCRE, the starting point for analyzing evidence under Rule 403 is determining the probative value of the evidence offered. "'Probative' means '[t]ending to prove or disprove.'" State v. Gray, 408 S.C. 601, 609, 759 S.E.2d 160, 165 (Ct. App. 2014). "'Probative value' is the measure of the importance of that tendency to the outcome of a case." Id. at 610, 759 S.E.2d at 165. The probative value of evidence is directly related to the how important that evidence is in assisting the jury in rendering a verdict. Id. Thus, when analyzing the probative value of

evidence, the court must consider the importance of the evidence as it relates to the issues presented in the case. State v. Lee, 399 S.C. 521, 528, 732 S.E.2d 225, 228 (Ct. App. 2012).

After determining the probative value of the evidence, the court must next evaluate the danger of confusion to the jury presented by the evidence. Very little case law exists in South Carolina regarding this aspect of Rule 403, SCRE. In Wilson v. Rivers, 357 S.C. 447, 453-454, 593 S.E.2d 603, 606 (2004), the Supreme Court held it was error to exclude the testimony of a biomechanics expert based on a contention that the testimony would be confusing. The case involved an automobile accident and the question before the jury was whether the plaintiff's back problems were caused by the accident. Id. at 449, 593 S.E.2d at 603-604. The defendant sought to introduce the testimony of an expert in the field of biomechanics to refute the plaintiff's claims. Id. at 450, 593 S.E.2d at 604. The Court held the testimony would not have been confusing to the jury because the expert considered the "damage to the car," "depositions, medical records, photographs, impact tests, and the accident report in reaching his conclusion." Id. at 453, 593 S.E.2d at 606. The expert discussed "fully explained the method he used to reach his conclusion and did not contradict himself." Id. at 453-454, 593 S.E.2d at 606.

In State v. Lyles, 379 S.C. 328, 340, 665 S.E.2d 201, 207 (Ct. App. 2008), this Court explained that evidence "potentially insinuating a key witness for the state is a drug dealer and drugs were present next to the victim" could "cloud the issues." The proffered testimony "would have established drugs were offered for sale outside of the apartment several months before the shooting by an individual known only as C.C." Id. This Court held "evidence of the mere presence of marijuana, without further indication of impairment, could mislead the jury" in a case asking the jury to decide whether the plaintiff, who was involved in an automobile accident and had marijuana in his system, was entitled to recover damages from the other driver. Kennedy v. Griffin, 358 S.C. 122, 128-129,

595 S.E.2d 248, 251 (Ct. App. 2004). The blood test performed that detected the marijuana in his system "did not measure the quantity of marijuana" or "how recently [he] had been exposed to marijuana." Id. at 128, 595 S.E.2d at 251. Additionally, there was no marijuana found in or near the plaintiff's truck and there was no testimony that he smelled of marijuana. Id.

Once a court has determined the probative value and the danger of confusion to the jury posed by the evidence, the court must balance the two. State v. Dial, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013). When juxtaposing the confusing effect against the probative value, the determination must be based on the entire record and will turn on the facts of each case. State v. Collins, 409 S.C. 524, 534, 763 S.E.2d 22, 27-28 (2014) (citing State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008)). Only after balancing the probative value and the danger of confusion may the court determine if the danger of unfair prejudice outweighs the probative value of the proffered evidence as required by Rule 403, SCRE.

