STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM EDGEFIELD COUNTY
Honorable Walton J. McLeod, IV, Circuit Court Judge

Appellate Case No. 2022-000046

THE STATE, ...RESPONDENT,

v.

BARRY WAYNE JONES,.....APPELLANT.

FINAL BRIEF OF RESPONDENT

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[1] *State v. Cartwright*, 425 S.C. 81, 819 S.E.2d 756 (2018) (providing three factors for trial courts to analyze to determine whether evidence of a defendant's suicide attempt is admissible.)

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APPELLANT'S 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 conscience 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?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Whether Judge McLeod properly denied immunity because Appellant did not prove he was without fault in bringing on the difficulty, that he was in actual danger of harm, or that he was in a place he had the right to be, among other elements of self-defense and the PPPA, when Appellant returned to the bar with a loaded gun after threatening to kill the victim, refused to leave when asked to by the victim who had the right to eject, and the victim was at the front of the vehicle unarmed and not doing anything threatening when Appellant fired?

2. Whether Judge McLeod properly found the State proved a nexus existed between the murder and Appellant's suicide attempt a mere forty minutes later when the judge thoroughly analyzed the three *State v. Cartwright* factors and conducted a Rule 403, SCRE, analysis on the record?

3. Whether Judge McLeod was within his zone of discretion to omit the portion of Appellant's requested charge that Appellant had the right to act on the appearance of imminent danger (and that he did not have to wait for the victim to get the drop on him) when Appellant was not, in fact, in imminent danger at the moment he fired and it was factually impossible for the victim to "get the drop on him" at that moment; and no person of ordinary firmness or courage would find either?

STATEMENT OF THE CASE

Appellant was indicted for murder and attempted murder in October of 2018 by an Edgefield County Grand Jury. A Protection of Persons and Property Act hearing was held from September 7th to 8th, 2021, before the Honorable Walter J. McLeod, IV, with Solicitor Rick Hubbard and Assistant Solicitor Robert McNair representing the State. R. 1. Appellant was represented by Luke and Brian Shealy along with Casey Secor. R. 1. Judge McLeod denied immunity on October 15, 2021 via a written order. (Amended Order.) R. 1501

Appellant proceeded to trial by jury from December 3 to 13, 2021, after which he was found guilty of murder but not guilty of attempted murder. R. 1491-1492. Judge McLeod sentenced him to thirty-five years' imprisonment. R. 1494. Appellant timely filed a motion for a new trial on December 20th, but Judge McLeod issued a written Order denying it on January 7, 2022. Appellant timely appealed; this brief of Respondent follows.

STANDARD OF REVIEW

"Circuit courts utilize pretrial hearings to determine whether a defendant is entitled to immunity under the Act, employing a preponderance of the evidence standard." *State v. McCarty*, 437 S.C. 355, 365, 878 S.E.2d 902, 908 (2022); *State v. Cervantes-Pavon*, 426 S.C. 442, 449, 827 S.E.2d 564, 567 (2019). "This Court, in turn, reviews an immunity determination for an abuse of discretion." *McCarty*, 437 S.C. at 365, 878 S.E.2d at 908. "An abuse of discretion occurs when the [circuit] 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, 290, 786 S.E.2d 132, 136 (2016).

"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, 847-848 (2006)). "An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010).

ARGUMENT

I. Judge McLeod properly denied immunity as Appellant did not prove he was without fault in bringing on the difficulty, that he was actually in danger of harm, or that he was in a place he had the right to be (among other elements), as the victim only turned back toward Appellant's vehicle after Appellant called his name and the victim was unarmed in the front of the vehicle when Appellant got out of his car and shot him.

Appellant argues Judge McLeod abused his discretion by denying him immunity from prosecution under the Protection of Persons and Property Act, S.C. Code §16-11-440 ("PPPA"). IBOA p. 15. The State disagrees and submits his argument is without merit. In order to be granted relief from this Court, Appellant has to prove there was no evidentiary support for Judge McLeod's conclusions in his October 15, 2021 written Order, and Appellant has not done so.

