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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

Assigned Judge: Darrell Scott Fisher, Circuit Court Judge
Disposition Judge: G.D. Morgan, Jr., Circuit Court Judge

Appellate Case Nos. 2023-000182 and 2023-001149

The State of South Carolina, Respondent,

v.

Luis Armando Alvarez, Appellant.

AND

The State of South Carolina, Respondent,

v.

Juan Carlos Alvarez, Appellant.

INITIAL BRIEF OF THE APPELLANTS

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STATEMENT OF THE CASE

On December 22, 2020, a Greenville County jury indicted each Appellant on two counts of attempted murder: one count with respect to Javier Solis, and the other count with respect Orlando Lopez. Indictments. It also indicted each Appellant on two counts of possession of a weapon during the commission of a violent crime (*to wit*, a knife) related to the attempted murders. Indictments. The Appellants' cases were called to a joint jury trial on May 9, 2022, before Honorable G.D. Morgan, Jr. Tr. 1. Assistant Solicitors W. Douglas Richardson and Jessica Holland represented the State. Tr. 1. Attorney Asher Watson represented Appellant Luis Alvarez and Attorneys Sara Gorski and Paul Neely represented Appellant Juan Alvarez. Tr. 1. On May 13, 2022, the jury found the Appellants guilty on all charges. Tr. 548:7-549:11. The Appellants were each sentenced to 25 years in prison, concurrent, on the two counts of attempted murder, and 5 years in prison, concurrent, on the two counts of possession of a weapon during the commission of a violent crime. Tr. 558:7-559:17. The Appellants filed post-trial motions, which were denied. Post-trial motions; Orders on post-trial motions.

This appeal follows.

STATEMENT OF FACTS

This case involves a four-on-two man fight in a parking lot of Club Vibe where Javier Solis, Orlando Lopez, Orlando Lopez's friend, and Jhefrey Colorado ambushed the Appellants.

In the early morning of September 22, 2018, the Appellants were at Club Vibe ("the Club"), sitting at the bar, when Orlando Lopez ("Lopez") walked in the back door with two others. Tr. at 164:7-9; 167:20-168:4. Lopez sat near the Appellants. Tr. at 146:22-147:1; 190:13-19. The Clubs owners, Bladimir Acosta ("Acosta") and Paula Patina ("Patina"), were friends with Lopez, Javier Solis ("Solis"), and Solis's wife, who was also at the Club. Tr. 145:15-16, 165:14-17, 221:12-14, 243:6-8. Acosta played a song from the Appellants' home country, Honduras. Tr. 147:4-6, 280:13-15, 306:10-12. Lopez testified that he commented, "What an ugly song," and one of the Appellants replied, "Shut up your mouth" "little Columbian son of a bitch." Tr. 145:15-16, 147:4-5. There was also testimony that one of the Appellants replied "Columbian, watch, watch what you say" without the offensive phrase. Tr. 147:4-8, 14-15; 164:13-16, 168:17-169:8. Jhefrey Colorado ("Colorado") testified that he saw Lopez and the Appellants argue inside the bar. Tr. 192:4-6. Lopez was drinking alcohol that night. Tr. 146:6-13, 192:12-14 (Lopez had two drinks of the liquor Aguardiente in the "very short period of time" he was at the Club); Tr. 178:14-24 (Lopez had two or three drinks of whiskey and coke).

Solis testified that he was not sitting near the Appellants, but the Appellants "passed my side" when they used the bathroom. Tr. 250:20-24. He also saw "gestures" and the Appellants speaking to Patina. Tr. 248:20-249:4. Although he did not know what was being said, it upset him, so he confronted the Appellants. Tr. 248:25-249:4, 25, 250:1-6. Solis was also drinking alcohol that night. Tr. 242:22-243:1 (Solis drinking Tequila from 10:00 pm to 2:00 am).

Tension was high inside the Club. Lopez and Solis sued the Club and its owners because the fight "started there."

Q: Well, it's true thought that you actually sued Club Vibe, right?
A: Yes.
Q: And that you sued [the owners], correct?
A: Yes.
Q: And that it's based on what happened in that club that night?
A: Yes.
Q: So you are holding them responsible for what happened to you?
A: Yes. Because it started there.

