STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Edgefield County

Honorable Walton J. McLeod, IV, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BARRY WAYNE JONES,

APPELLANT

APPELLATE CASE NO. 2022-000046

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF ISSUES ON APPEAL

1.

Did the trial judge err by denying Appellant immunity from prosecution pursuant to the Protection of Persons and Property Act, when Appellant proved by a preponderance of the evidence that he was entitled to immunity pursuant to the Act?

2.

Did the trial judge abuse his discretion by admitting evidence that Appellant allegedly attempted suicide in the moments before he was taken into custody where, pursuant to State v. Cartwright, 425 S.C. 81, 819 S.E.2d 756 (2018), the state failed to prove an unmistakable nexus existed by clear and convincing evidence linking the suicide attempt to a guilty conscious derivative of the offenses for which Appellant was being tried, and where any probative value of the evidence was substantially outweighed by the danger of unfair prejudice pursuant to Rule 403, SCRE?

3

Did the trial judge abuse his discretion by failing to tailor the self-defense instruction to adequately reflect the facts and theories presented by Appellant, specifically that Appellant was not required to wait until his assailant got the drop on him, that he had the right to act under the law of self-preservation and prevent his assailant from getting the drop on him, since the charge was supported by the evidence and was crucial to the jury's understanding of the law on self-defense?

STATEMENT OF THE CASE

An Edgefield County Grand Jury indicted Appellant on October 24, 2018 for the offenses of murder and attempted murder. R. 1578-1581. A pretrial hearing pursuant to the Protection of Persons and Property Act ("the Act") was held on September 7-8, 2021 before the Honorable Walton J. McLeod, IV. R. 1. Solicitor Rick Hubbard and Assistant Solicitor Robert McNair represented the state. R. 1. Luke Shealy, Brian Shealy, and Casey Secor represented Appellant. R. 1. By order filed October 15, 2021, Judge McLeod found Appellant was not immune from prosecution pursuant to the Act. R. 1501-1512.

Appellant's case was called to trial on December 3, 2021 before Judge McLeod, and a jury. Solicitor Rick Hubbard and Assistant Solicitor Robert McNair represented the state. R. 380. Luke Shealy, Brian Shealy, and Casey Secor represented Appellant. R. 380. On December 13, 2021, the jury acquitted Appellant of attempted murder, but found him guilty of murder. R. 1491, l. 22 – 1492, l. 4. He was sentenced to thirty-five years imprisonment. R. 1494, ll. 14-16.

On December 20, 2021, Appellant filed a motion for a new trial. R. 1547-1555. By order dated January 7, 2022, Judge McLeod denied the motion. R. 1556-1560.

This appeal follows.

STATEMENT OF FACTS

Appellant was raised in Johnston, South Carolina. R. 1079, l. 13. After he graduated from Lander University, he was hired at Savannah River Site (SRS), where he eventually met his wife, Dana, who also worked at SRS. R. 1080, l. 6 – 1082, l. 4. After Appellant married, he and his wife moved to Barnwell, South Carolina, closer to SRS. R. 1079, ll. 12-14. The pair were married for twenty years until Dana tragically succumbed to cancer after an eight year battle. R. 1082, ll. 5-16. The last two years were particularly difficult for Appellant. R. 1082, ll. 12-13. After his wife's death, Appellant was "too depressed" to continue working at Savannah River Site without her and decided to retire early with a reduced pension after twenty-seven years of employment. R. 1080, ll. 23-25; R. 1082, ll. 20-25.

In 2017, after he retired, Appellant moved back to Johnston to help care for his elderly father who was ill. R. 1083, ll. 13-25. Johnston is a small town and there were not many establishments to socialize or eat. Appellant discovered the Johnston Pool Room, a local sports bar. R. 1084, ll. 1-19. Appellant frequented the pool room about four to five times a week. R. 1085, ll. 6-9. In September 2017, Appellant met Angie Smith at the pool room and the two began dating. R. 1085, l. 10 – 1086, l. 6. Appellant, who had been living with his father, moved into Angie's house shortly after they began dating. R. 1086, ll. 7-25. While he kept most of his possessions at his father's house, he predominately lived with Angie and kept his valuables, clothing, and toiletries at her house. R. 1086, l. 19 – 1087, l. 4.

Angie introduced Appellant to Milledge Hall, the decedent. Milledge was Angie's cousin. Appellant knew Milledge only by his nickname, "B'Boy," which was short for "Big Boy." R. 1087, ll. 5-21; R. 888, ll. 8-20. Milledge was "six feet one inch tall" and three hundred pounds at the time of his death. R. 882, ll. 19-23.

In late 2017, Milledge's grandson, Clayton Hall, and his wife, Madison Hall, purchased the Johnston Pool Room. R. 487, l. 10 – 488, l. 2. Milledge allegedly invested sixteen thousand dollars in the business when his grandson purchased it. R. 488, l. 22 – 489, l. 2. However, Milledge was not listed as an owner nor was he employed by the pool room. R. 512, ll. 6-23. Rather, Milledge frequented the pool room as a patron and, like most other patrons, drank alcohol when he did so. R. 512, ll. 18-23.

Clayton had frustrations with Appellant, as a patron, from the time Clayton purchased the pool room. R. 512, l. 24 – 513, l. 5. Appellant had criticisms about how the business was ran and complained about the quality of the food, the cold temperature inside, and the allowance of smoking inside the establishment. R. 513, ll. 6-14; R. 1090, l. 8 – 1092, l. 11. These complaints "rubbed" Clayton and the other employees the "the wrong way." R. 513, ll. 15-17. However, Appellant's behavior never rose to the level of needing to ban him from the establishment nor did Clayton ever have to call law enforcement due to Appellant's behavior. R. 513, ll. 18-20.

Sometime in April 2018, about a month before the shooting which led to Appellant's conviction, Appellant learned Milledge had been telling others that Appellant had been fired from Savannah River Site rather than retired. R. 1097, l. 14 – 1098, l. 3. This was upsetting to Appellant because his retirement from SRS was "deeply personal" given his reason for retiring early (due to his wife's passing). R. 1098, ll. 4-7. Appellant approached Milledge one evening at the pool room and asked him whether it was true that he was telling others Appellant had been fired. Milledge admitted he told others this untruth, but refused to tell Appellant from whom he had heard the rumor. R. 1098, l. 15 – 1099, l. 1. Milledge told Appellant it did not matter who he had heard it from and he did not seem to care that it was untrue. R. 1099, ll. 7-14. However, Appellant made clear that it mattered to him who was spreading the rumor. R. 1099, ll. 9-11.

During the exchange, Milledge quickly stood up from his bar stool and "got . . . in [Appellant's] face." Appellant put his hands up, "like, whoa," and backed up. Milledge then threatened Appellant. He said, "I'll beat your ass all about this bar." R. 1101, ll. 2-10. Appellant immediately went back to where he was sitting with Angie and told her they needed to leave. They paid their tab and left. R. 1102, ll. 16-21.

Appellant had never had any "problems" with Milledge before this encounter and it left him feeling uneasy. R. 1101, ll. 22-25; R. 1102, ll. 24-25. He was "scared" of Milledge and did not "want to be around him unless he had to." R. 1106, ll. 5-7. Consequently, Appellant stopped going to the pool room as frequently and started going to Foley's, a bar in nearby Saluda, South Carolina. When Appellant did go to the pool room, he "kept [his] distance from" Milledge and began sitting at the front of the establishment since Milledge usually sat at the back of the bar. R. 1103, ll. 1-3; R. 1105, l. 15 – 1107, l. 4.

Tony Friar, who lived in Johnston his entire life, knew both Appellant and Milledge. Friar worked with Appellant and his wife at Savannah River Site and the three carpooled together for ten to twelve years. R. 1036, l. 1 – 1037, l. 19. Friar grew up with Milledge and knew him from living in the same small community. R. 1037, ll. 20-24. He maintained Milledge had "a reputation of being a fighter." R. 1039, ll. 20-22. There was also an occasion during a "disagreement" with others where Friar saw Milledge seated in his truck with a rifle. R. 1038, l. 5 – 1039, l. 19; R. 1047, ll. 6-14. Friar would sometimes see Milledge "around town" and Milledge would encourage Friar to eat at the pool room. R. 1040, ll. 18-20. Friar was aware that Milledge's grandson was running the establishment. R. 1040, ll. 17-25.

One evening in April 2018, about a month or less before the shooting, Friar went to the pool room to eat with his wife and brother on Milledge's invitation. R. 1040, ll. 9-21. When

Friar walked in, he saw Appellant. He did not know Appellant had moved back to Johnson. Appellant got up and quickly said hello to Friar before Friar was seated at a table. R. 1041, ll. 8-17. Later on, Appellant came and sat down with Friar and his family. Milledge was also at the pool room that evening. Appellant commented that he did not like Milledge "and that Milledge had a problem with him." R. 1041, ll. 18-23. Appellant explained that he did not like Milledge because "Milledge was telling people that Barry [Appellant] had gotten fired from Savannah River Site." R. 1041, l. 24 – 1042, l. 2. Friar knew this was not true and that Appellant had retired from SRS "due to his wife's passing." R. 1042, ll. 3-10. Appellant was venting his frustration that Milledge was spreading this lie. R. 1042, ll. 11-17.

After Appellant returned to where he was sitting, Milledge came and sat in the booth with Friar. R. 1042, ll. 18-21. Milledge asked Friar if he knew Appellant. Friar explained that he had known Appellant basically "all his life" and that the two had worked together at SRS. R. 1042, l. 22 – 1043, l. 1. Milledge then asked, "Well, he got fired from out there, didn't he?" Friar corrected Milledge and told him Appellant did not get fired, but Milledge did not seem convinced. R. 1043, ll. 1-11. Milledge admitted "he couldn't stand Barry [Appellant]" and "with aggression" said, "I'm gonna take care of him." Simultaneously, Milledge "took his hand and did his fist like that in his hand." R. 1043, ll. 12-19. Friar, who again knew Milledge's reputation of being a fighter, told Milledge that the two needed to work it out, but Milledge again said he was going to "take care of him [Appellant]." R. 1043, ll. 17-19.