Law of Self-Defense

To be entitled to immunity after using deadly force, a defendant must prove he met all four elements (or applicable sections of the Act) of self-defense by a preponderance of the evidence. He:

(1) Must be without fault in bringing on the difficulty;

(2) Must have believed he was in imminent danger of losing his life or sustaining serious bodily injury, or actually was in such danger;

(3) "Reasonable Fear." If based on belief, a reasonably prudent person of ordinary fitness and courage would have entertained that same belief; and

(4) The defendant had no other probable means of avoiding the danger or sustaining serious bodily injury than to act how he did.

State v. Curry, 406 S.C. 364, 371, 752 S.E.2d 263, 266 n. 4 (2013).

If a defendant only meets the first two elements, then he must also prove he meets the applicable section(s) of the PPPA that replace elements **(3)** reasonable fear; and **(4)** the duty to retreat. However, if the State disproves one element at any point, the judge may deny immunity right then and there and send the case to a jury. *State v. Bixby*, 388 S.C. 528, 554, 698 S.E.2d 572,

586 (2010) ("It is an axiomatic principle of law that the defense has not been established if any one element is disproven.")

Section (A): The presumption of reasonable fear applies (replacing element 3) if:

> **(1)** The victim was in the process of unlawfully and forcefully entering or had entered an occupied vehicle or attempted to remove another person against his will from the vehicle; and
>
> **(2)** Knows or has reason to believe that unlawful and forcible entry is or has occurred.

Section (B): Section A does not apply, however, if:

> **(1)** The victim had the right to be in the residence or vehicle; or
>
> **(3)**[2] The defendant was engaged in an unlawful activity at the time or used an occupied vehicle to further such unlawful activity.

Section (C): A person who:

- Is not engaged in unlawful activity; and
- Who is attacked in a place he had the right to be . . .
- Has no duty to retreat (replacing element 4) and has the right to meet force with force to prevent death or GBI to himself or others.

Section (D): A person who attempts to enter a person's occupied vehicle is presumed to be doing so with the intent to commit an unlawful act or violent crime.

First, Judge McLeod found Appellant was at fault in bringing on the difficulty because he returned to the bar with multiple guns minutes after he sent a text to his friend Joe "Jo Jo" Mims saying, "I'm going to kill that Be Boy.[3]" Amended Immunity Order R. 1508. Clayton Hall, the victim's grandson, testified at the immunity hearing he had asked his grandfather to tell Appellant not to come back to the bar. Amended Immunity R. 294-298. Judge McLeod therefore rightly found the victim had asked Appellant to leave multiple times and he had refused to

[2] Items 2 and 4 of Section B are omitted as they are irrelevant to the facts of this case.
[3] "Be Boy" was the nickname of the victim.

submit to it. The judge wrote, the defendant's "refusal to leave upon the question of Mr. Hall, 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." Amended Immunity Order R. 1508. This was a finding based on evidentiary support. Thus, Judge McLeod did not abuse his discretion and this Court should affirm.

Second, even if Appellant was not at fault, Judge McLeod found Appellant failed to show he was in actual imminent danger or reasonably believed he was in imminent danger. Amended Immunity Order R. 1508-1509. No one testified that the victim carried a gun and no gun was recovered; he actually only ever carried a cell phone. *Id*. The judge also found Appellant armed himself before returning to the bar. *Id*. Therefore, Appellant was not in actual imminent danger. This was a ruling backed by evidentiary support so the judge did not abuse his discretion.

