THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APPEAL FROM AIKEN COUNTY
COURT OF GENERAL SESSIONS
CLIFTON NEWMAN, CIRCUIT COURT JUDGE

---

CASE NO. 2021-GS-02-00376

---

THE STATE OF SOUTH CAROLINA — RESPONDENT

VS

KENNETH ANDREW WHITAKER, JR. — APPELLANT.

---

# FINAL BRIEF OF APPELLANT

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## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Cases** **Page(s)**

## STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT ERR IN DENYING THE DEFENDANT'S REQUEST TO SUBMIT EVIDENCE OF THE VICTIM'S VIOLENCE AGAINST THE APPELLANT?

II. DID THE TRIAL COURT JUDGE ERR IN FAILING TO INSTRUCT THE JURY ON SELF DEFENSE OR ACCIDENT?

## STATEMENT OF THE CASE

The Appellant was indicted in May 2021in Aiken County for murder (R. 8 lines 18- 19, R. 9 lines 21-22). He was tried before the Honorable Clifton Newman on September 20-22, 2021(R.3-52). The jury found the Appellant guilty of the lesser offense of voluntary manslaughter (R. p 51). Judge Newman sentenced the Appellant to twenty-eight (28) years with credit for nineteen (19) months served (R. p. 52 lines 21-24). The notice of appeal was timely served and filed.

The facts as developed during the trial were that the Defendant and the Victim were married and have two children. They were living together at the time of the incident. According to the statements introduced at trial the Victim was in the living area of the small home. The Defendant awakened and came into the living area from the bedroom. The Victim was, according to the Defendant's statement, was out of control. The Defendant's statement was that he attempted to calm her, but she attacked him spreading human feces on his clothing and then on his face at which time he slapped her to get her to stop (R. p 10-16)

It is undisputed that the Victim had a brain tumor and that the slap caused the tumor to become unstable, and that the tumor's instability caused the Victim's death (R. p 25 lines 1-5, R. p 26 lines 6-18, R. p 27 line 4 - p 28 line 12, R. p 29 lines 12-20, R. p 39 line 12- p 44 line 23, R. p 46 line 11- p 50 line 23).

At trial counsel for the Defendant argued that the Defendant was entitled to a charge on the law of self defense and accident on the grounds that if the jury believed the Defendant's statement, then the jury could conclude that he was within his rights to defend himself and that the action he took was reasonable in light of the force being exerted against him. The Trial Judge declined to charge self defense or accident (R. p 39 line 9 – p 45 line 12). The Jury returned a

verdict of Guilty on the charge of Voluntary Manslaughter. Defense Counsel made the proper motions throughout the trial and after the Verdict moved for a Judgement Not Withstanding the Verdict. All Defense motions were denied, and this appeal followed.

## STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006); *State v. Douglas*, 367 S.C. 498, 506, 626 S.E.2d 59, 63 (Ct.App. 2006) *cert. granted*, June 2007; *State v. Wood*, 362 S.C. 520, 525, 608 S.E.2d 435, 438 (Ct.App. 2004).

An appellate court is bound by the trial court's factual findings unless they are clearly erroneous. *State v. Quattlebaum*, 338 S.C. 441, 450, 527 S.E.2d 105, 109 (2000); *State v. Patterson*, 367 S.C. 219, 224, 625 S.E.2d 239, 241 (Ct.App. 2006); *State v.Landis*, 362 S.C. 97, 101, 606 S.E.2d 503, 504 (Ct.App. 2004). *State v. Dantonio*, 376 S.C. 594, 602 (S.C. Ct. App. 2008)

As to the law of Self Defense:

> There are four elements required by law to establish self-defense . . . . First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, 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. If the defendant actually was 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. Fourth, 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 this particular instance. If, however, the defendant was on his own premises he had no duty to retreat before acting in self-defense. These are the elements of self-defense.*Id.* at 46, 317 S.E.2d at 453.... the facts and circumstances necessitated the circuit court charge additional elements that were requested by the defendant); *see also State v. Nichols*,325 S.C. 111, 116–17, 481 S.E.2d 118, 121 (1997) (finding the evidence supported including additional instructions on (1) "the right to act on appearances," (2) "relevance of prior difficulties," and (3) "that a person does not have to wait before acting in self-defense"). *State v. McCray*, 773 S.E.2d 914, 921 (S.C. Ct. App. 2015)