After this conversation, Friar "warned" Appellant that he "better we aware of" Milledge and to "be careful around him" because he was "violent" and known to be a fighter. This caused Appellant additional concern. R. 1107, l. 16 – 1108, l. 8.

On May 5, 2018, two days before the shooting, Appellant was at the pool room with his girlfriend, Angie. There was an error on his bar tab that resulted in Appellant being overcharged. Appellant brought the mistake to his server's attention who told Clayton. Clayton came over to where Appellant was sitting and Appellant explained the error. However, Clayton "just shook his head and walked off." R. 1108, l. 9 – 1110, l. 14. Appellant paid the tab and denied "losing [his] cool." R. 1109, l. 24 – 1110, l. 2. Clayton, on the other hand, claimed Appellant complained about the overcharge with an "aggressive tone." R. 491, l. 3 – 492, l. 2. Clayton "could . . . feel the tension from him [Appellant] a lot worse than just a friendly patron." R. 492, ll. 2-3.

The following morning, Sunday, May 6, 2018, Clayton and his wife, Madison, decided to "take a one night trip" just "to get out of town" "due to the stress" allegedly caused by Appellant. R. 494, ll. 2-12. Prior to leaving, Clayton allegedly told his grandfather, Milledge, about Appellant's "behavior" and that he intended to ask Appellant "not to come back to the establishment [the pool room] anymore." R. 494, ll. 13-17. Clayton claimed Milledge recommended Clayton have this conversation with Appellant outside the pool room so as not to affect the other patrons or embarrass Appellant. R. 495, ll. 4-19.

On Monday, May 7, 2018, the day of the shooting, Appellant "checked on his dad" as usual and then ran errands. On his way back from running errands, Appellant stopped at the pool room sometime between 4:00 and 4:45 to meet his friends. R. 1119, ll. 5-24. He and his friends met every Monday or Tuesday at the pool room to catch up with each other. R. 1119, l. 21 – 1120, l. 19. No one stopped Appellant at the door and said he was not permitted at the pool room. He was served as usual. R. 1120, ll. 5-16.

As Appellant was socializing with his friends, he realized he had several text messages from Angie, his girlfriend. He received a text from her at 5:06 asking him if everything was okay and another text at 5:15 that simply said, "Hello?" Appellant responded at 5:17 stating he was sorry, that he did not hear his phone when she texted, and that he was meeting his friends at the pool room as usual. Angie responded with a series of angry text messages: "I can't believe you;" "We're not gonna make it like this. You need to come talk to me;" "I'm really pissed now;" "If you don't come talk to me, it won't be pretty when you get home;" "Answer me;" and "I'll come show out." R. 1120, l. 20 – 1123, l. 21. Appellant did not respond to these messages.

Appellant had been growing tired of his relationship with Angie. He found that she was no longer fun to be around anymore in part due to her excessive drinking and her "smothering" behavior. R. 1110 1, l. 23 – 1111, l. 17. For example, if Appellant was at his father's house for longer than he had been the previous day, Angie would constantly be texting asking him where he was even though he was merely at his father's house. R. 1111, ll. 18-23. Additionally, Angie had been "drinking more and more" and often became belligerent and physically aggressive when she did so. R. 1111, ll. 11-13; R. 1134, ll. 9-11. During the early morning hours of Sunday, May 6, 2018, after returning home from the pool room, Appellant was forced to text Sergeant Mathis of the Johnston Police Department, an acquaintance of Appellant, to come calm Angie down as she refused to stop drinking and go to sleep. Appellant did not want to call 911 because he was afraid he or Angie would get arrested. R. 1117, l. 21 – 1118, l. 3. Sergeant Mathis came to their house minutes later and Angie agreed to stop drinking and go to bed. R. 1118, ll. 6-24.

After Appellant did not respond to Angie's series of angry text messages that evening, she showed up at the pool room. When she walked in, she did not acknowledge Appellant who

was sitting with his friends. Instead, she walked to the back of the bar and sat next to Milledge, her cousin. R. 1125, l. 14 – 1126, l. 1. Appellant decided to leave. R. 1126, ll. 18-20. He also decided that he was "finished with Angie." R. 1126, ll. 21-24. He was going to break up with her and move out of her house. R. 1127, ll. 2-5. Appellant walked out of the pool room followed by his friend, Randy Yonce. R. 1127, l. 19 – 1128, l. 9; See State's Exhibit No. 13 (Pool Room Video). Unbeknownst to Appellant, Milledge walked outside shortly after Randy. R. 1128, ll. 10-13; R. 1129, ll. 8-10; See State's Exhibit No. 13 (Pool Room Video). As Appellant was pulling out of the parking lot, Milledge struck the "rear right fender" of Appellant's car with his hand. R. 1129, ll. 1-7; See State's Exhibit No. 13 (Pool Room Video). Milledge yelled something and then threw his hands up in the air as Appellant drove away. R. 1129, ll. 11-25; See State's Exhibit No. 13 (Pool Room Video). The loud noise "startled" Appellant, who at the time was looking both ways in an effort to pull out into traffic. R. 1129, l. 20 – 1130, l. 2. Appellant saw Milledge in his rear view mirror. R. 1129, ll. 13-14. In that moment, Appellant believed Milledge had an "aggressive intent." R. 1130, ll. 3-6. Appellant did not stop to engage Milledge in any way. He merely drove away. R. 1130, ll. 15-18.

At some point after leaving the pool room, Appellant texted his friend, Joe Mims, "Can you come calm me down?" R. 890, ll. 12-17. Followed by, "I'm gonna kill that B'Boy [Milledge]." R. 891, ll. 4-18. Appellant explained that he was merely venting his frustration with what he perceived as Milledge interfering with Appellant's relationship with Angie and causing "more problems for" Appellant as he was trying to break up with Angie, which was a difficult task to begin with. R. 1137, l. 8 – 1138, l. 25. Appellant denied that he meant he was literally going to kill Milledge. R. 1137, ll. 21-23.

Appellant drove straight to Angie's house and packed up all his valuables, including his guns and a safe. He also packed his medication and toiletries as well as several treasured Clemson shirts his wife had bought him over the years. R. 1131, l. 10 – 1132, l. 25. While Appellant was packing up his possessions, Angie texted him several times. The first read, "You couldn't even come and speak." Followed by, "Everyone stared at me." Finally, about fifteen minutes later at 6:47, Angie texted, "See you soon. No fighting." R. 1139, l. 3 – 1140, l. 2. Appellant perceived this final text as evidence that Angie had "calmed down" and that it was "safe" to return to the pool room to talk to her with the goal of ending their relationship. R. 1140, ll. 3-5. He also assumed that Angie had "taken care of" the "situation" with Milledge, her cousin. R. 1140, ll. 6-7.

As a precaution, at 6:52, before he returned to the pool room to speak with Angie and end their relationship, Appellant texted Sergeant Mathis and asked if he was available. R. 1140, ll. 15-24. Appellant hoped Mathis could be present at the pool room while Appellant broke up with Angie. His plan was to get Angie to come outside and speak with her in his car. However, Mathis never responded to this text. Apparently, he was not on duty that day. R. 1141, ll. 5-11.

After packing his possessions, Appellant drove back to the pool room and parked directly in front of the business. R. 1142, ll. 5-22; See State's Exhibit No. 14 (Pool Room Video). He hoped Angie would see his car through the window and come outside so the two could talk inside Appellant's car. If Angie did not come outside, Appellant planned to text or call her. R. 1143, ll. 2-6. Appellant did not feel comfortable going inside based on his earlier interaction with Milledge in which Milledge struck the back of Appellant's car, yelled, and threw his hands into the air. R. 1143, ll. 12-17; R. 1144, ll. 9-20.

After Appellant had been sitting in his car for several minutes, Milledge walked outside. R. 1144, l. 21 – 1145, l. 4. He approached Appellant's vehicle but paused a few feet away. See State's Exhibit No. 14 (Pool Room Video). Milledge then motioned for Appellant to get out of the car. See State's Exhibit No. 14 (Pool Room Video). Appellant refused because he was "scared of him." R. 1145, ll. 5-12. Instead, Appellant rolled down his window about six inches. R. 1145, ll. 10-12. Appellant did not want to roll the window down any farther because he was afraid Milledge would grab him and pull him out of the car. R. 1145, ll. 10-14.

When Milledge first began talking to Appellant outside his window, it was all about Angie. R. 1145, ll. 14-16. Milledge told Appellant "that it wasn't nice" Appellant had left the pool room earlier without speaking to Angie and that it had embarrassed her. R. 1146, ll. 17-21. Milledge also wanted to know why Appellant had "called the law on [his] cousin" the night before and complained Appellant had been going to Foley's with Angie, taking business away from the pool room. R. 1145, l. 17 – 1146, l. 9.

Milledge repeatedly demanded Appellant get out of the car so Milledge could "beat [his] ass." R. 1147, ll. 4-13. Milledge tried to open Appellant's door. He pulled on the handle, but the door was locked. R. 1147, ll. 20-25. Milledge stood outside Appellant's window for nearly ten minutes. His tone and demeanor became progressively more aggressive. R. 1148, ll. 6-13. Milledge began talking about Clayton and the pool room and complained Appellant "was basically trying to run the bar." R. 1148, ll. 13-17.

As the confrontation escalated, Milledge invited Appellant out of the car to fight. Appellant continued to refuse. Appellant was scared of Milledge. He knew Milledge could harm him with just his bare hands. Milledge was larger and stronger than Appellant. R. 1149, ll. 9-19. Milledge lunged at Appellant several times. See State's Exhibit No. 14 (Pool Room

Video). Appellant could smell alcohol on Milledge's breath and knew he was intoxicated. R. 1151, l. 25 – 1152, l. 6. It was later estimated that at the time of the shooting Milledge's blood alcohol content (BAC) was 0.12, well above the legal limit to operate a vehicle. R. 1267, ll. 1-21. When Milledge repeatedly lunged at Appellant's window, it made Appellant feel threatened and "fearful [for his] life." R. 1152, ll. 7-11.