The evidence of the deceased's conduct – shooting two people in the parking lot of the East Room during an altercation – was probative of the deceased's violent nature. The probative value of the evidence was extremely high because it went directly to an element of Appellant's defense, which required a showing that he (and brother) was in reasonable apprehension of fear of imminent death or great bodily injury from the deceased. While the judge opined the information would confuse the jury, the information was very straightforward. The state conceded the jury was aware the deceased faced two counts of attempted murder because the state presented Appellant's statements to law enforcement during its case-in-chief, which contained information about the charges. Permitting the jurors to hear from the witnesses – specifically, Edwards – was unlikely to cause confusion among the jurors regarding the issues in the case. Edwards would have provided context to the jurors on the facts supporting the criminal charges lodged against the deceased, which the jurors easily would have

understood. Edwards' testimony was short, straightforward, and unequivocal. The only alleged confusion was from the solicitor's unsupported and outrageous allegation that Galloway was acting in self-defense. It was unsupported because the solicitor presented no actual evidence that Galloway was acting in self-defense. He claimed he had a witness, but he never presented the witness's testimony. It was outrageous because the solicitor was prosecuting Galloway for two counts of attempted murder, but he was simultaneously claiming Galloway acted in self-defense. Quite simply, the solicitor cannot have it both ways. Either there was probable cause to believe Galloway was guilty of attempted murder, which the solicitor was required to possess under the Rules of Professional Conduct, or Galloway was acting in self-defense and the solicitor was obligated to dismiss the attempted murder charges. In light of the solicitor's failure to dismiss the attempted murder charges, it is hard to imagine the solicitor believed Galloway was acting in self-defense. Thus, the danger of confusing the jurors was very low. Balancing the high probative value of the evidence against the low danger of confusion required admission of the testimony regarding the deceased's specific instances of conduct giving rise to his two charges of attempted murder. The trial judge erred in finding otherwise.

This Court also refused to examine whether the evidence presented was admissible pursuant to Rule 405(b), SCRE, because this Court concluded the trial court's analysis pursuant to Rule 403, SCRE, was correct. Appellant respectfully requests this Court rehear the matter and conduct the analysis required under Rule 405(b), SCRE, which supports admission of the evidence.

"The Sixth Amendment rights to notice, confrontation, and compulsory process guarantee that a criminal charge may be answered through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence." State v. Gillian, 360 S.C. 433, 449–450, 602 S.E.2d 62, 71 (Ct.App.2004); accord State v. Mizzell,

349 S.C. 326, 330, 563 S.E.2d 315, 317 (2002); State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994); State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 402 (1986). The Due Process Clause of the Fourteenth Amendment ensures these rights are extended to criminal defendants in state courts. See U.S. Const. amend. XIV; Pointer v. Texas, 380 U.S. 400, 403–404 (1965) (holding the Sixth Amendment applicable to the states through the Fourteenth Amendment); Mizzell, 349 S.C. at 330, 563 S.E.2d at 317 ("The Sixth Amendment is applicable to the states through the Fourteenth Amendment."). "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." Chambers v. Mississippi, 410 U.S. 284, 294 (1973).

Generally, evidence of a person's character or a trait of character is not admissible to prove action in conformity therewith on a particular occasion. Rule 404(a), SCRE. However, the rule provides for several exceptions. One of those exceptions permits "[e]vidence of a pertinent trait of character of the victim offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor." Rule 404(a)(2), SCRE. This has long been the rule in South Carolina – even prior to the adoption of the Rules of Evidence. See State v. Boyd, 126 S.C. 300, 119 S.E. 839 (1923) (explaining a defendant has the right to attack the reputation of the prosecuting witness for violence); see also, State v. Thrailkill, 71 S.C. 136, 50 S.E. 551, 553 (1905) (explaining general reputation evidence of the deceased for turbulence is admissible). Whenever "evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion." Rule 405(a), 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 also be made of specific instances of that person's conduct." Rule 405(b), SCRE.

> 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 they were directed against the defendant or, if directed against others, were so closely connected in 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, or to produce reasonable apprehension of great bodily harm.

State v. Day, 341 S.C. 410, 419-420, 535 S.E.2d 431, 436 (2000); see also State v. Hill, 129 S.C. 166, 123 S.E. 817 (1924); State v. Amburgey, 206 S.C. 426, 429, 34 S.E.2d 779, 780 (1945).