Moving to the Act, the judge found Appellant did not establish either Section A or C by a preponderance of the evidence. Amended Immunity Order R. 1509-1510. Regarding Section A, Judge McLeod found Appellant was not entitled to the presumption of reasonable fear as the encounter lasted nine minutes and the victim did not do anything overtly threatening during that time. (The immunity judge is not required to accept the defendant's version of the facts, which would have been the victim had a gun.) "[T]he video showed that when the Defendant exited his vehicle and subsequently fired the first shot, Mr. Hall was at the front of the vehicle not in the process of entering [Appellant's] car." Amended Immunity Order R. 1510. Further, evidence was presented that the victim stopped and took a step back before Appellant fired, and a witness heard Appellant calling the victim's name before he fired. The video also corroborates this testimony showing something happened that caused the victim to turn around that final time toward Appellant's vehicle and shows he was at the front of the car when the shot rang out. *See*

State's Exhibits 13 and 14 (videos) and Defense Exhibit 12 (photo showing how far away the victim was when Appellant opened his door). This was a reasonable ruling backed by evidentiary support.

Regarding Section C, Judge McLeod disagreed with the defense, who argued Appellant was in a place he had the right to be just because he was in his occupied vehicle. Amended Immunity Order R. 1510. The judge found Appellant was not in a place he had the right to be because he was stripped of his right to be at the bar when he was asked to leave. The judge cited *Wright v. United Parcel Service, Inc*., 315 S.C. 521 (Ct. App. 1994) (although entry by a person on the premises of another may initially be lawful, a person becomes a trespasser when they fail to depart after being asked by the owner to leave.") and S.C. Code §16-11-620 (1976): "Any person who, without legal cause or good excuse . . . fails and refuses . . . to leave immediately upon being ordered or requested to do so by the person in possession or his agent or representative is a trespasser" in support. Thus, the judge rightly found Appellant was not entitled to use deadly force before retreating. Amended Immunity Order R. 1511. Appellant has not shown any way Judge McLeod abused his discretion as all of his conclusions were backed up with evidentiary support and Appellant has not shown how Judge McLeod made an error of law. This Court should affirm.

II. The trial court properly analyzed the attempted suicide evidence under Rule 403, SCRE, and admitted it as the State proved by clear and convincing evidence a nexus existed between the attempt and the murder. The attempt occurred a mere forty minutes after the murder and Appellant told officers he meant to kill himself multiple times.

Appellant argues the trial court erred by denying his pretrial *in camera* motion to exclude evidence of his suicide attempt shortly after he killed the victim because the danger of unfair prejudice substantially outweighed the prejudicial effect. IBOA at p. 34. The State disagrees and submits Appellant's argument is without merit. The admission or exclusion of evidence is a matter best left to the sound discretion of Judge McLeod and his ruling should not be disturbed unless this Court finds the judge manifestly abused his discretion and probable prejudice resulted. *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847-848 (2006). Judge McLeod's conclusions would have to lack evidentiary support or be controlled by an error of law, and Appellant has not demonstrated either occurred here. *Id*. at 429-430, 632 S.E.2d at 848.

As a general rule, any guilty act, conduct, or statement by the defendant is admissible as evidence of consciousness of guilt.[4] *State v. McDowell*, 266 S.C. 508, 515, 224 S.E.2d 889, 892 (1976). "Relevant circumstantial evidence regarding a defendant's guilty conduct may be admissible under Rule 403 as a circumstance tending to show the defendant's consciousness of guilt even though it is not conclusive evidence of guilt." *State v. White*, 437 S.C. 490, 497-498, 879 S.E.2d 21, 25 (Ct. App. 2022). "[C]ourts have unanimously held that an accused's attempt to commit suicide is probative of consciousness of guilt and is therefore admissible." Dale Joseph Gilsinger, *Admissibility of Evidence Relating to Accused's Attempt to Commit Suicide*, 73 A.L.R.

[4] Noting here the Supreme Court's admonition that, "[e]vidence of attempted suicide is not easily analogized to evidence of guilt" as "suicide-attempt evidence is fraught with the potential for extreme prejudice." *Cartwright*, 425 S.C. at 91, 819 S.E.2d at 761. But also noting the Supreme Court, in abrogating *State v. Orozco*, 392 S.C. 212, 708 S.E.2d 227 (Ct. App. 2011) on this issue, did *not ban* this line of reasoning but only added safeguards to the line of reasoning in its elemental framework and *in camera* hearing requirement.