Eventually, Milledge pulled out a gun. See State's Exhibit No. 14 (Pool Room Video). Appellant was about three feet from Milledge while he was brandishing the gun. While the state alleged this object was a phone, Appellant knew it was a gun. R. 1152, l. 19 – 1154, l. 12; R. 1156, ll. 7-8. However, Milledge also had a large phone clipped on his right front pocket. R. 1156, ll. 18-19. After initially pointing the gun, Milledge put the gun back in his waistband. See State's Exhibit No. 14 (Pool Room Video). However, Milledge subsequently pulled his shirt up with his left hand and showed Appellant the gun again, which was on his right side, the same side as his phone. R. 1156, ll. 2-6; R. 1157, l. 25 – 1158, l. 8; See State's Exhibit No. 14 (Pool Room Video). Appellant felt "threatened for [his] life." R. 1155, ll. 19-20. He knew Milledge could shoot him at any moment. R. 1155, ll. 21-22. At that point, Appellant reached for his gun bag that was on the back seat. He grabbed the first gun he could. R. 1158, ll. 17-23. It ended up being his wife's .38 special handgun that Appellant had previously bought her "for self protection." R. 1159, ll. 11-17. Appellant put the gun on his lap. R. 1161, l. 9.

Milledge eventually began telling Appellant to leave. R. 1157, ll. 2-4. Milledge became increasingly angry and frustrated that Appellant would not get out of the car to fight. R. 1157, ll. 5-14. Appellant was also asking Milledge to leave the side of his car. Knowing Milledge was armed and could shoot him at any time, Appellant did not want to pull out of the parking lot until Milledge was safely back inside the pool room. R. 1165, ll. 7-22.

Toward the end of the confrontation, Milledge began to walk back toward the front door of the pool room. See State's Exhibit No. 14 (Pool Room Video). Appellant was hopeful that he was finally going back inside. R. 1157, ll. 20-24. However, Milledge spun on his heels and headed back toward Appellant's car. See State's Exhibit No. 14 (Pool Room Video). Milledge motioned aggressively with his arms and hands for Appellant to leave. See State's Exhibit No. 14 (Pool Room Video). He continued to walk aggressively toward Appellant's car. See State's Exhibit No. 14 (Pool Room Video). Appellant knew Milledge was armed but could not see Milledge's right hand. R. 1162, ll. 7-10. When Milledge began to turn the corner toward Appellant's car, Appellant got out of the car and fired twice striking Milledge. Appellant knew his life was "on the line" and his heart was beating "150 beats per minute." R. 1162, ll. 7-13. Appellant wanted to live. R. 1162, ll. 14-15. Once Milledge was on the ground, Appellant got back into the car and drove away. See State's Exhibit No. 14 (Pool Room Video).

Milledge's friends quickly began coming out of the pool room. See State's Exhibit No. 14 (Pool Room Video). Appellant did not feel comfortable staying there with Milledge's friends present so he quickly backed up and drove away. R. 1167, ll. 2-5. Milledge's friends tended to him until law enforcement arrived. See State's Exhibit No. 14 (Pool Room Video). There were numerous individuals around Milledge as he laid on the ground. See State's Exhibit No. 14 (Pool Room Video). On the surveillance footage, it appears a man identified as Roger picked up a black object that was on the ground around Milledge's body with a towel. See State's Exhibit No. 14 (Pool Room Video).

After leaving, Appellant eventually began being followed by a marked Edgefield County Sheriff's Office patrol vehicle driven by Captain James Florida. R. 1170, l. 24 – 1171, l. 8 Florida never activated his blue lights or sirens as he maintained he was waiting for backup

before attempting to stop Appellant. R. 1172, ll. 5-13. Appellant testified that Florida was "laying way back" from his car but would aggressively pull up very close behind Appellant's vehicle like he was going to "run [Appellant] off the road." R. 1173, ll. 1-5. Florida did this several times. Appellant thought Florida was going to hit him. R. 1173, ll. 9-23. He was startled as such behavior was "not normal . . . for a police officer." R. 1173, ll. 21-23. The last time Florida pulled up close to Appellant, Appellant noticed Florida had a gun in his hand. R. 1174, ll. 2-12. Consequently, after Florida backed up again as he had been doing, Appellant turned right onto Pleasant Lane. Appellant was hoping to lose Florida.

From Pleasant Lane, Appellant turned right onto Log Creek Road, a dirt road. Appellant quickly "threw" the vehicle "in park." R. 1175, l. 1 – 1176, l. 18. He got out of his car and retrieved his AR-15 style rifle from his trunk. R. 1177, ll. 11-15. As he was putting the rifle on the back passenger seat, he saw Florida drive by him down Pleasant Lane. Appellant knew Florida had seen him as he drove by. R. 1177, ll. 16-24. Appellant continued driving down Log Creek Road. He wanted to find somewhere safe. R. 1179, ll. 14-24. He backed into a small clearing. As he was parked off the side of the dirt road, Captain Florida drove past Appellant and began firing at him. Florida then stopped his vehicle and fired at Appellant again. R. 1180, l. 12 – 1185, l. 2. Appellant was struck in the chest by one of these bullets. R. 1057, ll. 1-25. Appellant decided to defend himself. He returned fire. R. 1186, ll. 4-13. Florida then fired twice at Appellant with a shotgun. Appellant was hit in the shoulder with buckshot. R. 1197, l. 24 – 1-72, l. 15. Unsurprisingly, Captain Florida claimed Appellant shot at him first and he merely returned fire. R. 692, ll. 15-23.

Unbeknownst to Appellant, Keith Kathmann with the Edgefield Police Department was behind Captain Florida providing backup. The shooting was captured by Kathmann's dash

camera. See State's Exhibit No. 8 (Kathmann Dash Camera Video). Appellant presented considerable evidence that Florida fired at Appellant first and the jury ultimately acquitted Appellant of the attempted murder of Florida.

ARGUMENT

1.

The trial judge erred by denying Appellant immunity from prosecution pursuant to the Protection of Persons and Property Act, when Appellant proved by a preponderance of the evidence he was entitled to immunity pursuant to the Act.

Relevant Facts

Appellant moved pretrial for immunity from prosecution pursuant to the Protection of Persons and Property Act. R. 1497. The trial judge held a pretrial hearing to determine whether Appellant was immune from prosecution. R. 1. Appellant presented the testimony of Tony Friar, Douglas Lacey, Randy Yonce, David Eagerton, and Appellant. Douglas Lacey, who was qualified as an expert in video enhancement without objection, was retained by the defense to enhance certain portions of the surveillance footage that captured the shooting at the Johnston Pool Room. R. 31, l. 17 – 35, l. 22. He cropped and zoomed in on specific identified portions of the video to make the images "more visually appealing." R. 40, ll. 1-23. The enhanced videos and still images were admitted for purposes of the hearing as Defendant's Exhibit No. 1. R. 43, l. 24 – 45, l. 13.

Tony Friar, who lived in Johnston his entire life, knew both Appellant and Milledge. R. 8, ll. 5-20. Friar worked with Appellant and his wife at Savannah River Site and the three carpooled together for ten to twelve years. R. 15, l. 14 – 16, l. 12. Friar grew up with Milledge and knew him from living in the same small community. R. 8, l. 21 – 9, l. 10. He maintained Milledge had a reputation of being a fighter. R. 9, ll. 11-19. There was a specific occasion Friar recalled where Milledge physically threatened his grandson's football coach after the coach

disciplined Milledge's grandson. Friar testified Milledge told him that if he did not "take care of it" Milledge "would come down and take care of the problem." R. 10, l. 21 – 13, l. 16.

One evening in April 2018, about a month or less before the shooting, Friar went to the pool room to eat with his wife and brother on Milledge's invitation. R. 17, l. 13 – 18, l. 5; R. 21, ll. 8-15. When Friar walked in, he saw Appellant. He did not know Appellant had moved back to Johnson. Appellant got up and quickly said hello to Friar before Friar was seated at a table. Later on, Appellant came and sat down with Friar and his family. Milledge was also at the pool room that evening. Appellant commented that Milledge did not like Appellant and "basically" that the two "had some beef." R. 18, l. 6 – 19, l. 5. Friar learned that Milledge was telling people that Appellant had been fired from Savannah River Site. R. 19, ll. 5-7. Friar knew this was not true and that Appellant had retired from SRS after his wife died because "he was kind of down." R. 17, ll. 3-8.

After Appellant returned to where he was sitting, Milledge came and sat down with Friar. Milledge asked Friar how well he knew Appellant. Friar explained that he had known Appellant "all his life." R. 19, ll. 7-11. Milledge then asked, "Well, didn't he get fired out at Savannah River Site?" R. 19, ll. 11-12. Friar corrected Milledge and told him Appellant did not get fired. R. 19, ll. 12-13. Milledge admitted he did not like Appellant and then "said you know me, I got something for him [Appellant]." R. 19, ll. 13-15. Simultaneously, Milledge made a "balled up fist" and hit it into his "other hand." R. 20, l. 24 – 21, l. 4. Friar, who again knew Milledge's reputation of being a fighter, told Milledge that the two "ought to quit arguing." R. 19, ll. 15-18.

Randy Yonce was at the pool room on May 7, 2018, but left before the shooting. He testified that he met friends at the pool room every Monday or Tuesday. R. 47, l. 3 – 48, l. 3. On the Monday of the shooting, he saw both Appellant and Milledge at the pool room. Appellant

was sitting with Yonce at the front of the establishment while Milledge "was sitting over on the other part of the bar." R. 50, l. 23 – 51, l. 18. Yonce did not see Appellant and Milledge interact at all that day. R. 48, ll. 4-17. He did not hear Appellant express any concerns about Milledge nor Milledge express any concerns about Appellant. R. 50, ll. 16-21. At some point, Angie Smith, Appellant's girlfriend walked in. She did not sit with Appellant. When Angie came in, Appellant "said something to the effect of oh, hell, here comes Angie." He then said he was concerned Angie was going to "start some trouble." Eventually, Yonce told Appellant he was going to leave. Appellant left when Yonce left. R. 49, l. 10 – 50, l. 8.