The South Carolina Supreme Court reversed a murder conviction where a judge refused to permit evidence of specific instances of violence by the deceased. Day, 341 S.C. at 421, 535 S.E.2d at 437. The Court explained that Day wanted to present testimony of a witness "concerning a past act of violence" by the deceased. Id. at 420, 535 S.E.2d at 436. During a proffer, the witness testified the deceased held a shotgun to her head for eighteen hours while he drove around Aiken County, accusing her of being involved in a drug trafficking scheme from which he was not benefitting. Id. This prior act of violence "occurred only four months" prior to the deceased's death and "was admissible to prove Day had a reasonable apprehension of violence from [the deceased], an essential element of his self-defense claim." Id. at 421, 535 S.E.2d at 437; cf. State v. Brown, 321 S.C. 184, 187, 467 S.E.2d 922, 924 (1996) (affirming the exclusion of the deceased's prior manslaughter conviction because it occurred twenty-three years before his death). The Court explained "[t]his evidence [was] relevant to Day's theory of self-defense because he claimed he thought [the deceased] may pull a gun on him if thought Day had deceived him." Day, 341 S.C. at 421, 535 S.E.2d at 437. Additionally, "[the deceased's] conduct in holding a gun to [the witness]'s head because he was suspicious of her [was] also further evidence of the continuous

and consistent pattern of [the deceased]'s drug-induced, violent paranoia, which the defense attempted to establish during trial." Id.

This Court examined a similar issue in State v. Mekler, 368 S.C. 1, 626 S.E.2d 890 (2005). Mekler was tried for shooting Bubba, who was the husband of her friend, Robette. The trial judge refused to permit testimony from Mekler regarding Bubba's prior conviction for criminal domestic violence. Mekler, 368 S.C. at 13, 626 S.E.2d at 896. Specifically, Mekler heard Bubba beating in Robette's door. Id. She later learned Bubba had been drinking when the incident occurred. Id. He also threated Robette and beat on her door until he broke through it with his fists. Id. This Court held "the prior act of violence by Bubba against Robette occurred less than three months prior to Bubba's death and was so closely connected at point of time to indicate Bubba's state of mind at the time of the shooting." Id. at 14, 626 S.E.2d at 897. "The prior incident of criminal domestic violence was also admissible to prove Mekler had a reasonable apprehension of great bodily harm from Bubba, an essential element of Mekler's claim of self-defense as well as her claim of defense of others." Id.

The trial judge erred in refusing to permit Appellant to present evidence of the facts giving rise to the deceased's two counts of attempted murder. Pursuant to Rule 404(a)(2), the evidence was admissible because it was a pertinent trait of character of the victim offered by an accused. Further, pursuant to Rule 405(b), SCRE, Appellant was permitted to offer "specific instances" of the deceased's conduct because it was an essential element of his defense. Finally, the evidence proffered by Appellant was admissible pursuant to the principles expressed in Day, supra. The deceased's act of shooting two people and firing indiscriminately into a crowd was "evidence of other specific instances of violence on the part of the deceased ... [that were] directed against others [and] were so closely connected in 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, or to produce reasonable apprehension of great bodily harm." See Day, 341 S.C. at 419-420, 535 S.E.2d at 436. The evidence was admissible to prove Appellant had a reasonable apprehension of violence from the deceased, which was an essential element of his defense. See id. at 421, 535 S.E.2d at 437The time frame for the deceased's shooting two people at the East Room was four months prior to his death, which was the same time period of the conduct ruled admissible in Day, supra. Thus, contrary to the judge's ruling, the time frame was not too remote. This Court refused to analyze the matter under Rule 405(a), SCRE. Appellant respectfully requests rehearing for this Court to conduct the analysis.

Imperfect self-defense

This Court held Appellant's contention the trial court's refusal to instruct the jury regarding imperfect self-defense "has no merit." According to this Court because a "trial court is required to charge only the current and correct law, and South Carolina has not adopted the doctrine of imperfect defense," then the trial judge committed no error in refusing to instruct the jury as requested. Furthermore, this Court held that because the doctrine of imperfect defense would entitle a defendant to a voluntary manslaughter instruction, and Appellant received such an instruction, then the judge committed no error. Appellant respectfully requests this Court rehear the matter.