5th 615, 624 (1999); *see also* 22A C.J.S. *Criminal Law* § 1011 (2006) ("Evidence is generally admissible that the accused attempted . . . suicide subsequent to the time the crime was committed. Such evidence ordinarily is admissible as indicating a consciousness of guilt.")

Attempted suicide evidence is analyzed similarly (adding in the three elements and *in camera* hearing requirement) to how evidence of flight is analyzed in this state because the test used to determine it is "equally useful in determining the admissibility of evidence of other types of evasive conduct." *State v. Martin*, 403 S.C. 19, 28, 742 S.E.2d 42, 47 (Ct. App. 2013). The rationale behind the admissibility is "one who is innocent and conscious of that fact would [not] flee." *Martin*, 403 S.C. at 29-30, 742 S.E.2d at 47 (internal citations omitted). "The courts should not suppose a person who knew he was innocent but under suspicion would disguise himself, hide from the police, or lie to officers investigating the crime of which he is suspected." *Id*. Courts consider the "chain of inferences leading from evidence of [the defendant's conduct]" to figure out whether the inferences logically "lead to consciousness of guilt of the crime charged." *Martin,* 403 S.C. at 29, 742 S.E.2d at 47 (*quoting United States v. Porter*, 821 F.2d 968, 976 (4th Cir. 1987).

In *State v. Cartwright*, our Supreme Court held evidence of a defendant's attempted suicide was admissible if there was an unmistakable nexus linking the attempt to a guilty conscience of the crime for which the defendant was on trial. *State v. Cartwright*, 425 S.C. 81, 91, 819 S.E.2d 756, 761 (2018). Finding a nexus is a case-by-case determination to be made outside the presence of the jury. *Id*. at 92, 819 S.E.2d at 761-762. A court should determine admissibility by examining three factors and by conducting a Rule 403, SCRE, analysis:

(1) The State proved the jury could reasonably find a suicide attempt occurred;

(2) The State proved the defendant was aware of the occurrence of the alleged crimes at the time of his attempt;[5] and

(3) The State proved an unmistakable nexus existed by clear and convincing evidence between the attempt and a guilty conscience derivate of the crime.[6]

Cartwright, 425 S.C. at 91-92, 819 S.E.2d at 761-762.

If a judge admits the evidence, a limiting instruction, jury instruction, or further comment by the judge is not permitted, but both parties may make full arguments in closing regarding how they believe the jury should consider the evidence. *Id*. at 92-93, 819 S.E.2d at 762.

All relevant evidence is admissible. Rule 402, SCRE; *State v. Pittman*, 373 S.C. 527, 578, 647 S.E.2d 144, 170 (2007). "Evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy." Rule 401, SCRE. Here, that would be whether Appellant knew he shot the victim with malice or not. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE. "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." *State v. Gillian*, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007). "Evidence is unfairly prejudicial

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[5] *Cf. State v. Crawford*, 362 S.C. 627, 635-636, 608 S.E.2d 886, 890-891 (Ct. App. 2005) ("The critical factor to the admissibility of evidence of flight is whether the totality of the evidence creates an inference that the defendant had knowledge that he was being sought by the authorities.")

[6] *Cf. State v. Pagan*, 369 S.C. 201, 209, 631 S.E.2d 262, 266 (2006) ("Flight evidence is relevant when there is a nexus between the flight and the offense charged."); *Crawford*, 362 S.C. at 636, 608 S.E.2d at 891 ("It is sufficient that the circumstances justify an inference that the accused's actions were motivated as a result of his belief that police officers were aware of his wrongdoing and were seeking him for that purpose.")

6 continued: Clear and convincing evidence is "that degree of proof which will produce in the minds 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).

if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one." *State v. Wilson*, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001). An appellate court reviews 403 rulings with an abuse of discretion standard and gives great deference to the trial court's decision. *State v. Myers*, 359 S.C. 40, 48, 596 S.E.2d 488, 492 (2004).