Appellant's testimony at the pretrial immunity hearing mirrored his testimony before the jury. He explained his background, his relationship with Angie, and his prior interaction with Milledge about a month before the shooting in which he confronted Milledge about Milledge telling others Appellant had been fired from Savannah River Site rather than retired. R. 58, l. 12 – 77, l. 4. During the confrontation, Milledge "got up off his barstool and came at [Appellant]." Milledge "got all up in [Appellant's] face." Appellant backed up and put his hands up. Milledge then threatened, "I'll beat your ass all over this bar." R. 76, ll. 2-7. Milledge weighed "280 or more pounds" and was bigger, taller, and stronger than Appellant. R. 76, ll. 10-17. Milledge's threat scared Appellant and he immediately walked away and told Angie they needed to leave. They paid their tab and left. R. 76, l. 18 – 77, l. 4. Appellant explained, as he did before the jury, that after this confrontation, he "tried to keep his distance" from Milledge by sitting at the front of the pool room when he visited and by frequenting a different establishment called Foley's in nearby Saluda. R. 78, l. 7 – 79, l. 6. Sometime after this confrontation, Tony Friar warned Appellant to be careful with B'Boy [Milledge] because he's been fighting all his life." R. 80, l. 24 – 82, l. 17.

Appellant then described what occurred on Saturday, May 5, 2018, and what occurred leading up to the shooting on May 7, 2018, including how Milledge struck the back of Appellant's car as he was pulling out of the pool room parking lot less than an hour before the shooting. R. 83, l. 8 – 97, l. 14. Appellant testified that when Milledge "beat" on the back of his car, it "startled" him. Milledge then yelled. Appellant was scared and "knew something was up." R. 97, l. 12 – 98, l. 7.

After gathering his valuables from Angie's house, Appellant returned to the pool room to break up with Angie. R. 98, l. 8 – 99, l. 19; R. 101, ll. 2-4. Milledge repeatedly demanded Appellant get out of the car so Milledge could "beat [his] ass." Milledge tried to open Appellant's door. He pulled on the handle, but the door was locked. Milledge stood outside Appellant's window for nearly ten minutes. His tone and demeanor became progressively more aggressive.

As the confrontation escalated, Milledge invited Appellant out of the car to fight. Appellant continued to refuse. Appellant was scared of Milledge. He knew Milledge could harm him with just his bare hands. Milledge was larger and stronger than Appellant. Milledge lunged at Appellant several times. See State's Exhibit No. 14 (Pool Room Video). Appellant could smell alcohol on Milledge's breath and knew he was intoxicated. When Milledge repeatedly lunged at Appellant's window, it made Appellant feel threatened and fearful for his life.

Eventually, Milledge pulled out a gun. See State's Exhibit No. 14 (Pool Room Video). Appellant was about three feet from Milledge while he was brandishing the gun. While the state alleged this object was a phone, Appellant knew it was a gun. However, Milledge also had a large phone clipped on his right front pocket. After initially pointing the gun, Milledge put the

gun back in his waistband. See State's Exhibit No. 14 (Pool Room Video). However, Milledge subsequently pulled his shirt up with his left hand and showed Appellant the gun again, which was on his right side, the same side as his phone. See State's Exhibit No. 14 (Pool Room Video). Appellant felt threatened for his life. He knew Milledge could shoot him at any moment. At that point, Appellant reached for his gun bag that was on the back seat. He grabbed the first gun he could. It ended up being his wife's .38 special handgun that Appellant had previously bought her for protection. Appellant put the gun on his lap.

Milledge eventually began telling Appellant to leave. Milledge became increasingly angry and frustrated that Appellant would not get out of the car to fight. Appellant was also asking Milledge to leave the side of his car. Knowing Milledge was armed and could shoot him at any time, Appellant did not want to pull out of the parking lot until Milledge was safely back inside the pool room. Toward the end of the confrontation, Milledge began to walk back toward the front door of the pool room. See State's Exhibit No. 14 (Pool Room Video). Appellant was hopeful that he was finally going back inside. However, Milledge spun on his heels and headed back toward Appellant's car. See State's Exhibit No. 14 (Pool Room Video). Milledge motioned aggressively with his arms and hands for Appellant to leave. See State's Exhibit No. 14 (Pool Room Video). He continued to walk aggressively toward Appellant's car. See State's Exhibit No. 14 (Pool Room Video). Appellant knew Milledge was armed but could not see Milledge's right hand. When Milledge began to turn the corner toward Appellant's car, Appellant got out of the car and fired twice striking Milledge. Once Milledge was on the ground, Appellant got back into the car and drove away. See State's Exhibit No. 14 (Pool Room Video).

David Eagerton, who was qualified as an expert in forensic toxicology and pharmacology without objection, testified that Milledge's blood alcohol content (BAC) at the time of the

shooting was somewhere between .1 and .13. R. 222, l. 20 – 223, l. 7; R. 228, ll. 15- 20. Eagerton explained that an individual with a BAC of .1 to .13 will have "pronounced impaired judgment." R. 231, ll. 8-10. "Their decision making ability is going to be impacted in a negative way. They usually have a little bit more difficulty in self-control and things of that nature." R. 231, ll. 10-13. Additionally, Eagerton explained that it is "not unusual to see a change in demeanor over time . . . Like you can have a very docile, nice person and then they can be loud and boisterous and obnoxious as they start to get to those levels or you can have a loud, boisterous, obnoxious person and they become quiet and withdrawn at those levels." R. 231, ll. 13-19. Individuals may also become angrier at those levels. R. 231, ll. 20-23.

The state presented several witnesses, including Renee Kaigler, Clayton Hall, Laynce Hatcher, and Brenda Hall, who claimed Milledge was not a violent person, was not the type of person who like to fight, and was never known to carry a gun. R. 257, ll. 1-11; R. 300, l. 16 – 301, l. 8; R. 303, l. 10 – 307, l. 3; R. 333, l. 22 – 334, l. 22; R. 344, ll. 2-16.

On May 7, 2018, Kaigler lived across the street from the pool room. She heard the gunshots and saw someone on the ground. She ran across the street and discovered it was Milledge and that he had been shot. R. 254, l. 22 – 255, l. 9. While there were several people outside, Kaigler testified that only she and Mr. Gessner were next to Milledge. R. 255, ll. 10-18. Kaigler denied that Milledge had a gun. She claimed she did not see a gun on the ground next to Milledge nor did she see anyone pick up a gun from around Milledge's body. R. 256, ll. 19-25. Kaigler later admitted that she did not know how many people had been outside before she reached Milledge. R. 262, ll. 9-24.

Betty Jean Edwards testified that, at the time of the shooting, she was at the IGA grocery store, which was located immediately adjacent to the Johnston Pool Room. R. 275, ll. 19-25.

While she was outside in the parking lot, she heard two people arguing. She looked up the hill and saw Milledge standing next to a gray car. He was arguing and "making motions with his hands." R. 276, l. 3 – 277, l. 3. Her "perception" was that "Milledge wanted this man to" leave. R. 277, l. 9 – 278, l. 7. She claimed the man in the car called Milledge's name. R. 291, l. 13 – 293, l. 25. She then saw the man get out of the car and heard two shots. Milledge fell backward. The man got back into the car and "sped away." R. 276, l. 24 – 277, l. 8. Edwards got into her car and drove to the pool room. She saw Milledge on the ground and went to comfort him. R. 278, ll. 10-15. She claimed she did not see a gun on Milledge or around him nor did she see anyone remove a gun. R. 279, l. 22 – 280, l. 3. Edwards later admitted that she did not have a "clear line of sight" from the IGA parking lot to the pool room parking lot where Milledge was standing. There were trees blocking her view. R. 285, ll. 2-8.

Clayton Hall testified to the problems he had with Appellant as a patron of the pool room. R. 294, l. 19 – 298, l. 20. As a result of the "stress" caused by Appellant, Clayton and his wife left for an overnight trip on Sunday, May 6, 2018, the day before the shooting. Before Clayton left for the trip, he claimed he told his grandfather, Milledge, that he intended to ask Appellant not to return to the pool room. Milledge allegedly advised Clayton to "handle any business" in "the most professional way, not to embarrass anybody" and if Clayton was going to have such a conversation with Appellant, to do it "[o]ut in the parking lot not to damage [the] business." R. 298, l. 21 – 300, l. 15. Clayton admitted that he kept a .40 caliber revolver in a secure location behind the cash register inside the pool room. However, he claimed his grandfather, Milledge, did not know about this gun. R. 304, l. 14 – 305, l. 20.

Laynce Hatcher, a regular patron at the Johnston Pool Room, testified that he went to the pool room on May 7, 2018. When he arrived, he saw Milledge outside. Milledge was arguing

with somebody in a car. However, Hatcher could not see or hear the person in the car as the car window was tinted and only slightly "cracked" open. R. 327, ll. 1-20. As Hatcher was walking by Milledge into the establishment, he heard Milledge say "no, I'll tell you what you're gonna do, you're gonna leave and not come back." R. 330, ll. 19-25. Several minutes later, Hatcher heard a gunshot. After he heard the first shot, he turned and saw Appellant fire a second shot. R. 331, ll. 9-23. Hatcher claimed he did not see Milledge with a gun before or after the shooting. R. 333, ll. 12-16.

Brenda Hall, Milledge's wife, testified that she was present during the confrontation between Appellant and Milledge about a month before the shooting when Appellant questioned Milledge about whether he had told others Appellant had been fired from SRS. R. 344, l. 17 – 345, l. 2. She claimed Milledge never stood up during the confrontation and never threatened Appellant. Instead, all Milledge said was "the best thing for you [Appellant] to do is just go back and sit down." Appellant did so and "[t]here was nothing else to it." R. 345, ll. 6-24. Brenda also testified that Milledge was overweight and had previously had triple bypass surgery. R. 346, ll. 7-10.

