STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Honorable H. Steven DeBerry, IV, Circuit Court Judge

Appellate Case No. 2022-000181

THE STATE, ...RESPONDENT,

v.

SEBASTIAN D. KAISK, ...APPELLANT.

INITIAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err by refusing to charge the jury on self-defense when there was evidence presented to support the existence of all four elements of the defense?

2. Did the trial court err by refusing to redact Appellant's comment on a Snapchat video, which was admitted into evidence as State's Exhibit No. 13, that he was "reporting to one of my G's . . . my official G's" pursuant to Rule 403, SCRE, since the remark was a reference to gangs and any probative value of the evidence was substantially outweighed by the danger of unfair prejudice?

3. Did the trial court err by sentencing Appellant to a consecutive term of five years imprisonment for possession of a weapon during the commission of a violent crime where the court erroneously found the sentence had to be served consecutively to the sentence imposed for the violent crime since pursuant to S.C. Code Ann. § 16-23-490(B) the court had discretion to order the five-year sentence to be served consecutively or concurrently?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Whether the trial court properly charged the jury on murder and voluntary manslaughter alone because no evidence of self-defense was placed into the record during the trial?

2. Whether the trial court properly allowed the Snapchat comments in because they went to malice, the res gestae behind the event, and Appellant's motive to kill the victim?

3. Whether, as the issue is not preserved for appellate review, the trial court's five-year consecutive sentence "by statute" is appropriate for PCR or, alternatively, a limited remand to determine whether the trial court contemplated an additional five years in Appellant's sentence for murder when running the sentences consecutive?

STATEMENT OF THE CASE

Appellant was indicted at the September 2019 term of the grand jury for Horry County for murder and possession of a weapon during the commission of a violent crime. (2019-GS-26-04608; -04610). The case was prosecuted by Assistant Solicitors Seth Oskin and Rachel Harte; Appellant was represented by Barbara Pratt, Esq. Appellant proceeded to trial by jury before the Honorable H. Steven DeBerry, IV, on February 7, 8, and 9th, 2022, after which Appellant was found guilty as indicted. Tr. 424. Judge DeBerry sentenced him to 43 years' imprisonment for murder and 5 consecutive years for the weapons conviction. Tr. 431. Appellant timely filed a notice of intent to appeal his convictions and sentence and subsequently submitted a Brief in support of his Appeal. This Brief of Respondent follows.

STATEMENT OF FACTS

Tyler Schaefer ("victim") and Sebastian Kaisk ("Appellant") were "pretty tight" according to Kaisk. They had lived together for a while at one point. However, something shifted come July 14, 2019. Appellant thought Schaefer had stolen $200.00 of marijuana from him, so Appellant set off to hunt him down. Appellant found him by the Bi-Lo in North Myrtle Beach near 38th Street South and Smith Street right off Highway 17. Tr. 180, Tr. 185, Tr. 192-193; State's Exhibit 8 (map of the area); State's Exhibit 38 (police interview with Appellant).

Schaefer had just finished purchasing a bag of noodles from BI-LO at 10:49 P.M. when Appellant approached him. They walked together for a while, but somehow Schaefer ended up seated on the ground with Appellant standing over, taunting, and threatening him. Appellant recorded a Snapchat video at 11:10 P.M. in which the victim said, while crying, "What the f***. What the f***." "What are you doing?" and "Let me call my kids." Appellant replied, "I'm reporting to my G's, my official G's"[1] and "Nah, man, I feel sorry for them, though. How about you say whatever you want for Heaven, or Hell, whichever you want to go to." The victim denied having Appellant's missing weed and tried to get away from him, but Appellant tackled him. Appellant then pulled out a gun and shot the victim in the side of his head at 11:18 P.M. Appellant ran away, then ran back to the victim, put a second bullet into the back of his head, grabbed the shirt he had brought, and ran off a second time. Tr. 198, Tr. 230-232, Tr. 359-360, Tr. 387, Tr. 394; State's Exhibit 41 (Snapchat page.) [2]

[1] Appellant told law enforcement he had sent the video to his friends as a joke. State's Exhibit 38 (recorded interview).

[2] Appellant gave law enforcement consent to search his phone and they located the Snapchat video therein. Tr. 277-280; State's Exhibit 13 (Snapchat video).

Appellant then started texting likely a female starting at 11:31 P.M., and, among other things, he said: “I can’t say it over the phone or text. We have to talk in person, and soon.” He then texted someone he named “Boss” in his phone that he needed to talk, but that it was about “[s]omething I can’t speak on.” “I don’t want nobody to have any evidence.” “I just need to tell you in person with no other ears.” “I’ll tell you in person, but I just need to hurry and leave the state.” Tr. 341-342, Tr. 327-342; State’s Exhibit 40 (cell phone extraction report).