First, while a trial judge is required to give only the current law, the only way for the law to change is for someone to challenge it at the circuit court level and the appellate court to make the requested change. If every case where a jury charge were at issue depended upon whether the current law was given, then there would never be any altercations to the jury instructions in this state. That is simply not the way the law works.

Second, although the trial judge instructed the jury on voluntary manslaughter, the instruction did not elucidate the jury on the interplay between self-defense and voluntary manslaughter. The

charge as given would not permit a jury to find Appellant guilty of voluntary manslaughter if the jury determined that Appellant's belief was unreasonable. Thus, the trial judge's instruction on voluntary manslaughter was not sufficient to satisfy Appellant's request.

Appellant's requested instruction on imperfect self-defense was necessary in order to combat the solicitor's closing argument. During his closing argument, the prosecutor argued that even if Appellant believed his brother was in danger of losing his life or serious bodily injury, he was still guilty of murder because the deceased was stabbed twenty-five times. R. 640, ll. 7-12. According to the solicitor, it may have been defense of others if Appellant had stabbed the deceased only once, but that "malice kick[ed] in" when the stab wounds numbered twenty-five. R. 640, ll. 7-12; see also R. 653, ll. 12-13. Using photographs of Adam, the prosecutor asked if he looked like "a man who was beat to death" or someone who had "serious bodily injury." R. 647, ll. 8-11. According to the solicitor, Adam "got hit in the face" and he "lost a tooth." R. 646, ll. 14-15. That was the extent of his injuries in the solicitor's view. R. 646, l. 15. These injuries were "[n]othing serious" because he had "[n]o broken bones." R. 646, l. 17.

Additionally, the solicitor asked the jurors to look at photographs of Adam. R. 647, ll. 8-11. He asked the jurors if he looked like he was beat to death, and then reminded them that he was not dead and had been released from the hospital. R. 647, ll. 8-11. He also asked the jurors if Adam had serious bodily injury based upon the photos. R. 647, ll. 8-11. The solicitor argued Adam and the deceased engaged in a fistfight and "[n]obody [was] close to death." R. 651, ll. 9-10. He characterized the brutal attack the deceased delivered to Adam as "wrestling." R. 651, ll. 11-24. He claimed Adam "was choosing to fight" and was "not running away in fear for his life." R. 651, ll. 11-24. Continuing along these lines, the solicitor told the jurors that "Adam never cried for help" and his injuries showed he was not in imminent danger. R. 653, ll. 2-20.

During the charge conference, the judge indicated he was "gonna consider Number 4." R. 624, l. 17. Specifically, the requested instruction provided:

> If you find that the Defendant 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 Voluntary Manslaughter.

R. 755.

However, the judge did not give the instruction. Therefore, defense counsel renewed his request. R. 685, ll. 5-8. He explained that the judge did not cover the concept of mistaken belief in the need for deadly force. R. 685, ll. 5-8. The judge indicated that he "thought [he] did." R. 685, ll. 9-10. He went on to explain that he "hid it" "in the second element." R. 685, ll. 12-14. He instructed the jurors regarding the reasonable belief of the person who defended another. R. 685, ll. 14-22. Defense counsel clarified that the purpose of the instruction was to inform the jury that if the defendant believed a person was in danger of serious harm and was mistaken as to that belief, then the jury could consider the conduct to be evidence of legal provocation for analyzing voluntary manslaughter. R. 685, l. 23 – R. 686, l. 3. The judge refused to provide this instruction to the jury. R. 686, ll. 4-6.