Arguments of Counsel

Defense counsel argued Appellant proved by a preponderance of the evidence that he was entitled to immunity pursuant to both § 16-11-440(A) and § 16-11-440(C). R. 354, ll. 15-17. Counsel discussed the prior difficulties between Appellant and Milledge, including the confrontation that occurred about a month before the shooting in which Milledge threatened Appellant. He also mentioned the interaction Tony Friar had with Milledge in which Milledge again threatened Appellant. During the confrontation leading up to the shooting, counsel emphasized that as Milledge's "gestures escalate" Milledge is clearly seen holding a black object

that Appellant identified as a gun. Milledge then did the "universal gesture" (lifting his shirt to expose his waistband) indicating he had a gun. Counsel figuratively questioned that if Milledge did not have a gun "then why did he do this [lift his shirt]?" R. 364, ll. 3-8. Counsel further argued that even assuming Milledge did not have a gun, under common law principles, Appellant is allowed to act on appearances. Additionally, Appellant was permitted under the law to judge Milledge "more harshly" due to the pair's prior difficulties. R. 364, l. 20 – 365, l. 13.

Defense counsel emphasized Appellant's testimony that leading up to the shooting, Milledge repeatedly ordered Appellant to get out of the car and fight, and pulled on Appellant's door handle in an effort to remove Appellant from the car. Appellant refused to get out of the car, which increasingly frustrated Milledge. R. 366, ll. 7-18. While counsel asserted Appellant had no duty to retreat pursuant to the Act, "case law says" the court must apply common law rules of self-defense first, one being that "you should retreat" unless it puts you in more harm. Counsel emphasized Appellant's testimony that he was worried Milledge would have harmed him if he had taken his eyes off Milledge in order to reverse out of the parking lot since he knew Milledge was armed and Milledge kept repeatedly walking back to the vehicle. R. 366, l. 22 – 367, l. 7.

Pursuant to § 16-11-440(A), counsel argued that the unrefuted evidence showed Milledge was pulling on Appellant's door handle, demanding he get out of the car, and telling him "I've got something for you," and "if you don't get out, I'll make you get out." R. 369, ll. 12-19. Counsel asserted that after Milledge brandished a gun, he turned "quite quickly for a big man and then continues to come forward, as Mr. Jones [Appellant] said, with steam, that is an on-going attempt to remove him [Appellant] from his vehicle." R. 369, ll. 19-24. Appellant only

shot when "he thought it was the last thing to do, otherwise he wouldn't be here, he would be mangled by a larger man who he had clearly seen had a gun." R. 371, l. 20 – 372, l. 7.

Order Denying Immunity

The trial judge ultimately denied Appellant immunity from prosecution. The judge found Appellant was at fault in bringing on the difficulty. R. 1508. The judge emphasized that Appellant returned to the pool room with multiple guns minutes after he sent a text message to Joe Mims stating, "I'm going to kill that Be Boy." R. 1508. Additionally, the judge found there was evidence Milledge ordered Appellant to leave multiple times but Appellant "refused to adhere to this request." R. 1508. The judge determined Appellant's "refusal to leave upon the request of Mr. Hall [Milledge], with the ability to do so, supports the finding that he was at fault in bringing on the difficulty and his claim for self-defense fails." R. 1508.

Even assuming Appellant was not at fault in bringing on the difficulty, the judge concluded Appellant's "claim of self-defense fails under the next two elements." R. 1508. The judge found Appellant failed to show he was in actual imminent danger or that he reasonably believed he was in imminent danger. R. 1508. The judge emphasized the testimony from state witnesses who claimed they did not know Milledge to carry a gun and the fact that no gun was allegedly ever seen nor recovered around Milledge's body after the shooting. R. 1508-1509. Accordingly, the judge found Appellant did not establish by a preponderance of the evidence the common law principles of self-defense. R. 1509.

The judge further found Appellant failed to establish he was entitled to immunity pursuant to § 16-11-440(A) or § 16-11-440(C). As to subsection (A), the judge emphasized that the surveillance footage "showed that when [Appellant] exited his vehicle and subsequently fired the first shot, Mr. Hall [Milledge] was at the front of the vehicle not in the process of entering his

[Appellant's] car." R. 1510. Consequently, the judge concluded Appellant was not entitled to the presumption of reasonable fear. R. 1510.

Regarding § 16-11-440(C), the judge emphasized that this portion of the Act "does away with any common law duty to retreat, so long as an individual can prove he (1) was not engaged in an unlawful activity, (2) was attacked, (3) was in a place where he had a right to be, and (4) reasonable believed the use of deadly force was necessary to prevent death or great bodily injury to himself or another person." R. 1510. The judge found Appellant was not in a place he had a right to be. He emphasized that although Appellant was lawfully present at the pool room initially, once he was asked to leave by Milledge, he was stripped of that right and became a trespasser. R. 1510. Therefore, Appellant was not permitted to use deadly force. R. 1511.

Appellant subsequently filed a written objection to the judge's order denying immunity. See R. 1513-1535.

Standard of Review

"A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which [the appellate court] reviews under an abuse of discretion standard of review." State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." State v. Jones, 416 S.C. 283, 289, 786 S.E.2d 132, 136 (2016).

Discussion

The trial judge erred by denying Appellant immunity from prosecution pursuant to the Protection of Persons and Property Act, when Appellant proved by a preponderance of the evidence he was entitled to immunity pursuant to the Act.

In 2006, the South Carolina General Assembly adopted the Protection of Persons and Property Act. S.C. Code Ann. § 16-11-410, et seq. The General Assembly explained its intent was to "codify the common law Castle Doctrine which recognizes that a person's home is his castle and to extend the doctrine to include an occupied vehicle and the person's place of business." S.C. Code Ann. § 16-11-420(A). The Act expresses the General Assembly's finding "that it is proper for law-abiding citizens to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves and others." S.C. Code Ann. § 16-11-420(B). The General Assembly recognized "that persons residing in or visiting this State have a right to expect to remain unmolested and safe within their homes, businesses, and vehicles." S.C. Code Ann. § 16-11-420(D). Finally, the General Assembly explained "that no person or victim of crime should be required to surrender his personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack." S.C. Code Ann. § 16-11-420(E).

To effectuate its intent, the General Assembly created a statute providing for immunity from prosecution to "[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). Section 16-11-440 sets forth the circumstances under which the Act allows the use of deadly force. Id. The statute states in relevant part:

> (A) A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:
>
> > (1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, or if he removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle; and

> (2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.
>
> …
>
> (C) A person who is not engaged in an unlawful activity and who is attacked in another place where he has the 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.

Our Supreme Court emphasized in State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013) "that immunity under the Act 'is predicated on an accused demonstrating the elements of self-defense to the satisfaction of the trial court by a preponderance of the evidence,' save the duty to retreat." State v. Douglas, 411 S.C. 307, 318, 768 S.E.2d 232, 238 (Ct. App. 2014) (quoting Curry, 406 S.C. at 371-372, 752 S.E.2d at 266-267). "[A] valid case of self-defense must exist, and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity." Id. at 318, 768 S.E.2d at 238 (quoting Curry, 406 S.C. at 371, 752 S.E.2d at 266) (alternation in original).

"There are four elements required by law to establish a case of 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 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." Id. at 318, 768 S.E.2d at 238-239 (internal citation omitted). As mentioned, the last element, the duty to retreat, need not be shown when seeking immunity under the Act. Id. at 318, 768 S.E.2d at 239 (citing Curry, 406 S.C. at 371, 752 S.E.2d at 266.

Recently, in State v. Glenn, 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." State v. Glenn, 429 S.C. 108, 118 838 S.E.2d 491, 496 (2019). "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. at 119, 838 S.E.2d at 497. "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.

Furthermore, when considering whether the defendant was in a place where he had a right to be as required by the Act, the trial court must consider proximate cause or a causal connection to the incident. Id. at 119-120, 838 S.E.2d at 497. "[T]o bar a victim of crime from claiming immunity based on a hyper-technical reading of the statute would lead to absurd results when his presence in the place he was attacked had no relation to the incident itself." Id. at 120, 838 S.E.2d at 497. Additionally, "a proximate cause analysis must also be applied to the unlawful activity element of subsection (C)." Id.

"A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard." Curry, 406 S.C. at 370, 752 S.E.2d at 266. 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).

Appellant proved by a preponderance of the evidence that he was immune from prosecution under the common law elements of self-defense. Appellant was not at fault in bringing on the difficulty. Appellant was preoccupied with his decision to end his relationship with Angie. He had no interaction with Milledge on the day of the shooting until Milledge, unbeknownst to Appellant, walked out after Appellant and aggressively struck the rear of his vehicle. This caused Appellant renewed fear of Milledge after Milledge's threat against Appellant about a month prior coupled with Appellant's knowledge of Milledge's reputation for violence. Appellant's decision to return to the pool room was not unlawful or intended to start a conflict with Milledge. Rather, it was Appellant's best option under the circumstances to end his eight month relationship with Angie.

The state alleged Appellant's test message, "I'm gonna kill that B'Boy," was literal. However, Appellant's text messages when read as a whole indicate he was seeking help from Joe Mims and Sergeant Mathis to assist in avoiding any conflict with both Angie and Milledge. It is telling that when Appellant arrived at the pool room, he remained in his car and did not seek a conflict. Rather, it was Milledge who came outside and confronted Appellant. The surveillance footage is consistent with Appellant's account that Milledge aired his personal grievances against Appellant with increasing animosity.

The state argued Milledge told Appellant to leave early in the encounter and therefore Appellant was at fault in bringing on the difficulty when he refused to leave. While it was disputed whether Milledge asked Appellant to leave early on, even if true, Appellant's failure to instantly do so does not make him at fault in bringing on the difficulty. Appellant testified that as Milledge's aggression continued to escalate, he wanted to leave which was corroborated by his headlights

turning on when he started his car as seen in the surveillance footage. However, Appellant believed using his hands to operate the vehicle and taking his eyes off of Milledge even for an instant would expose him to further harm. Appellant was not required to retreat "if by doing so he would increase his danger of being killed or suffering serious bodily injury." See State v. Fuller, 297 S.C. 440, 444, 377 S.E.2d 328, 331 (1989).

Further, it is apparent from Appellant's testimony and the surveillance footage that Appellant actually was in imminent danger of losing his life or sustaining serious bodily injury. The footage shows Milledge brandishing and threatening Appellant with a gun during the confrontation. Milledge's act of lifting his shirt to show Appellant the black object concealed on his waistband is almost universally recognized as a signal that one is armed. When Appellant fired the fatal shots, Milledge, who again Appellant knew was armed, was charging at Appellant. Accordingly, Appellant actually was in imminent danger and 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. However, even if Appellant was not in actual danger, based on Milledge's words and actions coupled with Milledge's prior threat and his reputation for violence, it was reasonable for Appellant to believe he was in such imminent danger and a reasonable man of ordinary firmness and courage would have entertained the same belief.

