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**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM GEORGETOWN COUNTY  
The Honorable Benjamin H. Culbertson, Circuit Court Judge

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Appellate Case No. 2022-000723

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THE STATE,

Respondent,

v.

ERYK J'VON SMITH,

Appellant.

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**INITIAL BRIEF OF RESPONDENT**

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## **STATEMENT OF ISSUE ON APPEAL**

The trial judge did not err in refusing to charge the jury on defense of others.

## STATEMENT OF THE CASE

Appellant was indicted in September of 2019 for attempted murder, armed robbery and criminal conspiracy. Appellant proceeded to a jury trial May 17-20, 2022, in Georgetown County before the Honorable Benjamin H. Culbertson. Ralph Wilson, Esq. and Lauren Anderson, Esq. represented the Appellant. The jury convicted Appellant of the lesser-included offense of assault and battery of a high and aggravated nature (ABHAN). He was acquitted of the armed robbery and criminal conspiracy offenses. He was sentenced to twenty years' imprisonment. This appeal follows.

## STATEMENT OF FACTS

In the evening of October 9, 2018, a shooting occurred at the Francis Marion Store, a gas station just north of Georgetown, during an attempted drug robbery. The victim, Joshua Miller (“Victim”), stated that he was riding with his friend Corey Hayes to the gas station so Hayes could sell Xanax pills to Janena Gamble and Jed Coleman. When they arrived, they observed Gamble’s car parked in the back behind the store in a poorly lit area, causing Hayes to feel “sketched out.” Hayes called to ask them why they were parked back there, to which they were reportedly “defensive.” Tr. 106, ln. 19—Tr. 108, ln. 4. As Hayes and Victim were about to leave due to their concerns, Coleman and Gamble agreed to pull around to the front and parked next to a gas pump parallel to Victim and Hayes. Tr. 108, ln. 5—Tr. 110, ln. 2.

Victim and Hayes were in a white Chrysler while Coleman, Gamble, Eryk Smith (“Appellant”), and Coleman’s younger brother Jayqwane (“Brother”) were in a black Audi. Gamble was identified as the driver of the Audi while Appellant was in the front passenger seat and the two Coleman brothers were in the backseat. Victim further testified that after the Audi pulled around, Gamble and Coleman got in the back of the Chrysler to complete the drug exchange. Appellant and Brother remained in the Audi. Tr. 108, ll. 13-18; Tr. 109, ln. 2—Tr. 111, ln. 11. After Hayes gave them a bag of Xanax, Coleman and Gamble jumped out of the car without paying Hayes. Tr. 111, ln. 19—Tr. 112, ln. 2. Gamble then threw the drugs through the open window of the driver’s door. As Gamble and Coleman were getting back into the Audi, Victim got out of the Chrysler; beating Gamble to the driver’s door as he reached inside the Audi for the bag of Xanax. Victim stated that as he reached into the car, he saw a “gun pointed at [him]” followed by a “bright flash.” Tr. 112, ll. 11-13.

It is undisputed that as Victim reached into the Audi, and that Appellant fired a single shot, striking Victim in the wrist and neck/jaw as the bullet left the vehicle. Tr. 112, ll. 3-23; Tr. 377, ll. 7-12. Gamble was also struck in the hand by the same bullet. Tr. 163, ll. 4-20. Victim initially ran towards the back of the store but upon realizing there was no help there, ran back towards the front of the store. As he ran back, he saw the black Audi “pull off.” Tr. 113, ln. 13—Tr. 114, ln. 7.

Victim was rushed to the local hospital for immediate treatment and then transferred to MUSC in Charleston for more treatment. After being discharged, Victim moved to the upstate to live with his mother for his recovery. He returned to the Georgetown area only to retrieve his dog and other belongings and then immediately left the same day for the upstate because he was still “scared for [his] life” and because “[t]hey didn’t ever catch them.” Tr. 115—Tr. 119. When asked on direct about what he told law enforcement about the transaction leading to the shooting, Victim admitted to originally lying—telling law enforcement that the transaction was over “weed” instead of Xanax.<sup>1</sup> Victim also recalled seeing a YouTube video made by Appellant a few months after the shooting in which he raps lyrics about shooting people “in the face” and leaving “without a trace.”<sup>2</sup> Tr. 121, ll. 12-25; Tr. 156, ll. 8-23.