"All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina." S.C. R. Evid. 402

## ARGUMENT

### I.

### THE TRIAL COURT ERRED IN NOT ALLOWING THE APPELLANT TO INTRODUCE EVIDENCE OF THE VICTIM'S VIOLENCE AGAINST HIM.

The law of South Carolina concludes that all evidence is admissible subject to relevance. "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina." S.C. R. Evid. 402

The Appellant argued to the Trial Court that an incident report listing the victim as the aggressor and the Appellant as the victim in a domestic violence incident which occurred approximately 3 years prior, was relevant to the Appellant's defense. The criminal history of the Victim was to be presented in tandem with the incident report as verification of the information contained within the incident report (R. p 17 line 19 – p 20 line 3).

The Appellant further argued to the Trial Court that a body worn camera video recording of the victim's mother, the State's witness, explaining the assault on the Appellant was relevant to his defense (R. p 17 line 19 – p 20 line 3).

The Trial Court concluded that the incident report and bodycam video recording of the Defendant's mother, a witness for the State, describing the act of violence was inadmissible (R. p 19 line 12- p 20 line 2). This is in direct contradiction of the South Carolina Rules of Evidence.

> "Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: Evidence of a pertinent trait of character of the victim of the crime 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"

S.C. R. Evid. 404

The incident report and video statement of the State's witness, the Victim's mother falls into this exception and has extreme probative value.

Further, the evidence sought to be admitted by the appellant demonstrated that the Appellant had knowledge that the Victim had the propensity to cause him bodily harm, as he was the Victim of domestic violence committed against him by the Victim.

> 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 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, or to produce reasonable apprehension of great bodily harm. *State v. Brown*, 321 S.C. 184, 467 S.E.2d 922 (1996); *State v. Amburgey*, 206 S.C. 426, 34 S.E.2d 779 (1945).

*State v. Day*, 341 S.C. 410, 419-20 (S.C. 2000)

The Trial Court concluded that the incident report along with the victim's criminal history and bodycam video recording of the Defendant's mother describing the act of violence was inadmissible and not in the form of being proper.

The Trial Court's denial encompassed a denial to present evidence favorable to the Appellant and restricted the Appellant's case for self-defense.

The Trial Court's denial of the admissibility of the evidence was an error of law.

## ARGUMENT

## II.

## THE TRIAL COURT ERRED IN NOT INSTRUCTING THE JURY ON THE LAW OF SELF-DEFENSE.

"When reviewing the circuit court's refusal to deliver a requested jury instruction, appellate courts must consider the evidence in a light most favorable to the defendant" *State v. Williams*, 400 S.C. 308, 314 (S.C. Ct. App. 2012)

> There are four elements required by law to establish self-defense in this case. First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, 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. If the defendant actually was 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. Fourth, 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 this particular instance. If, however, the defendant was on his own premises he had no duty to retreat before acting in self-defense . These are the elements of self-defense. *State v. Davis*, 282 S.C. 45, 46 (S.C. 1984)

The Victim, unprovoked by the Appellant was in the process of committing an assault on the Appellant by smearing her own feces, a human waste product known to contribute to diseases and other permanent afflictions, on his face and clothing when the Appellant struck her across the face causing her to fall. The Victim later died at the hospital. The incident occurred in the home the Appellant shared with the Victim (R. p 10-16, R. p 21 line 6- p 23 line 4, R. p 24 lines 1-8).

The evidence and testimony presented to the Trial Court established three of the four elements of self-defense. The fourth element is satisfied by the fact that the Appellant was in his own home at the time of the assault upon him and had no duty to retreat. Moreover, there were

children in the home whom he had a duty to protect. Given the nature of the Victim's actions, it was not only appropriate, but necessary that he act to prevent harm to those children.

The Trial Court did not instruct the jury on self-defense based up on the incorrect conclusion that a person's exposure to someone else's bodily fluids does not constitute a risk of bodily harm. The Judge also stated, outside of the presence of the Jury, that this was not a self-defense case. That decision should have been left to the jury because it was an issue of fact as to whether the Victim was the aggressor and whether the action taken by the Defendant was reasonable (R. p 32 line 18- p 45 line 12).