During the motion for new trial, defense counsel re-iterated his request for an instruction regarding how to analyze "a failed self-defense claim." R 703, ll. 3-9; see also R. 725. Defense counsel explained that the jury charge would have assisted the jurors in understanding the interplay among murder, voluntary manslaughter, and self-defense. According to defense counsel, the proposed jury charge provided instruction "on if [the jurors] don't feel it was self-defense, they could still use the possibility of an imperfect self-defense on the question of whether or not it was murder or voluntary manslaughter." R. 703, l. 20 – R. 704, l. 1. He elaborated: "And we specifically

requested the charge just in case the jury did not believe that self-defense charge was perfected." R. 704, ll. 2-4.

"In some jurisdictions there is recognition of an imperfect right of self-defense which will not excuse one from criminal liability, but which will mitigate a homicide from murder to manslaughter." William S. McAnnich, et al., The Criminal Law of South Carolina 635-636 (6th ed. 2013). One of the ways in which this issue may develop is when "the defendant may have had an honest but unreasonable belief in the necessity to use deadly force." Id. at 636. Additionally, imperfect self-defense may exist where a defendant "may have used excessive force." Id.

> The basic rationale of such cases proceeds as follows: a person who acts under an honest but unreasonable belief in the necessity to use deadly force to defend himself, or who uses excessive force has not acted with malice aforethought, the predicate of any murder conviction; however, he has committed an unlawful and intentional killing, so he is guilty of manslaughter.

Id.

Imperfect self-defense "operates to negate malice, an element the state must prove to establish murder." State v. Faulkner, 483 A.2d 759, 761 (Md. Ct. App. 1984). "As a result, the successful invocation of this doctrine does not completely exonerate the defendant, but mitigates murder to voluntary manslaughter." Id. Maryland also recognizes imperfect defense of others. Bowman v. State, 650 A.2d 954, 955 (Md. Ct. App. 1994). Maryland's pattern jury instructions provide that "if the defendant actually believed that the person defended was in immediate and imminent danger of death or serious bodily harm, even though a reasonable person would not have so believed, the defendant's actual, though unreasonable, belief is a partial defense of others and results in a verdict of voluntary manslaughter rather than murder." Id. at 955 n.1.

Pursuant to imperfect self-defense doctrine, the crime is reduced from murder to manslaughter (1) where the defendant had a genuine, but unreasonable fear of imminent danger, (2) where the

defendant acted in self-defense, but was the aggressor, or (3) where the defendant acted in self-defense, but used excessive force. State v. Sams, 410 S.C. 303, 315, 764 S.E.2d 511, 517 (2014). "South Carolina has not expressly adopted the doctrine of imperfect self-defense." Id.

However, the South Carolina Supreme Court appeared to reject imperfect self-defense for the first scenario. State v. Finley, 277 S.C. 548, 551, 290 S.E.2d 808, 809 (1982). Finley argued for the jury to be instructed that if the jury believed Finley had an actual, although unreasonable, belief that he was in imminent danger of bodily harm, then the crime would be reduced from murder to voluntary manslaughter. Id. The Court declared, "This is not the law in South Carolina." Id. Rather, South Carolina law requires the defendant's actual belief in imminent danger to be a reasonable belief. Id.

Nevertheless, South Carolina has adopted the doctrine of imperfect self-defense in at least two circumstances. In the first scenario, the Supreme Court held a trial judge erred in failing to instruct the jury on voluntary manslaughter based upon evidence showing the deceased, who was a police officer, used excessive force in effectuating an arrest. State v. Linder, 276 S.C. 304, 308, 278 S.E.2d 335, 337 (1981). The state alleged Linder shot the officer while the officer was in the process of making a valid arrest. Id. at 307, 278 S.E.2d at 337. Linder testified that the officer bumped his motorcycle with his patrol car causing Linder to fall to the ground. Id. The officer then began to fire on him. Id. Linder returned fire ultimately killing the officer. Id.