Under the common law principles, Appellant was entitled to step out of his car and strike the fatal blow in order to prevent Milledge from "getting the drop on him," and even if Milledge did not appear to have a gun raised in the moment Appellant shot, Appellant was permitted to judge Milledge's actions more harshly based on his prior threat and reputation. See State v. Starnes, 340 S.C. 312, 531 S.E.2d 907 (200); State v. Day, 341 S.C. 410, 535 S.E.2d 431 (2000); State v. Rash, 182 S.C. 42, 188 S.E.2d 435 (1936).

The above analysis proves that Appellant was entitled to immunity pursuant to the common law principles of self-defense. However, for purposes of argument, even if Appellant's claim failed in one or more respects, he was still entitled to immunity pursuant to § 16-11-440(A) and § 16-11-440(C). Section 16-11-440(A) is applicable in this case and provides the Act's strongest protections:

> A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:
>
> (1) against whom the deadly force is used **is in the process of unlawfully and forcefully entering**, or has unlawfully and forcibly entered a dwelling, residence, or **occupied vehicle**, or if he removes **or is attempting to remove another person against his will from** the dwelling, residence, or **occupied vehicle**; and
>
> (2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.

(emphasis added). Appellant testified that Milledge demanded Appellant get out of his car and fight and pulled on his door handle in an effort to get Appellant out of the vehicle. Appellant described how Milledge became increasingly frustrated that Appellant would not get out of the car, which was corroborated by Milledge's actions as seen in the surveillance footage demonstrating his escalating aggression, including his act of brandishing a gun. Appellant testified that it was his belief Milledge intended to forcibly remove him from the car as Milledge came toward him "with steam" immediately prior to Appellant making the decision to shoot. This is also corroborated by the surveillance footage which shows Milledge approaching Appellant's vehicle with aggression immediately before Appellant fired. These facts fall squarely within subsection (A) of the Act, which states, even in the absence of an obvious attack, that the act of attempting to remove an individual against his will from his vehicle creates a presumption of reasonable fear of imminent

death or great bodily injury such that the individual can use deadly force against his assailant. Appellant proved by a preponderance of the evidence that he was entitled to immunity pursuant to § 16-11-440(A).

Although Appellant proved by a preponderance of the evidence that he was entitled to immunity pursuant to the common law principles of self-defense and § 16-11-440(A), Appellant also proved he was entitled to immunity pursuant to § 16-11-440(C), which states:

> A person who is not engaged in an unlawful activity and who is attacked in another place where he has the 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.

(emphasis added). This portion of the Act specifically does away with any common law duty to retreat so long as an individual can prove he was attacked while acting lawfully in a place he had a right to be. There has been no claim by the state that Appellant was acting unlawfully at the time of his fatal encounter with Milledge, and Appellant was in a place where he had a right to be as he was sitting in his car in the parking lot of the pool room. Factually consistent with findings of immunity in cases like State v. Douglas, 411 S.C. 307, 768 S.E.2d 232 (Ct. App. 2014), and State v. Jones, 416 S.C. 283, 786 S.E.2d 132 (2016), Appellant had a right to use deadly force in the face of an attack by an intoxicated Milledge, who was determined to fight and was armed with a gun. Appellant's use of a gun to combat the threat of an armed attack by Milledge was a proper "force for force" response to end the assault and prevent death or great bodily injury to himself. Appellant had no duty to retreat pursuant to the Act. Accordingly, Appellant proved by a preponderance of the evidence that he was entitled to immunity pursuant to § 16-11-440(C).

Respectfully, this Court should hold the trial judge erred by denying Appellant immunity from prosecution and reverse Appellant's conviction and sentence.

2.

The trial judge abused his discretion by admitting evidence that Appellant allegedly attempted suicide in the moments before he was taken into custody where, pursuant to *State v. Cartwright*, 425 S.C. 81, 819 S.E.2d 756 (2018), the state failed to prove an unmistakable nexus existed by clear and convincing evidence linking the suicide attempt to a guilty conscious derivative of the offenses for which Appellant was being tried, and where any probative value of the evidence was substantially outweighed by the danger of unfair prejudice pursuant to Rule 403, SCRE.

Relevant Facts

Appellant moved pretrial to exclude any evidence that Appellant allegedly attempted to commit suicide shortly before he was taken into custody pursuant to State v. Cartwright, 425 S.C. 81, 819 S.E.2d 756 (2018) and Rule 403, SCRE. R. 1536. The judge held an *in camera* hearing on the motion. R. 388, ll. 17-18.

Deputy Robert Harter of the Edgefield County Sheriff's Office testified that he participated in the "actual takedown" of Appellant on Log Creek Road. R. 391, ll. 3-5. He was one of the officers who "converged" on Appellant as he was lying on the ground in the apex of the driver's door of his vehicle. R. 391, l. 16-23. When Harter walked up, he saw two weapons on the ground beside Appellant. One was an "AR-15 type rifle" and the other was a silver .38 revolver. R. 392, ll. 1-5. Appellant was placed in handcuffs. Another officer asked Appellant "if he was hurt" because he was covered in blood. Appellant allegedly said "he had shot himself." R. 392, ll. 8-21. Appellant never mentioned the word suicide nor did he say anything about trying to kill himself. R.

392, l. 22 – 393, l. 2. He also did not give any explanation for why he shot himself. R. 393, ll. 3-5. In his statement shortly after the event, Harter wrote Appellant said "he was hurting and had tried to shoot himself under the chin." R. 400, l. 3 – 401, l. 5.

Officer Samuel Sherrill with the Edgefield County Sheriff's Office also responded to Log Creek Road in regard to the shooting. R. 403, ll. 4-25. Appellant was already in custody when Sherrill arrived. R. 404, ll. 8-12. Sherrill was asked to accompany Appellant to the ambulance and ride with him to the hospital. R. 404, ll. 1-7. While Appellant was on a stretcher being transported to the ambulance, he volunteered several statements. R. 404, l. 13 – 405, l. 12. Appellant allegedly said to Sherrill, "I wish y'all would have killed me. Y'all should have just let me die." R. 405, ll. 16-25. Appellant did not offer any explanation for why he wanted to die. R. 406, ll. 12-14. While in the ambulance in route to the hospital, Appellant allegedly said, "The only hole that hurts if the one I put in my neck." R. 407, ll. 13-16.

Sergeant James Morgan with the Edgefield County Sheriff's Office likewise responded to Log Creek Road. He arrived after the gunfire had seized but before Appellant was taken into custody. R. 413, l. 23 – 415, l. 4. He teamed up with Sergeant Densmore and the pair moved in together to arrest Appellant when the command was given. R. 415, ll. 5-25. After Appellant was in custody and handcuffed, Densmore asked him "about his current medical state." R. 416, ll. 5-6. There was blood all over Appellant's face and chest. R. 416, ll. 7-10. According to Densmore, Appellant told him "where he was shot at, where he was hurting at, around his chest, stomach, arm there, and then he lifted his head and he said I'm also shot here (referring to the "chin area")." Appellant then voluntarily told Densmore, "I tried to kill myself and I couldn't even do that." R. 416, ll. 11-19. Appellant did not give a reason why he attempted to kill himself. R. 423, ll. 7-14.

Lastly, Captain James Florida, the Edgefield County officer involved in the shootout with Appellant, testified that while he was giving Appellant commands before his arrest, such as "stop shooting . . . let me see your hands . . . clear your hands," Appellant allegedly told Florida "that he wanted me to let him bleed to death." R. 424, l. 4 – 425, l. 8. Appellant did not provide a reason as to why he wanted Florida to let him bleed to death. R. 429, ll. 4-15. Florida claimed Appellant made this statement after all the gunfire had ended. R. 426, ll. 20-24. He later admitted he did not include Appellant's alleged statement in the typed statement he provided to the South Carolina Law Enforcement Division. R. 427, l. 12 – 428, l. 9.

At the conclusion of the *in camera* testimony, defense counsel argued the state failed to meet its burden of proving the evidence was admissible. Counsel outlined the three factors enumerated by our Supreme Court in Cartwright: (1) a jury could reasonably find that a suicide attempt occurred; (2) the defendant was aware of the occurrence of the alleged crimes at the time of the suicide attempt; and (3) an unmistakable nexus exists by clear and convincing evidence linking the suicide attempt to a guilty conscience derivative of the offense for which the defendant is on trial. R. 432, l. 20 – 433, l. 22; See Cartwright, 425 S.C. at 92, 819 S.E.2d at 761-62. Counsel conceded the state met its burden of proving the first two factors. R. 432, l. 22 – 433, l. 15; R. 445, ll. 16-18. As to the third factor, counsel asserted the state failed to show Appellant attempted suicide because he [felt] so guilty, one, for the crime of murder against Milledge Hall, and two, that he [felt] so guilty for his participation in the shootout with law enforcement on Log Creek Road." R. 433, l. 19 – 434, l. 4. Counsel emphasized that there was no evidence in the record as to why Appellant attempted suicide. Appellant never offered any explanation for doing so and the state failed to prove by clear and convincing evidence that it

was because of Appellant's "overwhelming guilt for shooting Milledge Hall or his overwhelming guilt for shooting at Officer Florida." R. 434, ll. 5-16.