The defense and the State's arguments and nexus the State proved in *Cartwright* are very similar to what Appellant presents to this Court here. Petitioner Cartwright was found hanging by a sheet from his jail cell bunk the same day he received additional criminal sexual conduct warrants, and the State moved photographs and other evidence in at trial to prove the attempt occurred. *Cartwright*, 425 S.C. at 89-90, 819 S.E.2d at 760. Cartwright admitted he attempted suicide after he became aware of the new charges, and the fact he had previously threatened to commit suicide if any of the three minors told anyone of his abuse enhanced the probative value of the attempt. *Id*. at 93, 819 S.E.2d at 762. At trial, Cartwright argued the State had to prove more than showing he knew he was charged with a crime, and evidence of his attempt could not be viewed as evidence of guilt because suicide was and is a complex act. *Id*. at 90, 819 S.E.2d at 760. But our Supreme Court found the evidence was relevant and its probative value outweighed any prejudicial effect. *Id*. at 93, 819 S.E.2d at 762.

Similarly, here, this Court should affirm because Judge McLeod properly found the evidence was relevant, a nexus existed by clear and convincing evidence, and the probative value outweighed any prejudicial effect. The court held a pre-trial *in camera* motion hearing after Appellant moved to exclude the evidence. R. 388-457. Respondent agrees with Appellant's recitation of the facts and summary of the proffered testimony presented during the hearing – IBOA pp. 34-38 – but underscores certain portions. Appellant left the bar's parking lot after shooting the victim and drove straight to Log Creek Road, where he then immediately attempted

suicide, then engaged in a shootout with police before he was "taken down." R. 391-400. During the shootout, he told police he wanted them to "let him bleed to death." R. 424.425. He had an AR-15 rifle and the silver .38 revolver with him that he had used to shoot the victim. R. 392.

When asked why he was covered in blood, Appellant stated, "he had shot himself," and "he was hurting and had tried to shoot himself under the chin." R. 392. R. 400-401. He also said, notably, "I tried to kill myself and I couldn't even do that." R. 416. While in the ambulance, Appellant also said, "I wish y'all would have killed me. Y'all should have just let me die," and "[t]he only hole that hurts is the one I put in my neck." R. 405, 407. *See* State's Exhibit 8 (Kathmann Dashcam); State's Exhibit 60 (Densmore Body Cam); State's Exhibit 18 (CD with Log Creek Video Clips).

During the hearing, Judge McLeod rightly oversaw the parties' arguments regarding the three *Cartwright* elements and concluded from the facts that **(1)** a jury could reasonably find that a suicide attempt occurred; **(2)** the defendant was aware of the occurrence of the crime at the time of the attempt; and **(3)** an unmistakable nexus existed between the attempt and a guilty conscience and the State had proved it by clear and convincing evidence. R. 432-433, R. 455-457. The defense, in fact, only challenged the third factor, conceding the first two were met. R. 432-434, R. 445.

The judge found the probative value was not substantially outweighed by any danger of unfair prejudice "in light of the specific facts of the case." R. 456. The judge considered the whole of the testimony and the whole of the events that led up to the attempt in making his ruling as appellate courts have instructed him to. R. 456-457. He found the "chain of events" including the "self-inflicted wound by the defendant and the statements that followed in close time and proximity in a non-custodial manner after . . . demonstrate[d] a nexus by clear and convincing

evidence of attempted suicide that can be linked to a guilty conscience." R. 456 Judge McLeod followed this Court's and our Supreme Court's guidance to the letter in analyzing the evidence. There is evidentiary support for his decisions and there are no errors of law. This Court should thus affirm.

III. Judge McLeod properly denied Appellant's request to charge on his right to act on appearances as Appellant had not yet established his right to fire in self-defense had arisen, the judge charged the portion of Appellant's requested charge that was supported by the facts and omitted the portion that was not, and Appellant cannot show prejudice from any alleged error of omission.