Appellant testified in his own defense however, he gave a markedly different account about the nature of what happened that day and what lead up to the shooting. Appellant stated that he spent most of the day “drinkin’” and “chillin’.” Appellant stated that he, Brother, and Gamble went to Coleman’s house and Coleman’s mother asked them to go buy cigarettes from the gas station. They went to Francis Marion to buy the cigarettes and returned to the house, but

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<sup>1</sup> Victim stated he did this presumably because he thought marijuana would have gotten him in less trouble than Xanax and did not “want nobody to get in trouble.” Tr. 120. ln 2-17.

<sup>2</sup> Apparently, Appellant had produced the song while out on bond for this case’s charges. Tr. 362, ln. 20- Tr. 364, ln. 19.

“got the wrong cigarettes.” Tr. 346—Tr. 349. When they returned to the Francis Marion, Appellant stated that they pulled up “beside” another car at the gas pump but thought they were still there just to buy cigarettes. Tr. 350, ln. 10—Tr. 351, ln. 8. Appellant did not mention anyone parked behind the store or phone conversations between Coleman/Gamble and Hayes regarding a drug transaction. Appellant did state that “we all had weapons”—including Coleman, Brother, Gamble, and himself.<sup>3</sup> Tr. 343, ll. 7-13. Coleman and Gamble got out of the car, but Appellant did not see where they went because he was “laid back in the car chillin’.” Tr. 351, ll. 6-12. According to Appellant, Coleman and Gamble were gone from the car for between five and ten minutes while parked next to the other car before anything happened. Tr. 351, ln. 20—Tr. 352, ln. 4.

At this point, Appellant’s testimony markedly diverged from Victim’s testimony. According to Appellant, as he was “layin’ back chillin’” in the car, Gamble “come frantically jump back in the car” and Victim then started attacking Gamble through the window, reportedly struggling for her gun. Tr. 352, ln. 6—Tr. 353, ln. 17. It is at that point that Appellant shot the Victim. When asked why he shot him, Appellant said he was “scared for [his] life” and it was “too fast for me to get out of the car.” Tr. 354, ll. 1-15. (Emphasis added) Regarding the situation and the drug transaction generally, Appellant stated:

I don’t know, she jumped in the car frantic, he’s literally right behind us, I don’t know what’s going on. I’m clueless to the fact of what’s really going on because I don’t know nothing. **I have no knowledge of nothing**, I don’t know what’s going on. All I know is, this is a man I don’t know jumping through this window attacking, he’s aggressing, and she’s going for her gun so I don’t know if she just got into a it [sic] with him in the store, I don’t know what the hell is going on, and she’s going for her gun and they fighting for the gun. (Emphasis added).

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<sup>3</sup> Reportedly, they all had guns because the party they were going to attend later was “in the hood.” Tr. 377, ln. 7-25.

Tr. 344, ll. 15-23. According to Appellant, he did not learn that the encounter was an attempted robbery of Victim and Hayes until the next day when he read about the shooting on the Internet.

Tr. 359, ll. 12-19.<sup>4</sup>

Following the close of the defense's case, defense counsel moved for a defense of others charge to be given to the jury based on Brother's presence in the car and the following statement by Appellant: "[. . .] he's gonna get this gun and he's gonna shoot me. He's gonna shoot everybody in this car, so I shot." Tr. 353, ll. 20-22. Following back and forth discussion, the Court declined to give the charge, stating:

Well, if the testimony is, I thought he was going to shoot everybody in the car, and he's in the car, he's including himself in that [. . .] I don't know that a jury could find him not guilty by self defense in the defense of others without also finding him not guilty of self defense of himself [. . .] if the testimony is, like, look, I thought he was going to kill everybody in the car, and he's one of the ones in the car, I think self defense of himself is more the appropriate charge, and I'm going to do that.

Tr. 410, ln. 24—Tr. 411, ln. 12.