Tr. at 174:11-22; *see also* Tr. at 282:14-18.

Lopez, Colorado, and Solis contradicted each other about what happened in the parking lot outside of the Club. Lopez testified that he announced that he was leaving the Club, but did not have time to make it to his car before the Appellants attacked him:

Q: And when you left, did you leave alone?
A: Yes.
Q: And when you left, were the [Appellants] still in the bar?
A: Yes.
Q: Once you left, where did you go?
A: I was going towards the car, but I did not have the time to get there.
Q: Okay. So when you say you were going towards the car, whose car?
A: It was to my car to go to my house.
Q: Okay. So you were going to your car?
A: Yes, sir.
Q: And was – at this point in time, was Jhefrey Colorado with you?
A: No. He was outside. I found him outside when I was going towards the car.
Q: So you saw Jhefrey Colorado outside after you left the club?
A: Yes. He was outside.
...
Q: ... [W]ere you alone when you left the club and outside in the parking lot?
A: Yes. Alone.
Q: ... [W]hat happened after you left the bar in the parking lot?
A: I was going towards the car and I felt someone behind. I looked and it was [the Appellants] already attacking me.

Tr. 148:8-149:6; 149:18-25. On cross examination, Lopez admitted that he was outside with Colorado, but still asserted that the Appellants did not let him get to his car before attacking him:

Q: … [Y]ou said you decided to leave [the Club]?
A: Yes.
Q: And that you went outside by yourself?
A: By myself.
Q: And you immediately went to your car?
A: I was going towards the car.
Q: Okay. And you were getting ready to leave?
A: Yes.
Q: And you didn't because that's when you felt you got stabbed?
A: Yes. They didn't let me get into the car.
Q: But that's not actually what happened either, right?
A: That's what happened.
Q: Well, that's what you're telling us today, but what actually happened was you stopped to smoke a cigarette outside?
A: Yes.
Q: Right next to your car?
A: Yes.
Q: And you even were out there with Jhefrey Colorado?
A: Uh-huh.
Q: But when you were asked by [the prosecutor], you said you went directly to your car and you didn't leave, and you couldn't leave because you were stabbed?
A: Yes.
Q: But that's not actually what happened because you were out there for a little while - - 5 minutes, 10 minutes, 20 minutes. You even ---
A: No. No. Jhefrey [Colorado] asked me if I had a light. And I was going to the car for the light, and that's when they got onto me.
Q: Okay. But you –
A: I looked for the light. And when I was going to leave, they didn't let me get into the car.

Tr. 169:9-170:21. On further cross examination, when confronted with his deposition testimony, Lopez admitted that he was outside for about five minutes before the Appellants came out:

Q: Sir, you testified when [the prosecutor] asked you did you – that [the Appellants] immediately came out behind when you walked out in the parking lot, correct?
A: Yes.
Q: But when you were giving a deposition under oath, you said that you were outside for about five minutes.
A: Yes. I smoked a cigarette and they came out from the back.

Tr. 181:16-24.

Colorado testified that he left "just after" Lopez. Tr. 191:10-15. When he got outside, he first went to his car to look for a cigarette. Tr. 191:20-23. He could not find any, so he walked over to Lopez to see if he (Lopez) had a cigarette. Tr. 192:20-25. Lopez was inside his car at this time. Tr. 193:3-13. Lopez told Colorado that he did not have a cigarette, although law enforcement body camera footage showed a pack of cigarettes underneath Lopez's vehicle. Tr. 193:13-15, 346:22-347:5. Colorado testified that because Lopez did not have any cigarettes, they walked to his (Colorado's) car to see if they could find one. Tr. 193:13-15. They could not find a cigarette, and Lopez went to his car. Tr. 204:24-205:1. Colorado testified that Lopez had an argument with the Appellants, who were then outside the Club. Tr. 205:5-19. In addition to Lopez and Colorado, one of Lopez's friends was also in the parking lot at the time. Tr. 173:17-25. Colorado told law enforcement that they "were all hanging out in the parking lot." Tr. 206:20-21.