Appellant argues the trial court erred by omitting the portion of his requested jury charge that he had the right to act on appearances. IBOA p. 41. The State disagrees and submits Appellant's argument is without merit. A trial court's decision regarding jury instructions will not be reversed where the charges as a whole properly charged the law to be applied. *State v. Wharton*, 381 S.C. 209, 213, 672 S.E.2d 786, 788 (2009). This Court will have to find Judge McLeod abused his discretion by way of an error of law to provide Appellant the relief he asks for, and he has not demonstrated such an error of law occurred here. *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001).

Appellant wanted the following charge:

> 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).

Defendant's Request to Charge #6.

The defense first raised the issue about the right to act on appearances right after they rested at trial. R. 1294-1388. They argued, "the right to act on appearances gives the defendant the right to judge the conduct of his adversary more harshly than he otherwise would and there are a non-exhaustive list of factors that are taken into consideration . . . ." *Id*.

The defense stated the factors were:

(1) The deceased's reputation for violence;

(2) Prior bad blood or difficulties between the defendant and the deceased;

(3) The deceased's alcohol consumption; and

(4) The deceased's prior threats against the defendant.

Tr. 1295-1298.

The defense reminded the judge he had heard testimony that the victim had a reputation for liking to fight and liking to drink, and Appellant knew that. The defense also reminded the judge that the victim had spread a false rumor that Appellant had been fired from his last job, and Appellant had confronted him about it in the months or weeks leading up to the day of the shooting. Tr. 1295-1297. Further, the day of, the victim had walked out of the bar as Appellant was leaving and tried to tap the back right corner of his car as Appellant turned onto the road to the right. Tr. 1297. Regarding the third factor, alcohol consumption, the defense stated the victim's BAC was .12, and Appellant knew the victim had been drinking. Tr. 1297. Finally, the defense stated Appellant had felt threatened when he confronted the victim about the job rumor weeks before and had felt threatened when the victim tapped his car. Tr. 1297-1298.

When reviewing the exhibits entered into evidence, the bar surveillance videos show Appellant leaving the bar at 6:30 P.M.,[7] and the victim exiting at 6:31:30 P.M. Appellant was in his silver Mercedes Benz parked in the upper right hand corner of the screen (the camera was in the lower left hand corner of the screen) nearest to the road by then and pulled out when the victim walked up to his car and tried to swat the back lower right part of Appellant's car. He then put both hands out in a "man, I wanted to talk to you" fashion as Appellant turned right out of the parking

[7] Clayton Hall, the bar owner and the victim's grandson, testified the surveillance video was an hour off because of Daylight Savings Time. R. 504-505.

lot. The videos show Appellant returned to the lot at 7:06 P.M. and, if one is facing the bar, (seen along the entire right side of the video), parked in the space furthest to the left in the spaces directly in front of the bar. His lights were off. The victim came out a few moments later and calmly walked down the sidewalk to Appellant's driver's side window.

The video shows the victim talked to the Appellant through the window for nearly 10 minutes. The conversation was calm at first and other vehicles and people entered the lot and the bar while it was going on. At 7:10:30 P.M., the victim motioned to the bar with his hand then back to Appellant. At 7:12, the victim pointed nonthreateningly to the bar again in a "please leave" fashion while talking then started walking back into the bar slowly. When Appellant still refused to leave, the victim started to look angry and motioned to the bar with both hands. He leaned toward the car at 7:13 P.M., then walked back toward the bar at 7:13:15 P.M. He returned to Appellant's driver's side window at 7:14 and waved a black cell phone around.[8] He backed off a little at 7:15 P.M and things calmed down.

By 7:16 P.M., when Appellant still refused to leave after clearly being asked,[9] the victim slung his left hand then right hand (that were empty) and pointed to the bar and started walking back in again. He motioned with his right hand in a "get out of here! Leave, please!" fashion to Appellant. He was about six or eight feet from Appellant, about two or three feet down the sidewalk toward the entrance of the bar (in the lower right-hand corner of the video) when he turned around yet again. He had nothing in his hands and was moving slowly. Appellant opened his car door, stood up with both feet out of the car, put both hands on his gun, and fired, killing the

[8] Appellant testified it was a gun, but multiple witnesses testified the victim did not own or carry a gun, and no gun was found on him or anywhere near him right after he was shot.