Following closing arguments, charges were given to the jury which included the standard self-defense charge. Tr. 459—Tr. 461. Following deliberations, the jury convicted Appellant of ABHAN, the lesser-included offense of attempted murder and acquitted him of criminal conspiracy and armed robbery. Tr. 476, ln. 14—Tr. 477, ln. 11. Appellant was then sentenced to twenty years of imprisonment with credit for time served. Tr. 481, ll. 11-25.

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<sup>4</sup> Appellant stated that neither Coleman nor Gamble bothered to explain what happened at the gas station after they left, even after Gamble was out of the hospital and they had hidden the guns on a "deer stand" behind "her house." Tr. 357—Tr. 358.

## STANDARD OF REVIEW

“In reviewing jury charges for error, [the Court of Appeals] must consider the circuit court’s jury charge as a whole in light of the evidence and issues presented at trial.” State v. Adkins, 353 S.C. 312, 318, 557 S.E.2d 460, 463 (Ct. App 2003). “When reviewing a jury charge for error, an appellate court considers the charge as a whole; the charge must be prejudicial to the appellant to warrant a new trial.” State v. Stukes, 416 S.C. 493, 498, 787 S.E.2d 480, 482 (2016). “But an instruction must be erroneous and prejudicial to warrant reversal” State v. Bowers, 428 S.C. 21, 28, 832 S.E.2d 623, 627 (2019). ““An appellate court will not reverse the trial [court’s] decision regarding a jury charge absent an abuse of discretion.”” State v. Washington, 424 S.C. 374, 394, 818 S.E.2d 459, 469 (Ct. App 2018) (citing State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010)). “The law to be charged to the jury is determined by the evidence presented at trial.” State v. Gaines, 380 S.C. 23, 31, 66 S.E.2d 728, 732 (2008). “If there is any evidence in the record from which it could reasonably be inferred that the defendant acted in self-defense, the defendant is entitled to instructions on the defense, and the [circuit court’s] refusal to do so is reversible error.” State v. Day, 341 S.C. 410, 416-17, 535 S.E.2d 431, 434 (2000). “In charging self-defense, the trial judge should consider the facts and circumstances of the case and fashion an appropriate charge.” State v. Santiago 370 S.C. 153, 160, 634 S.E.2d 23, 27 (Ct. App. 2006). “Failure to give requested jury instructions is not prejudicial error where the instructions given afford the proper test for determining the issues.” State v. Burkhardt, 350 S.C. 252, 263, 565 S.E.2d 298, 304 (2002). “No instruction should be given by the trial judge, at the request of appellant, which tenders an issue which is not presented or supported by the evidence.” State v. Weaver, 265 S.C. 130, 137, 217 S.E.2d 31, 34 (1975).

## ARGUMENT

### **The trial judge did not err in refusing to charge the jury on defense of others.**

Appellant argues the trial judge erred in refusing to charge the jury on defense of others. Specifically, that because Appellant testified “he fired because he thought Victim would ‘shoot everybody in this car,’” there was evidence at trial that Appellant was acting in defense of another. The trial judge did not abuse his discretion in refusing to charge defense of others because the evidence introduced at trial did not support a defense of others charge. Further, even if the trial judge did err in refusing to charge defense of others, it was harmless because the jury did not find Appellant not guilty by self-defense.

### **Self-Defense**

A self-defense charge is only required when the evidence supports it. State v. Slater, 373 S.C. 66, 69, 644 S.E.2d 50, 52 (2007). A person is justified in using deadly force in self-defense when (1) defendant is without fault in bringing on the difficulty, (2) the defendant actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he was actually in such imminent danger, (3) if the defense is based upon the defendant’s actual belief of imminent danger, a reasonable prudent man of ordinary firmness and courage would have entertained the same belief; 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 this particular instance. State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984). “Upon request a defendant is entitled to a jury instruction on self-defense if he had produced evidence tending to show the four elements of that defense.” State v. White, 425 S.C. 304, 311, 821 S.E.2d 523, 527 (Ct. App 2018).(Citations omitted). “An accused who provokes or initiates an assault cannot claim self-defense unless he both withdraws from the conflict and communicates his withdrawal

by word or act to his adversary.” State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999). The court in State v. Williams held that the defendant was not “without fault” in bringing on the difficulty, and could not assert the defense of self-defense with respect to a murder charge. State v. Williams, 427 S.C. 246, 830 S.E.2d 904 (2019). The court in State v. Santiago held that a self-defense charge was not warranted because defendant was not on his property, therefore he had a duty to retreat. State v. Santiago, 370 S.C. 153, 162, 634 S.E.2d 23, 28 (Ct. App 2006).