As to the question of whether spreading human waste on an individual is an assault, that action is no different than spitting on a person.

> Spitting is a battery in most jurisdictions. In *State v. Keller* ( 40 Ore App 143, 146, 594 P2d 1250, 1252), the Oregon Court of Appeals held that spitting is "offensive physical contact": "[S]pitting on another can be an interference with the physical integrity of the victim that is comparable to striking, slapping, etc." ( *Id.*, 594 P2d at 1252.) In *People v. Peck* ( 260 Ill App 3d 812, 814, 198 Ill Dec 760, 633 NE2d 222, 223, citing *Regina v. Cotesworth*, 6 Mod Rep 172 [Q.B., 1705] [holding that spiting is a battery]), the Illinois Supreme Court wrote that "since the development of early common law, spitting has been recognized as an act sufficient to support a battery."

*Hitchcock Plaza, Inc. v. Clark*, 2003 N.Y. Slip Op. 51524 (N.Y. Civ. Ct. 2003)

Further, South Carolina acknowledges the risk of bodily harm associated with being assaulted with bodily fluids.

> An inmate, a detainee, a person taken into custody, or a person under arrest, who attempts to throw or throws body fluids including, but not limited to, urine, blood, feces, vomit, saliva, or semen on an employee of a state correctional facility or local detention facility, a state or local law enforcement officer, a visitor of a state correctional facility or local detention facility, or any other person authorized to be present in a state correctional facility or local detention facility in an official capacity is guilty of a felony and, upon conviction, must be imprisoned not more than fifteen years. A sentence under this provision must be served consecutively to any other sentence the inmate is serving. This section shall not prohibit the prosecution

> of an inmate for a more serious offense if the inmate is determined to be HIV-positive or has another disease that may be transmitted through body fluids. S.C. Code § 24-13-470

No evidence was presented that the Appellant initiated the confrontation. Taking the evidence most favorable to the Appellant, the question of whether the assault against the Defendant justified his actions. Moreover, if the jury had been given the law of self-defense, the jury could also conclude that the Appellant had just cause to believe that the assault with bodily fluids put him at a risk of bodily harm. He had no duty to retreat and reacted with appropriate force.

> "If there is any evidence of record from which it can be reasonably inferred that an accused justifiably inflicted a wound in self-defense, then the accused is entitled to a charge on the law of self-defense." *State v. Wigington*, 375 S.C. 25, 31, 649 S.E.2d 185, 188 (Ct.App. 2007). When any evidence in the record entitles the accused to a jury charge on self-defense, a trial judge's refusal to give the charge is reversible error. *State v.Muller*, 282 S.C. 10, 10, 316 S.E.2d 409, 409 (1984).

*State v. Jackson*, 384 S.C. 29, 35 (S.C. Ct. App. 2009)

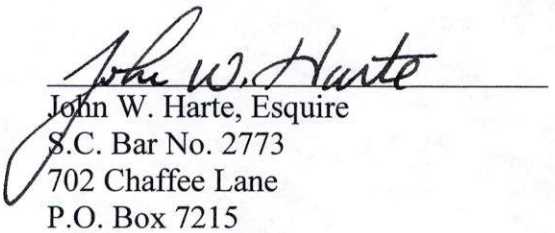
The Jury should have been instructed on the law of self-defense because, if the jury believed the statements of the Defendant, he was entitled by law to defend himself and the jury could reasonably conclude that his action was an appropriate response. The unknown fact that the victim was exceptionally fragile would not render his action inappropriate because there is no evidence in the record from which one might conclude that the Defendant knew that the victim was that fragile.

The Trial Court's failure to instruct the jury on the law of self-defense is an error of law justifying the granting of a new trial.

## CONCLUSION

The Trial Court failed to properly weigh the probative value of the Appellant's proposed exhibits and was in error to deny the Appellant's motion to have the evidence admitted. The Trial Court was in error in its decision not to instruct the jury on the law of self-defense. For the reasons and authorities set forth above, it is respectfully submitted that the Appellate Court should reverse the conviction of the Appellant and remand the case to the lower court for new trial.

Respectfully submitted,



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**CERTIFICATION OF COUNSEL**

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I certify that the appellants final brief(s) complies with Rule 211 SCACR.

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