[9] As has been said, the victim was the grandfather of the owner of the bar. The bar owner testified he had asked his grandfather to get Appellant to leave the premises. The victim therefore had the right to eject Appellant from the lot.

victim. Law enforcement arrived at 7:19 and 7:20 P.M. State's Exhibits 13 and 14 (videos); Defense Exhibit 12 (photo showing how far away the victim was when Appellant opened his door); Defense Exhibits 71 (CD of photos); Defense Exhibits 96 and 97 (CDs of videos).

After a lengthy charge conference in chambers, Judge McLeod told the defense he would grant their request to charge in part, not taking it verbatim but maintaining the spirit of the charge. R. 1389-1390. The judge charged the following:

> 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 danger. It is for you to decide whether the defendant's fear of immediate danger or death or serious bodily injury was reasonable and would have been felt by an ordinary person in the same situation.

R. 1480.

Appellant objected to Judge McLeod leaving the part out about waiting for his assailant to get the drop on him. R. 1390; Defendant's Motion for a New Trial. However, Judge McLeod is required to charge only the current and correct law as it is supported by the evidence in the record. *State v. Peer*, 320 S.C. 546, 466 S.E.2d 375 (Ct. App. 1996); *State v. Gates*, 269 S.C. 557, 561, 238 S.E.2d 680, 681 (1977). An appellate court should not reverse his decision unless he committed an abuse of discretion, and it determines whether that occurred by considering the jury instructions in their entirety. *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000); *State v. Kerr*, 330 S.C. 132, 144, 498 S.E.2d 212, 218 (Ct. App. 1998). The judge should only charge the law as it will "enlighten the jury and aid it in arriving at a correct verdict." *State v. Blurton*, 352 S.C. 203, 207-208, 573 S.E.2d 802, 804 (2002). Here, it is factually impossible for

the victim to have in any way "gotten the drop on" Appellant when Appellant fired on him. Therefore, Judge McLeod charged the correct law according to the facts.

An erroneous jury instruction is not grounds for reversal unless the appellant can show prejudice from the erroneous instruction. *Ellison v. Simmons*, 238 S.C. 364, 372, 120 S.E.2d 209, 213 (1961) (*citing Cole v. Raut*, 378 S.C. 398, 405, 663 S.E.2d 30, 33 (2008)). "A person has the right to act on appearances, even if the person's belief is ultimately mistaken." *State v. Dickey*, 394 S.C. 491, 501, 716 S.E.2d 97, 102 (2011); *State v. Fuller*, 297 S.C. 440, 443-444, 377 S.E.2d 328, 331 (1989). "Once the right to fire in self-defense arises, a defendant is not required to wait until his adversary is on equal terms or until he has fire or aimed his weapon in order to act." *State v. Starnes*, 340 S.C. 312, 322, 531 S.E.2d 907, 913 (2000) (emphasis added) (additional citation omitted) (finding the petitioner was entitled to a directed verdict on the issue of self-defense because he was a security guard who was in the process of ejecting the petitioner and petitioner was advancing toward him with a gun with a clear intent to assault him when he fired.)

Here, Judge McLeod made no error of law as the requested and omitted charge was not supported by evidence in the record. *See Cole*, 378 S.C. at 404, 663 S.E.2d at 33 (*quoting Clark*, 339 S.C. at 389, 529 S.E.2d at 539). The right to self-defense never arose for Appellant because he at the very least could not establish he was in actual danger of death or great bodily injury and could not establish the victim ever tried to enter his occupied vehicle, among other elements he could not and did not prove. The evidence shows Appellant leaving the bar around 6:30 P.M. He was mad the victim tried to swat his car, and he was in an argument with his girlfriend over text message at the time because he had not invited her to the bar when he was there. Defense Exhibit 10 (text messages.) He then texted his friend Jo Jo at 6:49 P.M. and said, "I'm gonna kill that Be

boy" (the victim's nickname), then at 6:51 P.M. said, "Yeah they talked shit the last time and my brother was in there but that's all I'm saying." Defense Exhibit 10.