### **Defense of Others**

“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. Starnes, 340 S.C. 312, 322-323, 531 S.E.2d 907, 913 (2000). (emphasis added).<sup>5</sup> To give a defense of others charge, there must be some evidence adduced at trial that the defendant was indeed lawfully defending others. Douglas v. State, 332 S.C. 67, 73, 504 S.E.2d 307, 310 (1998). Where a defendant does not testify he was shooting for purpose other than to protect himself, he is not entitled to a charge

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<sup>5</sup> In State v. Cook, 78 S.C. 253, 257, 59 S.E. 862, 863 (1906), the South Carolina “The doctrine of freedom from fault in bringing on a difficulty as a condition precedent to a plea of self-defense applies with equal force to a case in which one person interferes in a difficulty between two others in behalf of, or to protect one of them; and generally speaking a person who does this will not be allowed the benefit of the plea of self-defense, unless such plea would have been available to the person whose part he took in case he himself had done the killing, since the person interfering is affected by the principle that the party bringing on the difficulty cannot take advantage of his own wrong... Thus, if a son fight in defense of his father, his act in doing so will receive the same construction as that of the father, and if the latter was the aggressor in bringing on the difficulty, and could not plead self-defense, the same rule applies to the son. And the son cannot rely on his own freedom from fault in bringing on the difficulty, as a defense, where he knew the father provoked the attack; both must have been without fault in bringing it on. Nor is a father justified in killing the adversary of his son, where the son had provoked and brought on the conflict in which he was placed in imminent danger.” (Quoting Wharton on Homicide (3d Ed.) § 332). The Court reasoned this rule prevented an innocent person from being killed while acting in self-defense by an attacker who did not know who the initial aggressor was when arriving on the scene of a conflict in progress. Id. at 259, 59 S.E. at 864

on defense of others. State v. Alford, 264 S.C. 26, 212 S.E.2d 252 (1975), *overruled on other grounds by* State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009).

In Starnes, Appellant shot and killed two men. He maintained the shootings were in self-defense, or, in the alternative, were to protect a friend, Fogle, from being killed or seriously injured. Starnes at 318, 531 S.E.2d at 911. Appellant had picked up Fogle to take to his house, reportedly to sell meth to Champlin and Welborn (“Victims”). Id., at 317-18, 531 S.E.2d at 910-11. When they arrived, Victims were already waiting for them inside Appellant’s home. Id. Sometime after they entered, Appellant stated he “heard some noise,” heard Champlin “cursing,” and saw Champlin “pointing a gun at Fogle.”<sup>6</sup> Id. Appellant then retreated into his bedroom and grabbed his .38 caliber revolver. Id. Realizing there was no escape through his bedroom, Appellant attempted to walk back through the living room but was confronted by Welborn. Appellant testified that, because Welborn had a gun, he shot him multiple times and then “immediately thereafter shot Champlin.”<sup>7</sup> Id. While the jury was charged on self-defense, the Supreme Court upheld the trial court’s denial of the defense of others charge, stating “Appellant was not entitled to a charge on defense of others” because “Appellant specifically maintained he shot Welborn and Champlin because he thought they were going to shoot *him*. At no point did appellant suggest he shot either Welborn or Champlin to protect Fogle.” Id. at 323, 531 S.E.2d at 913 (emphasis added).

Similarly, Appellant was shooting primarily on behalf of his own safety rather than Brother’s and thus **may** have been entitled to a self-defense charge but not a defense of others

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<sup>6</sup> Fogle had testified similarly but characterized the entire event as only lasting a “couple of seconds.” Starnes, 340 S.C. at 316, 531 S.E.2d at 910.