A cab driver found the victim on the ground after he had been bleeding for thirty minutes. Once officers arrived between 12:30 and 12:45 A.M., the victim was “in pain and hollering” and said he “was there to give someone money;” that he “owed somebody.” He died later in an emergency room. The autopsy showed the first bullet went into his right neck and traveled through his right lung, his airway, windpipe, and blood vessels but not his skull. The second bullet went into the back of his head and exited behind his right ear. Two spent .380 shell casings were found at the scene. Tr. 180-181, Tr. 188-189, Tr. 194-195, Tr. 201-202, Tr. 242, Tr. 318-321; State’s Exhibits 9, 10, 11 (scene photographs); State’s Exhibit 39 (recorded interview).

The entire incident was caught on camera by the Windy Hills Hardware Store camera, the BI-LO’s CCTV, the Scotchman Convenience Store’s camera, and the Samu Spa’s camera. A five-minute summary video was admitted as State’s Exhibit 37 at trial that included the Snapchat clip. The video showed the Appellant and the victim interacting before the murder, and it showed Appellant shooting the victim, running away, then coming back to shoot him again in the back of the head.

A photo of Appellant was pulled off one of the cameras and released as a BOLO. Appellant was located and initially lied to the police about going into the Scotchman to look for the victim. He then admitted he lied after officers confronted him with the fact that the murder

was on camera. He also admitted that he was the person in the BOLO photo and confessed to shooting the victim. A search warrant of Appellant's home on Hilton Drive produced a backpack with clothing, and ammunition, and a pile of his hair clippings was found in the trashcan in his bathroom. He had tried to change his appearance before fleeing. Tr. 26-27, Tr. 38-42, Tr. 203-204, Tr. 224-227, Tr. 234-237, Tr. 242-251, Tr. 270-271, Tr. 274-277, Tr. 281-282, Tr. 297, Tr. 303, Tr. 347, Tr. 353-360; State's Exhibit 38 (recorded police interview); State's Exhibits 22, 23, 24, 25 (photographs of Appellant's home); State's Exhibit 37 (compilation video).[3]

[3] The Windy Hills video: State's Exhibit 3, the BI-LO's video: State's Exhibit 12, and the Samu Spa's video: State's Exhibit 14 were not designated as matter to be included in the record on appeal because all clips pertinent to this appeal are included in State's Exhibit 37, the State's summary video.

STANDARD OF REVIEW

"If there is no evidence to support the existence of any one element [of self-defense], the trial court must not charge self-defense to the jury. Whether there is any evidence to support each element is a question of law." *State v. Williams*, 427 S.C. 246, 249, 830 S.E.2d 904, 906 (2019). "The admission or exclusion of evidence is an action within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion." An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions. *State v. Douglas*, 369 S.C. 424, 429-430, 632 S.E.2d 845, 848 (2006).

ARGUMENT

I. The trial court properly declined to charge the jury on self-defense as Appellant brought on the difficulty and no other evidence was introduced to support the charge.

Appellant argues Judge DeBerry erred by declining to charge the jury on self-defense. The State disagrees and submits Appellant's argument is without merit. In South Carolina, a defendant must establish the four elements of self-defense to be acquitted of a crime before a jury, but especially to be entitled to a jury charge on it. The elements are:

> **(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 person of ordinary fitness and courage would have entertained the same belief that he actually was in imminent danger *and* the circumstances were such that he was actually in imminent danger *and* the circumstances were such as would warrant a person of ordinary prudence, fitness and courage to strike the fatal blow in order to save himself from serious bodily harm or loss of his own life; and
>
> **(4)** the defendant had no other probable means of avoiding the danger.

State v. Bryant, 336 S.C. 340, 344-345, 520 S.E.2d 319, 321-322 (1999) (emphasis added.)

A defendant may request a charge on self-defense, but a trial judge is well within his right to deny the request if no evidence is presented that supports the charge. "The trial court must charge the jury on the law applicable to the jury's deliberations." *State v. Marin*, 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016). In fact, the trial court "is *required* to charge *only* the current and correct law of South Carolina" and the law to be charged must be determined from the evidence presented at trial. *Winkler v. State*, 418 S.C. 643, 655, 795 S.E.2d 686, 693 (2016) (emphasis added).

"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*, 649 S.C. 25, 649 S.E.2d 185 (Ct. App. 2007). However, a jury charge is not required unless it is "supported by the evidence." *State v. Bryant*, 336 S.C. 340, 344, 520 S.E.2d 319, 321 (1999). "If there is no evidence to support the existence of any one element, then the trial court must not charge self-defense to the jury. Whether there is any evidence to support each element is a question of law." *State v. Williams*, 427 S.C. at 249, 830 S.E.2d at 905-906.

Here, during the charge conference, the solicitor aptly argued against Appellant's request to charge self-defense as there was no evidence Appellant was without fault in bringing on the difficulty as per *State v. Williams*. Tr. 377-378. Appellant tracked down the victim, was armed with a gun (while the victim was weaponless), recorded a Snapchat video wherein he taunted, threatened, and held the victim against his will – then asked him to choose his last words for "heaven or hell" – refused to let him call his kids even though the victim begged him through tears, then minutes later is seen shooting him point blank. The entire incident was caught on camera. There was no struggle for the weapon. The Appellant was in control the entire time. He was calm, cool, and collected. There was no testimony of any threats by the victim to Appellant, only the other way around. The Appellant then came back a second time and shot the victim a second time through the back of his skull, all over a missing $200 worth of marijuana.