The Appellants did not follow Lopez, Colorado, and Lopez's friend out of the Club. Rather, they stayed inside, and left sometime later when Acosta (the Club owner who was friends with Lopez, Solis, and Solis's wife) told them that they had to leave. Tr. 267:24-25. The Appellants did not want to leave the Club by themselves and urged Acosta to make everyone leave at the same time. Tr. 268:19-21. Acosta refused this request and told the Appellants that they (alone) had to leave. Tr. 269:18-20. The Appellants left the Club, only to find Lopez, Colorado, and one of Lopez's friends lying in wait. The Appellants could not turn around and go back inside, as Acosta had locked the Club's door. Tr. 167:17-22, 228:14-16; 229:2-5, 264:13-15, 270:4-5. Although Solis's wife could not see anything that was happening outside, she knew that the men planned on attacking the Appellants, as she told Solis not to leave the Club. *See* Tr.

254:14-17, 280:1-6. By this time, Lopez and Colorado were standing next to each other, and Lopez was arguing with the Appellants. Tr. 224:8-11. Solis went outside despite his wife's pleas.

The Appellants then faced four men: Lopez, Lopez's friend, Colorado, and Solis. At some point, Colorado armed himself with what was described as a club, a tube or stick, and a metal tube or pole, and the Appellants had a box cutter that they used for work. Tr. 198:13-14; 303:13-14, 347:14-15; Tr. 167:17-22, 228:14-16; 229:2-5, 254:11-13, 264:13-15, 270:4-5, 280:1-6, 288:15-19; 391:9. The Appellants were bleeding, and they tried to escape the attack in their work van, however the van door would not open. Tr. 199:8-10, 354:20-24. They were able to escape through nearby woods. Tr. 199:10-12.

Although the Appellants had each submitted multiple *Brady* and Rule 5, SCRCrim.P., requests to the State, the State failed to preserve and provide them with crucial information and evidence. Sometime after the State issued warrants for the Appellants arrest, the State of Florida took them into custody, and they were extradited to South Carolina. Tr. 72:16-73:16; 74:14-77:4. The State did not produce the Florida law enforcement records to the Appellants, which included the Appellants' medical records and their statements to law enforcement regarding their medical condition. Tr. 92:5-93:25.

Sometime after the Appellants were extradited to South Carolina, Officer Urbina activated his body camera and read the Appellants' warrants to them in Spanish. Tr. 55:1-5. This video recording would have shown any injuries that the Appellants still had when they arrived in South Carolina, three weeks after the incident. Tr. 62:7-20. However, three days into trial, the State determined that it could not produce this video recording because it never downloaded the video from Officer Urbina's body camera. Tr. 82:16-83:6; 90:5-7. Officer Cassel also activated his body camera when he spoke with the victims and witnesses soon after the event, whose

statements were being translated from Spanish to English by Officer Nunez. Tr. 325:2-5; 327:23-328:12. The State never downloaded the video from Officer Cassel's body camera, and therefore never produced the recording to the Appellants. Tr. 82:16-83:6; 90:5-7. This video recording would have provided impeachment evidence, as the State argued that the inconsistent testimony was due to mistranslations. Tr. 476:10-21.

The court charged the jury on the various types of criminal intent:

> In order to establish criminal liability, criminal intent is required. For example, the mental state required to be proven by the State in this case for a particular crime might be purpose, intent, knowledge, recklessness, or criminal negligence.
>
> ... Criminal - - criminal intent can arise from action or a failure to act. It may arise from negligence, recklessness, or indifference to duty or to consequence that is considered by the law to be the equivalent of criminal intent.

Tr. 533:7-12, 534:5-13. Over the objection of the Appellants, the court also charged accomplice liability. Tr. 431:18-434:14; 441:16-442:2; 536:10-538:6. While the court instructed the jury that attempted murder requires specific intent, it did not instruct the jury that it had to find the Appellant, as an accomplice, specifically intended that the victim be killed when he aided the crime of attempted murder. *See* Tr. 536:10-538:6. Despite the Appellants' request, the court refused to charge self-defense. Tr. 445:23-467:20.