The bar video then shows Appellant returning to the bar at 7:06 P.M., less than twenty minutes after threatening to kill the victim via text. Appellant had an almost ten-minute conversation with the victim while seated in his vehicle in the parking lot, and at no time did the victim ever attempt to enter his vehicle. Words and gestures were exchanged, but the physical evidence unequivocally shows the victim walked back toward the bar then barely turned around, still 6-8 feet from Appellant, when Appellant got out of his car, put both hands on his weapon, and shot and killed the victim. Defense Exhibit 12. Just like in *State v. Oates*, even if the victim had a weapon like Appellant claimed he did (which multiple witnesses testified to never seeing the victim carrying a gun and that no gun was found on or near him when he died), the physical evidence shows the victim was walking away and then was turning when he was shot and killed. He was not charging at Appellant, he had no weapon drawn, and Appellant got out of his car to shoot him. Therefore, Appellant's right to self-defense never arose and Judge McLeod was not required to even charge self-defense. However, Judge McLeod was certainly within his discretion to deny the "act on appearances" charge.

While *State v. Oates*, 421 S.C. 1, 803 S.E.2d 911 (Ct. App. 2017), was an appeal from the trial court's denial of the appellant's motion for immunity, this Court's conclusion to affirm the denial shows how fact-intensive each self-defense case is, and that no matter what the victim necessarily did in the moments leading up to their death, what they were doing in the exact moment they were killed is of prime importance in making self-defense determinations on appeal. *Oates*, 421 S.C. at 10-11, 803 S.E.2d at 916-917. The *Oates* victim actually ordered the appellant out of his truck at gunpoint, entered the occupied vehicle, ratcheted his gun and said, "Nobody's going

to take my car." *Id*. However, this Court affirmed the denial of immunity because *the moment* the appellant fired, the victim had holstered his weapon in his waistband and was walking away. *Id*. This Court found Section (A) of the Protection of Persons and Property Act did not apply (the presumption of reasonable fear replacing elements 2 or 3 of self-defense depending on the facts) because at the moment of the shooting, the victim was not unlawfully or forcibly entering the appellant's vehicle. *Id*. at 14, 803 S.E.2d at 918.

Similarly, here, the victim was not aiming a weapon at Appellant, charging at Appellant, or endangering Appellant in any way when he was shot. Therefore, Judge McLeod properly denied Appellant's request to charge his right to not wait "until his assailant got the drop on him" because he had the right to "act on appearances." It was factually impossible for the victim to have in any way been able to "get the drop on" Appellant in the moment he fired.

Further, to receive his omitted charge, the physical evidence would have had to show an ordinary person would also have believed he was in immediate danger of death or great bodily injury, and the evidence does not show that. Therefore, Judge McLeod correctly stated the law according to the facts, because under the circumstances as they appeared to Appellant, he did not prove "he believed he was in such [imminent] danger and a reasonably prudent man of ordinary firmness and courage would have entertained the same belief." *State v. Jackson*, 277 S.C. 271, 87 S.E.2d 681, 684-685 (1955). Even if he were in actual danger, however, Appellant has not shown how but-for this alleged error of omission, the result of his trial would have been different. He cannot do so here, especially considering the malice found in his text message less than twenty minutes before he returned to the bar, "I'm going to kill that Be boy." Defense Exhibit 10. He did, in fact, return and kill "that Be boy." This Court should affirm, as Appellant has not shown an error of fact or law occurred, and he has not shown prejudice.

CONCLUSION

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

Respectfully submitted,

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Columbia, South Carolina
October 4, 2023

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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM EDGEFIELD COUNTY
Honorable Walton J. McLeod, IV, Circuit Court Judge

Appellate Case No. 2022-000046

THE STATE, ...RESPONDENT,

v.

BARRY WAYNE JONES,.....APPELLANT.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, Order of the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

This 4th day of October 2023.

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