Judge DeBerry determined there was no question "that but for the defendant's actions, they would not have been where they were but for him [Appellant] bringing a gun to the situation." Tr. 384. The judge reasonably agreed with the solicitor that Appellant was "not

without fault in bringing on the difficulty," and "the case law requires [therefore] that we not charge self-defense." Tr. 384. This Court should affirm.

II. Judge DeBerry properly allowed the statement "I'm reporting to one of my G's . . . my official G's" into evidence because it went to malice and the res gestae of the case. It was more probative than prejudicial and there is no evidence it had anything to do with gangs.

Appellant argues Judge DeBerry erred in allowing the jury to hear the Appellant state he was "reporting to one of my G's . . . my official G's" on the Snapchat video he himself recorded on his phone right before he shot the victim. He argues it was more prejudicial than probative because it was a reference to a gang. The State disagrees and submits Appellant's argument is without merit. The statement went directly to malice, demonstrating he planned to kill the victim the whole time. It was also a part of the res gestae of the case. Plus, Appellant stated he sent it to his friends as a joke, and no other reference to gangs was made in any piece of evidence. In fact, there is no evidence that Appellant was in a gang at all. This Court should affirm.

The defense objected to the statement in the video, arguing it should be redacted under *State v. Liverman*, 386 S.C. 223, 687 S.E.2d 70 (Ct. App. 2009) and Rule 403, SCRE. Tr. 262-263. The solicitor argued it went to malice and motive on why Appellant killed the victim. Tr. 263. After a long discussion about the *Liverman* case, the court ruled that Appellant's case was distinguishable because in *Liverman*, multiple expert witnesses testified "as to what certain body tattoos might mean and g[a]ve their opinion on them. That is far and away from what we have here when it's a statement of the defendant himself during – just before the commission of a crime." Tr. 265-266. The judge then allowed the statement to be played for the jury. Judge DeBerry did grant the Appellant's request for a limiting instruction (that the solicitor offered to consent to) that no law enforcement officer testify about what "G's" meant. Tr. 362.

Here, the evidence was relevant under Rule 401, SCRE, and more probative than prejudicial under Rule 403, SCRE, so Judge DeBerry rightly admitted it into evidence, as it would help the jury determine the facts and understand the issues. It went to malice: Appellant

pulled the victim back toward him the second time, was armed with a gun, he sought out the victim or knew where he was and found him, and then filmed him while on the ground crying. Tr. 363-364. As the jury was instructed, malice is "the evil, depraved heart, and a wicked spirit. A demonstrated hostility toward another, ill-will." Tr. 389. Appellant pulled the trigger once then came back and did it a second time. "Reporting to my G's" is just one piece of evidence in a long string that demonstrated malice aforethought in this case. He was making the video to send to his friends to make fun of the victim. That is all. This Court should affirm.

III. Appellant was sentenced to five consecutive years "by statute" when S.C. Code Ann. § 16-23-490(B) allows the trial court discretion. This issue is not preserved for appellate review. Thus, the proper remedy is at PCR or, in the alternative, a remand to address whether the trial court contemplated the additional five years in his sentence for murder.

After Appellant was found guilty of both murder and possession of a weapon during the commission of a violent crime, Judge DeBerry sentenced him to five years "consecutive by statute." Tr. 424, Tr. 431. "This is to run consecutive by statute with Indictment 2019-GS-26-04608 for the crime of murder." Tr. 431. The judge gave Appellant 43 years for murder. Tr. 431. When discussing the sentence with the court, the State said, "I believe it is consecutive per statute." Tr. 427. The defense, during mitigation, said "He's just 21 now. I mean, for him, you know, 30 years, which is the minimum, plus five for the possession, that is going to be a lot of his life, probably all of it. If he got out after day-for-day at that point, he would be 56, 57, a little younger than me." Tr. 430. This shows the defense contemplated the minimum of thirty years for murder plus an additional five years. No party brought up Section B of § 16-23-490 and its instruction that "Service of the five-year sentence is mandatory unless a longer mandatory minimum term of imprisonment is provided by the violent crime. The court may impose this mandatory five-year sentence to run consecutively or concurrently."

Therefore, this issue is not preserved for appellate review because there was no contemporaneous objection. The record is unclear whether Judge DeBerry contemplated an additional five years in his 43-year sentence in giving the consecutive 5-year sentence. Perhaps he would have structured the sentence as 48 years for murder and 5 years concurrent for the weapons charge had a party brought Section B to his attention. As there is no remedy available here per *State v. Johnston*, 333 S.C. 459, 510 S.E.2d 423 (1999) (holding a defendant's challenge to a sentence could not be raised for the first time on appeal), the proper remedy is through post-conviction relief. In the alternative, a limited remand to inquire of Judge DeBerry's sentence

structure intentions is a possibility. Either way, the sentence should not be vacated entirely as there is no statutory provision for that.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

Respectfully submitted,

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