The Appellants did not testify at trial. The court was planning to give the "no inference charge" regarding the Appellants' right to remain silent, but it failed to do so. *See* Tr. 522:20-541:14. Sometime after the jury was dismissed to deliberate, the court's failure became apparent to the court and/or trial counsel. *See* Tr. 543:4-13. Before the court and parties were able to discuss the matter on the record, the jury had reached its verdict, completed the written verdict forms, the foreperson certified that "this decision was the unanimous decision of the jury," the jury provided notice to the bailiff that it had reached a verdict, and the bailiff provided notice to

the court that the jury had reached a verdict. Tr. 540:12-16; 543:6-13; *see also* Verdict Forms. Although the jury reached its verdict, which was certified by the foreperson, the court instructed the jury on the "no inference charge" and told it to "continue" its deliberations – even though its deliberations had concluded. Tr. 544:24-546:11. There is no record evidence that the jury was given a new verdict form to replace the completed one signed by the foreperson. *See* Tr. 543:8-546:14. Six minutes later, the jury again provided notice that they had reached a verdict. Tr. 547:4-6. That verdict found both Appellants guilty on all charges. Tr. 548:5-549:16.

ARGUMENT

I. The trial court erred in denying the Appellants' request to charge self-defense where there was evidence in the record from which it could be reasonably inferred that the Appellants acted in self-defense.

Standard of Review

"An appellate court will not reverse a trial court's decision regarding a jury instruction absent an abuse of discretion." *State v. White*, 425 S.C. 304, 311, 821 S.E.2d 523, 527 (Ct. App. 2018) (quoting *State v. Stanko*, 402 S.C. 252, 264, 741 S.E.2d 708, 714 (2013)). "When reviewing the trial court's refusal to deliver a requested jury instruction, appellate courts must consider the evidence in a light most favorable to the defendant." *Id.* (quoting *State v. Williams*, 400 S.C. 308, 314, 733 S.E.2d 605, 608–09 (Ct. App. 2012)). "The law to be charged to the jury is determined by the evidence presented at trial." *Id.* (quoting *State v. Gaines*, 380 S.C. 23, 31, 667 S.E.2d 728, 732 (2008)). "If there is any evidence to support a jury charge, the trial court should grant the request." *Id.* (quoting *State v. Brown*, 362 S.C. 258, 262, 607 S.E.2d 93, 95 (Ct. App. 2004)). "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 trial judge's refusal to do so is reversible error." *State v. Day*, 341 S.C. 410, 416–17, 535 S.E.2d 431, 434 (2000) (quoting *State v. Muller*, 282 S.C. 10, 316 S.E.2d 409 (1984)).

Argument

"To establish self defense in South Carolina, four elements must be present: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, defendant must show that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that he was actually in imminent danger and that the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or the loss of his life; and (4) the defendant had no other probable means of avoiding the danger." *Day*, 341 S.C. at 416, 535 S.E.2d at 434 (citing *State v. Bryant*, 336 S.C. 340, 520 S.E.2d 319 (1999)).

There is ample evidence in the record from which it could reasonably be inferred that the Appellants acted in self-defense. The difficulty between the Appellants and Lopez, Solis, Colorado, and their friends started inside the Club. *See Day*, 341 S.C. at 417, 535 S.E.2d at 435 (the jury can consider "past difficulties between the parties in weighing self-defense"). Lopez and the Appellants argued over a song that was playing from the Appellants' home country. Tr. 145:15-16, 147:4-8, 14-15; 164:13-16, 168:17-169:8. Colorado testified that he saw Lopez and the Appellants arguing. Tr. 192:4-6. Solis was angry at the Appellants because he saw them say something to Patina - - although he did not know what was said, he decided to confront them. Tr. 248:20-249:4, 25, 250:1-6. It was also reasonable to infer that Solis was angry when the

Appellants "passed" him when they used the bathroom. Tr. 250:20-251:3, 23-25, 252:1-3, 252:4-253:9. Lopez and Solis were both drinking alcohol that night. Tr. 146:6-13, 192:12-14; 178:14-24; 242:22-243:1; *see also State v. Douglas*, 411 S.C. 307, 327, 768 S.E.2d 232, 243 (Ct. App. 2014) (evidence of the victim's intoxication is relevant to self-defense). Lopez and Solis sued the Club and its owners because "it started there." Tr. at 174:11-22; *see also* Tr. at 282:14-18.