As to Rule 403, SCRE, defense counsel argued any probative value of the evidence was substantially outweighed by the danger of unfair prejudice. R. 446, ll. 10-16. He emphasized our Supreme Court's finding in Cartwright that "suicide attempt evidence is fraught with the potential for extreme prejudice." R. 446, ll. 16-19; See Cartwright, 425 S.C. at 92, 819 S.E.2d at 761-62. Counsel argued suicide is "a bad act." It is a crime under common law and "a moral crime to many people." R. 446, l. 24 – 447, l. 1. Consequently, counsel asserted the admission of such evidence would lead the jury to convict Appellant on an improper basis. Specifically, counsel stated, "They're [the jurors are] sitting here wrestling with these issues of malice, or self defense, and all of a sudden their mental doors are proverbially just blown off by hearing about how he [Appellant] tried to commit suicide and they're not thinking. They're not applying the facts to the law now. They're thinking about what a bad man he [Appellant] is for doing that. I can't believe he would do that. . . . I'm done. I'm done listening. And that is the problem." R. 447, ll. 1-8. Counsel continued, "[T]hey may be so overborne by disgust for a man [who] would try to take his own like regardless of the circumstances." R. 447, ll. 17-19. Counsel further argued the evidence had little probative value given that Appellant had a "strong self defense claim at the pool hall" and therefore it was less likely that the attempted suicide was related to Appellant's alleged guilty conscious. R. 448, l. 10 – 449, l. 3.

The trial judge ultimately found evidence of Appellant's attempted suicide was admissible. He concluded that the three factors outlined in Cartwright had been met. R. 455, ll. 22-23. He maintained that the "chain of events" including the shooting at the pool room, what occurred leading up to the confrontation with law enforcement about forty minutes after the shooting, and the

statements Appellant made concerning the self-inflicted wound "demonstrate a nexus by clear and convincing evidence of attempted suicide that can be linked to a guilty conscious." R. 455, l. 23 – 456, l. 11. As to Rule 403, the judge ruled that "in light of the specific facts of this case," in which Appellant asserted self-defense, "the highly probative nature that encapsulates that entire story of facts outweighs the prejudicial effect of the evidence of attempted suicide." R. 456, ll. 12-25. The judge emphasized that "it is a close call and it's supposed to be." R. 457, ll. 1-2. Yet, he found the evidence admissible after considering the "rigorous framework." R. 457, ll. 2-7.

Appellant contemporaneously objected when the attempted suicide evidence was admitted before the jury. R. 706, ll. 14-24; R. 783, l. 4 – 784, l. 3; R. 793, l. 9 – 794, l. 9; R. 799, l. 24 –801, l. 17.

Standard of Review

"The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." State v. Cartwright, 425 S.C. 81, 89, 819 S.E.2d 756, 760 (2018) (quoting State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006)) (internal quotation marks omitted). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id. at 89-90, 819 S.E.2d at 760 (quoting Douglas, 369 S.C. at 429-430, 632 S.E.2d at 848) (internal quotation marks omitted).

Discussion

The trial judge abused his discretion by admitting evidence that Appellant allegedly attempted suicide in the moments before he was taken into custody where, pursuant to State v. Cartwright, 425 S.C. 81, 819 S.E.2d 756 (2018), the state failed to prove an unmistakable nexus

existed by clear and convincing evidence linking the suicide attempt to a guilty conscious derivative of the offenses for which Appellant was being tried, and where any probative value of the evidence was substantially outweighed by the danger of unfair prejudice pursuant to Rule 403, SCRE.

"Evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy." Cartwright, 425 S.C. at 90, 819 S.E.2d at 760 (quoting Rule 401, SCRE) (internal quotation marks omitted); See State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991). "All relevant evidence is admissible, except as otherwise provided . . ." Id. (quoting Rule 402, SCRE) (internal quotation marks omitted); See State v. Langley, 334 S.C. 643, 515 S.E.2d 98 (1999). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Id. at 90, 819 S.E.2d at 761 (quoting Rule 403, SCRE) (internal quotation marks omitted). "The determination of the prejudicial effect of the evidence must be based on the entire record and the result will generally turn on the facts of each case." Id. (quoting State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007)) (internal quotation marks omitted). "Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one." Id. at 91, 819 S.E.2d at 761 (quoting State v. Wilson, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001)) (internal quotation marks omitted).

Suicide attempt evidence "is fraught with the potential for extreme prejudice" and "the admission of such evidence should be approached with the utmost caution." Id. Consequently, before admitting such evidence, the "trial court shall determine whether the State has proven that: (1) a jury could reasonably find that a suicide attempt occurred; (2) the defendant was aware of the occurrence of the alleged crimes at the time of the suicide attempt; and (3) an unmistakable nexus exists by clear and convincing evidence linking the suicide attempt to a

guilty conscience derivative of the offense for which the defendant is on trial." Id. at 92, 819 S.E.2d at 761-62. "Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established." In re Dickey, 395 S.C. 336, 354, 718 S.E.2d 739, 748 (2011) (internal citation omitted). "If the trial court concludes that the three factors have been established, the evidence is relevant and may be admitted, subject to a Rule 403, SCRE analysis. The suicide attempt evidence may be admitted only when all three factors have been met, and the evidence survives a Rule 403 analysis." Id. at 92, 819 S.E.2d at 762. In light of this "rigorous framework," suicide attempt evidence "will rarely be admitted." Id. at 93, 819 S.E.2d at 762.

In Cartwright, the appellant was charged with molesting his daughter and two stepdaughters. While he was detained prior to trial, Cartwright attempted to commit suicide. Id. at 89, 819 S.E.2d at 760. A guard at the local detention center found Cartwright hanging from his bunk with a sheet wrapped tightly around his neck. Id. The guard recalled that Cartwright was unresponsive, but still breathing. Id. During his testimony, Cartwright offered the following explanation as to why he attempted suicide: "I turned myself in. I'd been there for 30 days. I couldn't get a bond. I was charged with the most heinous crimes that somebody could ever think about being charged with . . . I'm in my cell with all these things on my mind, and then the daughter that I loved . . . hates me so much because I had her husband . . . locked up . . . and she held a grudge against me, and they come and served me ten warrants . . . At that time I didn't feel I wanted to live anymore." Id. While noting the "case presents a close question," our Supreme Court held evidence of Cartwright's suicide attempt was admissible. Id. at 93, 819 S.E.2d at 762. The Court emphasized that prison staff found Cartwright hanging in his cell on the same day Cartwright was served with additional warrants and that Cartwright admitted he

attempted suicide after he became aware of the new charges. Id. The record also showed that Cartwright had previously threatened to commit suicide if his daughter or stepdaughters "told anyone about the sexual abuse." Id. The Court held the "fact that Cartwright acted on his threat and attempted suicide enhances the probative value of the evidence." Id. The Court concluded evidence of Cartwright's suicide attempt was relevant, that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, and thus properly admitted. Id.

In this case, the state failed to establish "an unmistakable nexus exists by clear and convincing evidence linking" Appellant's suicide attempt to a guilty conscience derivative of the offenses for which Appellant was on trial, the alleged murder of Milledge and attempted murder of Captain Florida. Appellant attempted to commit suicide after being followed by and ultimately fired upon by law enforcement. Such actions by law enforcement suggested they did not believe Appellant acted in self-defense when he shot Milledge and further indicated Appellant faced imminent incarceration at best and death by law enforcement at worst.

Appellant's suicide attempt is not evidence of a guilty conscience from having to defend himself against Milledge or law enforcement. First, Appellant's encounter with law enforcement served as a break in the causal chain between Appellant shooting Milledge in self-defense and his suicide attempt where almost an hour passed between when Appellant shot Milledge and when he attempted suicide, particularly where Appellant did not attempt suicide during that hour. Second, Appellant testified at the pretrial immunity hearing that shot Milledge out of necessity and not out of malice which is incongruous with a guilty conscience. Appellant freely testified that he shot Milledge in self-defense and only shot at law enforcement after he was shot and wounded by Captain Florida. Appellant's ability to testify about shooting Milledge and at law

enforcement and his justification for doing so is contradictory to a guilty mind. Accordingly, the state failed to establish an "unmistakable nexus" linking Appellant's suicide attempt to a guilty conscience derivative of the offenses for which Appellant was tried.

Additionally, any probative value of Appellant's suicide attempt was substantially outweighed by the danger of unfair prejudice. The evidence has no probative value because it does not make it more or less probable that Appellant shot Milledge or at Captain Florida with malice. The only permissible use of suicide attempt evidence pursuant to Cartwright is to prove a guilty conscience where there is evidence of an unmistakable nexus between the suicide attempt and the offenses for which the defendant is on trial. As argued above, no such nexus exists in this case. Accordingly, the evidence has no probative value. However, the evidence was extremely prejudicial to Appellant. Suicide is considered morally reprehensible in many different religions and cultures. As our Supreme Court recognized in Cartwright, such evidence is "fraught with the potential for extreme prejudice." Cartwright, 425 S.C. at 91, 819 S.E.2d at 761. There is a reasonable probability that the evidence Appellant attempted suicide may have led the jury to convict Appellant on an improper basis, namely an emotional one. Consequently, it should have been excluded pursuant to Rule 403.

Respectfully, this Court should hold the trial judge abused his discretion by admitting evidence of Appellant's suicide attempt, reverse Appellant's conviction, and remand for a new trial.

3.

The trial judge abused his discretion by failing to tailor the self-defense instruction to adequately reflect the facts and theories presented by Appellant, specifically that Appellant was not required to wait until his assailant got the drop on him, that he had the right to act under the law of self-preservation and prevent his assailant from getting the drop on him, since the charge was supported by the evidence and was crucial to the jury's understanding of the law on self-defense.

Relevant Facts

Appellant submitted numerous written requests to charge to the trial judge. Appellant's Request to Charge No. 6 concerned the right to act on appearance as it relates to self-defense. See R. 1495. The request read in part:

> One who acts in self-defense may act on appearances. He may be mistaken. The law does not hold him to a *refined assessment* of the danger, provided, of course, he acted as the person of ordinary coolness and courage would have acted or should have acted in meeting the appearance of danger. **He doesn't have to wait until his assailant gets the drop on him. He has a right to act under the law of self-preservation and prevent his assailant from getting the drop on him; if it is apparent his assailant is taking steps to get the drop on him, one who acts in self-defense must take steps first to prevent such assailant from getting the drop on him.** See State v. Rash, 182 S.C. 42, 50 (1936); State v. Starnes, 340 S.C. 312, 322 (2000).

(emphasis added)

The parties "had an extensive charge conference" with the judge in chambers. R. 1389, l. 8. After the charge conference, defense counsel put his objections on the record. Counsel objected to the judge not charging the entirety of Request to Charge No. 6. R. 1390, ll. 16-25. The judge emphasized that he granted the request to charge "in part." While he acknowledged he did not "take your charge verbatim," he maintained he "took the spirit of the charge." R. 1390, ll. 18-20.