<sup>7</sup> Apparently by this point Champlin had already given his gun to Welborn but Appellant still thought Champlin was going to shoot him, likely based on the earlier threat to Fogle. Starnes, 340 S.C. at 318, 531 S.E.2d at 911.

charge (Emphasis added). First and foremost, the bulk of Appellant's testimony regarding the shooting relates his own fear rather than a perceived threat to Brother. Appellant relies primarily on one sentence out of his entire testimony to support a defense of others charge: "he's gonna get this gun and he's gonna shoot me. **He's gonna shoot everybody in this car**, so I shot." Tr. 353, ll. 20-22 (emphasis added). However, what follows in his testimony under direct examination is a focus on himself and his own safety rather than Coleman's, Gamble's, or Brother's:

Q. And at that time you shot him were you in fear?

A. I was scared for *my life*, honestly.

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[A]nd she's going for her gun and they fighting for the gun. Like I said, *I'm in direct*, I'm right – *I'm literally in the passenger seat*.

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Q. Okay. Alright. Now, after the shot, what happened? Tell the jury exactly [sic] happened.

A. Well, exactly what happened after the shot, I see – he falls, but I know Ms. Gamble, she – well, Ms. Janena, she's screaming about her hand or says she's been shot in her hand, and I'm apologizing, because I'm not apologizing because I feel like – I'm apologizing because it shot her accidentally, like, *I was trying to save myself. I wasn't – I was trying to save myself*. So she's hollering and hooting and hollering about her hand, and I'm apologizing, I'm hysterical because that was not – that's not something I wanted to do, *it's something I had to do in order to protect myself, it's not something I wanted to do*.

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Like, this is my first time ever shootin' someone, so I don't know what do [sic], *I'm scared, like, I'm scared, like, I'm scared, like, this really just happened. Like, I was really in the line of fire, I really could have lost my life just now, like, and I have to shoot someone in order to not lose my life*.

Tr. 354, ll. 6-25; Tr. 356, ln. 1—Tr. 357, ln. 8 (emphasis added). On cross examination,

Appellant gave similar testimony:

Q. And you knew you had hit him in the face and neck area?

A. No. I didn't know exactly where I hit him. Like I said, I was aiming for that arm where that gun was. I'm not worrying about where it hit him, I'm aiming for this gun, *I'm worrying about this gun, I'm worried about losing my life. I'm not worried about anything else*. I'm not worried about harming him. It was not – I

didn't want to harm him. I didn't want to do nothin' to him. I didn't want that to happen. *I was literally scared for my life. I didn't want to die or I didn't want to be shot.*

Tr. 380, ll. 1-10 (emphasis added).

Based on the highlighted testimony, it was therefore reasonable for the trial court to conclude that self-defense was the appropriate charge instead of defense of others based off the principle identified in Starnes. Like with Starnes, there may have been another person potentially in harm's way—Fogle in the other room in that case—but the record there demonstrated, as it does here, that the person asserting self-defense acted primarily for their own safety, thereby overriding any presumption they were acting to defend another.

Even if failing to give the defense of others charge was erroneous, the error was not prejudicial to Appellant because the jury did not acquit him of ABHAN under self-defense. As the trial court correctly pointed out, “I don't know that a jury could find him not guilty by self defense in the defense of others without also finding him not guilty of self defense of himself, that's what I'm saying.” Tr. 411, ll. 3-6. Under harmless error analysis, the inquiry “[. . .] is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered.” State v. Middleton, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014) (quoting State v. Kerr, 330 S.C. 132, 144–45, 498 S.E.2d 212, 218 (Ct. App. 1998)). In the present case, Appellant has not met the burden of showing that the failure to give the defense of others charge contributed to the jury's verdict. It is reasonable to suggest that the jury simply did not find Appellant's self-defense narrative credible, thus making any real distinction between self-defense and defense of others meaningless as far as the verdict is concerned. Alternatively, it is sufficient to conclude, as the trial court did, that a jury could not reasonably acquit Appellant by defense of others but not acquit by self-defense (or also

acquitting by self-defense), or vice-versa. Accordingly, even if refusing to charge defense of others was error, it was harmless and does not affect the legitimacy of the verdict and conviction.

### CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgments and convictions of the lower court should be affirmed.

Respectfully submitted,


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