The Appellants were not at fault for bringing on the difficulty. The Appellants were the victims of a deliberate ambush, a surprise attack, facilitated by the Club owner who forced them out of the Club and locked the door behind them. The Appellants did not follow Lopez, Colorado, and Lopez's friend out of the Club. Acosta forced the Appellants out of the Club by themselves, and then locked the door behind them. Tr. 167:17-22, 228:14-16; 229:2-5, 264:13-15, 270:4-5. Although Solis's wife could not see anything that was happening outside, it is reasonable to infer that she knew that the men planned on attacking the Appellants, as she told Solis not to go outside. Tr. 254:11-13, 280:1-6.

The Appellants had the right to act on appearances, and they were not required to wait for a person to be actually attacked before acting. *State v. Guderyon*, 438 S.C. 476, 492, 884 S.E.2d 202, 210 (Ct. App. 2022), *reh'g denied* (Mar. 22, 2023); *see also State v. Starnes*, 340 S.C. 312, 322, 531 S.E.2d 907, 913 (2000) ("the accused doesn't have to wait until his assailant gets the drop on him, he has the right to act under the law of self-preservation and prevent his assailant getting the drop on him"); *Jordan v. Texas*, 593 S.W.3d 340, 344 (Tex. Crim. App. 2020) ("'multiple assailants' does not require evidence that each person defended against was an aggressor in his own right; it requires evidence that the defendant had a reasonable fear of serious bodily injury from a group of people acting together"). Faced with a four-on-two ambush from men who were under the influence of alcohol and with whom the Appellants had previous

difficulty, the Appellants had a reasonable fear of serious bodily injury and defended themselves. *See* Tr. 167:17-22, 228:14-16; 229:2-5, 254:11-13, 264:13-15, 270:4-5, 280:1-6, 288:15-19; 391:9.

The court's statements reveal that it engaged in weighing the evidence rather than applying the proper "any evidence" standard. Tr. at p. 447:20-24 ("I mean, I don't think the trail of blood [to the Appellants' work van] is evidence of self-defense. And just in my opinion, it does not rise to that level …"). The trail of blood is evidence of self-defense: it shows that the Appellants were injured and bleeding as they tried to escape the ambush by four men. *See Wiley v. State*, 183 S.W.3d 317, 332 (Tenn. 2006) ("A self-defense claim would have been corroborated by evidence of the bloody towel with the petitioner's blood found at the scene.").

The court incorrectly believed that one of the four men had to first use a weapon against the Appellants to charge self-defense. Tr. at 448:23-449:2 ("[E]ven if there was a weapon out there, that doesn't, again, necessarily give them a self-defense unless there was some testimony that the weapon was being used by somebody and they had to defend themselves"). It also incorrectly believed that for the Appellants to have acted in self-defense, one of the four (or three) men had to first attack the Appellants before they could defend. Tr. 451:16-20 ("But a three on two fight has to begin with the victim starting the fight. Just because there are three on two out there, there's no testimony in the record that the victim started the fight …"). The Appellants had the right to act on appearances. *Guderyon*, 438 S.C. at 492, 884 S.E.2d at 210; *Starnes*, 340 S.C. at 322, 531 S.E.2d at 913.

The State exacerbated the court's failure to charge self-defense by commenting on it in its closing. Tr. at 470:20-471:4 ("That's what I'm asking today that you do, is use simply your common sense in this case. You will not hear any type of charge to you on the law of self-

defense. … You will not hear anything about that from the judge who charges you on the law"); Tr. 471:10-24 ("Somehow or another, I anticipate that they're going to bring to you and say that these two individuals, Javier and Mr. Colorado, Orlando, had some kind of fault in this. … There is nothing in the record to that effect. And the reason why is because it's not a valid claim …"); Tr. 493:6-9 ("They want to come in here and argue to you self-defense. Let me tell you, self-defense, there's no evidence of that mind you …").