The judge ultimately charged the jury concerning the right to act on appearances as it pertains to self-defense as follows:

> The defendant does not have to show that he was actually in danger. It is enough if the defendant believed he was in imminent danger and a reasonably prudent person of ordinary firmness and courage would have had the same belief. **One who acts in self-defense may act on appearances. He may be mistaken. The law does not hold him to a refined assessment of the danger, provided, he acted as the person of ordinary coolness and courage would have acted or should have acted in meeting the appearance of the danger.** It is for you to decide whether the defendant's fear of immediate danger of death or serious bodily injury was reasonable and would have been felt by an ordinary person in the same situation.

R. 1480, ll. 4-16 (emphasis added).

As seen, the trial judge refused to charge a critical part of Appellant's Request to Charge No. 6, specifically:

> He doesn't have to wait until his assailant gets the drop on him. He has a right to act under the law of self-preservation and prevent his assailant from getting the drop on him; if it is apparent his assailant is taking steps to get the drop on him, one who acts in self-defense must take steps first to prevent such assailant from getting the drop on him.

R. 1495.

In Appellant's motion for a new trial filed several days after his conviction, Appellant argued he was denied a fair trial in part because of the trial judge's refusal to charge the above language. R. 1547.

Standard of Review

"An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." State v. Marin, 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016) (quoting State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010)) (internal quotation marks omitted).

Discussion

The trial judge abused his discretion by failing to instruct the jury on the critical language contained in Appellant's Request to Charge No. 6: "He doesn't have to wait until his assailant gets the drop on him. He has a right to act under the law of self-preservation and prevent his assailant from getting the drop on him; if it is apparent, or reasonably apparent his assailant is taking steps to get the drop on him, one who acts in self-defense must take steps first to prevent such assailant from getting the drop on him." R. 1495. This charge was supported by the evidence and was crucial to the jury's understanding of the law of self-defense.

"A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." State v. Williams, 400 S.C. 308, 314, 733 S.E.2d 605, 608 (Ct. App. 2012) (quoting State v. Mattison, 388 S.C. 469, 478, 697 S.E.2d 578, 583 (2010)) (internal quotation marks omitted). "The law to be charged must be determined from the evidence presented at trial." Id. (quoting State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 512 (2000)) (internal quotation marks omitted); See Mattison, 388 S.C. at 478, 697 S.E.2d at 583 (stating appellate courts should "consider the court's jury charge as a whole in light of the evidence and issues presented at trial").

"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." Id. at 314, 733 S.E.2d at 608-609 (citing Cole, 338 S.C. at 101, 525 S.E.2d at 512-513). "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." Id. at 314, 733 S.E.2d at 609 (quoting State v. Day, 341 S.C. 410, 416-417, 535 S.E.2d 431, 434 (2000)) (alteration in original).

In State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984), our Supreme Court suggested a standard self-defense instruction. However, in State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989), the Court made clear that it did not intend Davis to be the exclusive self-defense charge. State v. Burkhart, 350 S.C. 252, 262, 565 S.E.2d 298, 303 (2002). Instead, "a trial judge should specifically tailor the self-defense instruction to adequately reflect the facts and theories presented by the defendant." State v. Day, 341 S.C. 410, 418, 535 S.E.2d 431, 435 (2000) (citing Fuller, 297 S.C. 440, 377 S.E.2d 328). "A self-defense charge is erroneous where the trial court fails to charge on elements of the defense which were applicable to the issues raised by the defendant." Id. (citing Fuller, 297 S.C. 440, 377 S.E.2d 328).

In State v. Day, our Supreme Court held the trial judge's failure to charge the specific elements of self-defense that were applicable to Day's theory constituted reversible error. Day, 341 S.C. at 418, 535 S.E.2d at 435. The Court found the trial judge's instruction was incomplete because it failed to include a charge indicating: (1) Day had a right to judge the conduct of the decedent more harshly than otherwise because of the decedent's drug consumption, and (2) the jury could consider prior instances of violence or unprovoked aggression by the decedent in determining whether Day had a reasonable belief of imminent danger. Id. Part of Day's defense was his argument that the decedent had previously pulled a gun on him and that the decedent was in a "drug induced paranoia" the day of the incident. Id. Consequently, the Court held the jury charge, which only included the standard self-defense instruction as outlined by our Supreme Court in Davis along a the charge on the right to act on appearances, was incomplete because the trial judge failed to charge on the decedent's substance abuse or his prior acts of violence. Id. Ultimately, the Court reversed Day's convictions and remanded for a new trial.

In State v. Nichols, 325 S.C. 111, 116-117, 481 S.E.2d 118, 121 (1997), the defendant argued the trial judge's instructions on the law of self-defense were inadequate under State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989), where the judge instructed the jury solely on the common law elements of self-defense. Nichols objected to the charge and requested 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. Id. at 117, 481 S.E.2d at 121. Nichols contended the trial judge's refusal to give further instructions was reversible error. Our Supreme Court agreed. Id.

The Court emphasized that the charge suggested in Davis was not intended to be the exclusive charge for self-defense and that trial courts have been instructed to consider the facts and circumstances of the case at hand to fashion a proper charge. Id. (citing Fuller, 297 S.C. at 443, 377 S.E.2d at 330). The Court held Nichols was entitled to a charge on the right to act on appearances because Nichols testified he thought he had seen a shiny object in the deceased's hand. Id. (citing State v. Jackson, 227 S.C. 271, 87 S.E.2d 681 (1955)). The Court also found the evidence showed there had been prior difficulties between Nichols and the deceased including an instance where the deceased pointed a rifle at Nichols. Consequently, the Court concluded Nichols was entitled to a charge on the relevance of prior difficulties. Id. (citing State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978) (prior bad blood, intoxication, and prior threats by deceased were relevant to defendant's reasonable apprehension of bodily harm)). Further, the Court held Nichols was entitled to a charge that he did not have to wait before acting in self-defense since Nichols testified he thought he saw a gun in the deceased's hand and did not wait for the deceased to fire or aim at him. Id. (citing State v. Rash, 182 S.C. 42, 188 S.E. 435

(1936)). Accordingly, the Supreme Court reversed Nichols conviction and remanded for a new trial. Id. at 118, 481 S.E.2d at 122.

In State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978), our Supreme Court held Hendrix was entitled to a directed verdict since he was acting in self-defense as a matter of law when he shot the decedent. Id. at 661-662, 244 S.E.2d at 507. Hendrix was celebrating Labor Day with his family at his property on the shore of Lake Murray. Id. at 655, 244 S.E.2d at 504. Evidence established that "ill feelings characterized the relationship" between Hendrix and the decedent. Id. The decedent had confronted Hendrix earlier in the day and warned "they were going to have to fight to settle" the matter. Id. Hendrix was standing next to his truck, which was parked on his land, when the decedent arrived at the property, stopped his vehicle in the road, jumped out, and advanced toward Hendrix. Id. at 656, 244 S.E.2d at 505. Hendrix reached into the cab of his truck, pulled out a shotgun, leveled it at the decedent, and told him three times to back off. Id. The decedent immediately turned around, walked back to his truck, reached into the cab, drew out his own shotgun, and walked straight back to where Hendrix was standing. Id. A neighbor of the decedent observed the commotion and approached the scene. Id. at 657, 244 S.E.2d at 505. When she saw the two men facing each other with shotguns, she screamed the decedent's name. Id. The decedent turned his head in the direction of the scream. Id. As the decedent turned, Hendrix began firing. Id. He fired four times in rapid succession, killing the decedent. Id.

The Court determined Hendrix was not at fault in bringing on the difficulty since he armed himself on his own land in a legal manner after he was threatened. Id. at 659, 244 S.E.2d at 506. The Court further found the second and third elements of self-defense were established since the evidence showed Hendrix was actually in imminent danger of losing his life. Id. at

659-660, 244 S.E.2d at 506. Having no duty to retreat because he was on his own property and being without fault in bringing on the fatal confrontation, the Court held Hendrix was warranted in reacting to the situation with force. Id. at 660, 244 S.E.2d at 507. In so holding, and relevant to this case, the Court emphasized, "Once [Hendrix's] right to fire in self-defense arose, he was not required to wait until his adversary was on equal terms or until he fired or aimed his weapon." Id. at 660-661, 244 S.E.2d at 507. This is significant since the evidence showed Hendrix shot the decedent when he was distracted by his neighbor's scream.

In this case, as in Day and Nichols, the trial judge erred by refusing to instruct the jury on the specific element of self-defense requested by Appellant since it was applicable to Appellant's account of what occurred. Appellant testified that toward the end of the confrontation, Milledge began to walk back toward the front door of the pool room. See State's Exhibit No. 14 (Pool Room Video). Appellant was hopeful that he was finally going back inside. R. 1157, ll. 20-24. However, Milledge spun on his heels and headed back toward Appellant's car. See State's Exhibit No. 14 (Pool Room Video). After motioning aggressively with his arms and hands for Appellant to leave, Milledge continued to walk aggressively toward Appellant's car. See State's Exhibit No. 14 (Pool Room Video). Appellant knew Milledge was armed and could not see Milledge's right hand. R. 1162, ll. 7-10. When Milledge began to turn the corner toward Appellant's car, Appellant got out of the car and fired twice striking Milledge. See State's Exhibit No. 14 (Pool Room Video).

As seen, before waiting for Milledge to aim the gun at him and perhaps fire, Appellant shot him in self-defense. Consequently, there was evidence to support the requested instruction. As our Supreme Court stated in Day, "A self-defense charge is erroneous where the trial court fails to charge on elements of the defense which were applicable to the issues raised by the

defendant." Day, 341 S.C. 410, 418, 535 S.E.2d 431, 435 (2000) (citing Fuller, 297 S.C. 440, 377 S.E.2d 328). Since the trial judge failed to charge an important element of self-defense relevant to Appellant's account of what occurred, respectfully, this Court should reverse Appellant's conviction and sentence and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his conviction and sentence and remand for a new trial.

Respectfully submitted,

s/ Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 20th day of September, 2023.