In reviewing whether Linder was entitled to a voluntary manslaughter instruction, the Court explained that "[u]nder either version of the facts the jury could find that Linder had failed to establish each element of the self-defense." Id. However, the Court concluded that "under Linder's version of the facts the jury could find sufficient provocation for a heat of passion by concluding that the officer used unnecessary force under the circumstances." Id. at 307-308, 278 S.E.2d at 337. "While a lawful arrest in a lawful manner will not constitute sufficient legal provocation to incite heat of passion, a

killing may be only manslaughter where a legal arrest is attempted in an unlawful manner because the passion may be aroused by the use of unnecessary violence." Id. at 308, 278 S.E.2d at 337.

Second, the Court held a defendant was entitled to a jury instruction on voluntary manslaughter based upon a failure to satisfy each element of self-defense. After re-iterating that voluntary manslaughter and self-defense are not mutually exclusive, the South Carolina Supreme Court explained that a voluntary manslaughter instruction must be given where "the jury may fail to find all the elements of self-defense but could find sufficient legal provocation and heat of passion." State v. Gilliam, 296 S.C. 395, 397, 373 S.E.2d 596, 597 (1988). Gilliam claimed he and the deceased were arguing when the deceased made threatening statements. Id. at 396, 373 S.E.2d at 597. The deceased then shot at Gilliam. Id. Gilliam pulled his own gun and shot the deceased. Id. The Court explained Gilliam's testimony that the deceased threatened him and then fired at him would support a finding of sufficient legal provocation and heat of passion. Id. at 397, 373 S.E.2d at 597.

The South Carolina Supreme Court has not addressed "imperfect defense of others." While the Court appears to have rejected imperfect self-defense where the actual belief in danger was not reasonable, see Finley, supra, the Court agreed that a jury instruction on self-defense was proper where the facts alleged to support a claim of self-defense provided evidence of heat of passion based upon sufficient legal provocation, see Gilliam, supra. Thus, where the evidence supported an actual belief in danger to another, but the belief was unreasonable, an instruction on imperfect defense of others was required. The instruction was necessary in this case to combat the solicitor's closing argument in which he informed the jurors that brother was not in imminent danger of death or serious bodily injury based upon the injuries he actually sustained and his failure to call out for help. Had the jury agreed with the solicitor that brother was not in actual danger of losing his life or sustaining serious bodily injury, but also believed that Appellant entertained the belief, then the instruction on

how to view such evidence – as reducing murder to voluntary manslaughter – was required. Appellant respectfully requests rehearing on this matter in order for this Court to adopt the doctrine of imperfect self-defense as an extension of the Supreme Court's opinion in Gilliam, supra, and hold the trial judge erred failing to instruct the jury as requested.

Respectfully Submitted,

Susan B. Hackett

SUSAN B. HACKETT
Appellate Defender

This 12th day of September, 2022.

RECEIVED
Sep 12 2022
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Eugene C. Griffith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

NICHOLAS BENJAMIN CHHITH-BERRY,

APPELLANT

APPELLATE CASE NO. 2019-000352

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-entitled case has been served upon J. Anthony Mabry, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), which is amabry@scag.gov; and Nicholas Benjamin Chhith-Berry, #370880, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 12th day of September, 2022.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

From: Warren, Kaylynn
To: "amabry@scag.gov"
Cc: Hackett, Susan; DDALESSIO@SCAG.GOV; Stock, Chris
Subject: 2019-000352 The State v. Nicholas Benjamin Chhith-Berry
Date: Monday, September 12, 2022 10:20:00 AM
Attachments: 2019-000352 The State v. N.B. Chhith-Berry AG Service Cover Letter.pdf
2019-000352 The State v. Nicholas Benjamin Chhith-Berry Petition for Rehearing and COS.pdf

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Good Morning,

Please find attached for service in the above-referenced case the Petition for Rehearing which will be filed today, September 12, 2022, via email filing.

Respectfully,
Kaylynn

Kaylynn Warren
Administrative Assistant
South Carolina Commssion on Indigent Defense
Division of Appellate Defense
(803) 734-1330