There was ample evidence in the record from which it could be reasonably inferred that the Appellants acted in self-defense, and the court's failure to charge self-defense is reversible error.

II. The trial court erred in charging the jury on accomplice liability for attempted murder, a specific intent crime.

Standard of Review

In criminal cases, the Court of Appeals "sits to review errors of law only and is bound by factual findings of the trial court unless an abuse of discretion is shown." *State v. King*, 422 S.C. 47, 54, 810 S.E.2d 18, 22 (2017) (quoting *State v. Laney*, 367 S.C. 639, 643, 627 S.E.2d 726, 729 (2006)). "An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law." *Id.* (quoting *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012)). "Errors, including erroneous jury instructions, are subject to harmless error analysis." *State v. Burdette*, 427 S.C. 490, 496, 832 S.E.2d 575, 578 (2019) (citation omitted). "When considering whether an error with respect to a jury instruction was harmless, we must determine beyond a reasonable doubt that the error complained of did not contribute to the verdict." *Id.* (citation and internal quotation omitted).

Argument

Attempted murder is a specific intent crime. *King*, 422 S.C. at 55-56, 810 S.E.2d at 22. "The highest possible mental state for criminal attempt, specific intent, is necessary because criminal attempt focuses on the dangerousness of the actor, not the act." *Id.*, 422 S.C. at 56, 810 S.E.2d at 22-23 (quoting 22 C.J.S. *Criminal Law: Substantive Principles* § 156, at 221-22 (2016)). "Thus, 'as the crime of attempt is commonly regarded as a specific intent crime and as it is logically impossible to attempt an unintended result, prosecutions are generally not maintainable for attempts to commit general intent crimes, such as criminal recklessness, attempted felony murder, or attempted manslaughter.'" *Id.*, 422 S.C. at 56, 810 S.E.2d at 23 (quoting 22 C.J.S. *Criminal Law: Substantive Principles* § 156, at 221-22 (2016)). In quoting the Supreme Court of Nevada, our Supreme Court explained:

> Attempted murder can be committed only when the accused's acts are accompanied by *express malice,* malice in fact. One cannot *attempt* to kill another with implied malice because there "is no such criminal offense as an attempt to achieve an unintended result." An attempt, by nature, is a failure to accomplish what one *intended* to do. Attempt means to try; it means an effort to bring about a desired result. Thus one cannot *attempt* to be negligent or *attempt* to have the general malignant recklessness contemplated by the legal concept, "implied malice." One cannot be guilty of attempted murder by implied malice because implied malice does not encompass the essential specific intent to kill.
>
> An attempt to kill with express malice is, on the other hand, completely consistent with the specific intent requirement of the crime of attempt. Express malice is the "deliberate intention unlawfully" to kill a human. Attempted murder, then, is the attempt to kill a person with express malice, or more completely defined: Attempted murder is the performance of an act or acts which tend, but fail, to kill a human being, when such acts are done with express malice, namely, with the deliberate intention unlawfully to kill.

King, 422 S.C. at 57, 810 S.E.2d at 23 (quoting *Keys v. State*, 766 P.2d 270, 273 (Nev. 1988)) (emphasis original).

Transferring the intent to kill from Appellant Juan Alvarez to Appellant Luis Alvarez, or vice versa, does not satisfy the necessary mens rea. *See People v. Bray*, 99 A.D.2d 470 (N.Y. App. Div. 1984) ("Defendant is correct in his contention that the convictions for attempted murder in the second degree charged in count one of the indictment and assault in the first degree charged in count six of the indictment must fall. Both these crimes require the specific intent to inflict actual harm to another person (i.e., intent to cause death or intent to cause serious physical injury). The People did not prove such intent on the part of defendant and his accomplices' intent should not be imputed to him").

Although the court instructed that specific intent was an element of attempted murder, it did not instruct that specific intent was necessary to find the Appellants guilty of accomplice liability. Before instructing the jury on attempted murder, the court instructed the jury on the various types of criminal intent:

> In order to establish criminal liability, criminal intent is required. For example, the mental state required to be proven by the State in this case for a particular crime might be purpose, intent, knowledge, recklessness, or criminal negligence.
>
> ... Criminal - - criminal intent can arise from action or a failure to act. It may arise from negligence, recklessness, or indifference to duty or to consequence that is considered by the law to be the equivalent of criminal intent.

Tr. 533:7-12, 534:5-13. These various types of criminal intent were irrelevant and inapplicable to attempted murder and accomplice liability for attempted murder. *State v. Washington*, 338 S.C. 392, 400, 526 S.E.2d 709, 713 (2000) ("Jury instructions by the court of irrelevant and inapplicable principles may be confusing to the jury and can be reversible error") (citing *Miller v. Schmid Laboratories, Inc.*, 307 S.C. 140, 142-43, 414 S.E.2d 126, 127 (1992) ("The instructions by the court of irrelevant and inapplicable principles of law was clearly erroneous and may have been confusing to the jury.").

The court later instructed the jury on accomplice liability as follows:

> ... If a crime is committed by two or more people who are acting together in committing a crime, the act of one is the act of all. A person who joins with another to commit an unlawful act is criminally responsible for everything done by the other person which happens as a probable or natural consequence of the acts done in carrying out a common plan and purpose.
>
> For example, two people can be guilty of killing another person when only one of the two had a gun. There was only one bullet, and only one of the two fired the shot that caused the death. If two or more people are together, acting together, assisting each other in committing the offense, the act of one is the act of all. Or as it is sometimes said, the hand of one is the hand of all.
>
> Prior knowledge that a crime is going to be committed without more is not sufficient to make a person guilty of that crime. Mere knowledge that another person is going to commit a crime, even if the defendant is present when the crime is committed, is not sufficient to convict the defendant as a principal.
>
> Guilt as a principal is shown by actual or constructed presence at the scene as a result of prior arrangement. Therefore, a finding of a prior arranged plan or common scheme is necessary for a finding of guilt as a principal. The State must prove beyond a reasonable doubt by competent evidence the theory of the hand of one is the hand of all.
>
> A principal of a crime is one who actually commits the crime or who is present aiding, abetting, or assisting in the crime. When a person doesn't act in the presence of and with the assistance of another, the act is done by both. Where two or more acting with a common plan or intent are present at the commission of a crime, it does not matter who actually commits the crime. All are guilty. The hand of one is the hand of all.
>
> Present at the commission of a crime means to be sufficiently near, to aid and abet and assist in the commission of a crime. Intent is also a necessary element, but there must have been a common design or intent to commit the crime, and the crime must have been committed pursuant thereto a person aiding and abetting some overt act.

Tr. 536:10-538:6. It did not instruct the jury what type of criminal intent was necessary to convict the Appellants of accomplice liability.

The jury could have convicted Luis Alvarez of knowingly or recklessly (rather than intentionally) aiding Juan Alvarez in knowingly or recklessly (rather than intentionally)

attempting to kill Lopez and Solis, or vice versa. *See Williams v. Indiana*, 737 N.E.2d 734, 740 (Ind. 2000) ("It is difficult if not impossible to see how [the defendant] received a fair trial when the jury could have convicted him of knowingly (rather than intentionally) aiding the principal in knowingly (rather than intentionally) attempting to kill [the victim]. As such, we now hold that the trial court committed fundamental error in not instructing the jury that it had to find that [the defendant] possessed the specific intent to kill when he knowingly or intentionally aided, induced, or caused his backseat accomplice to commit the crime of attempted murder").

While the court instructed the jury that attempted murder requires specific intent, it did not instruct the jury that it had to find the Appellant, as an accomplice, specifically intended that the victim be killed when he aided the crime of attempted murder. *See Specht v. Indiana*, 838 N.E.2d 1081, 1090 (Ind. Ct. App. 2005) ("While we agree with the State that the *attempted murder* instruction in this case does properly instruct on the basic elements of attempted murder, ... the jury was never specifically instructed that it had to find that [the defendant], as a non-shooting accomplice, specifically intended that the victim be killed when he *aided* in the crime of attempted murder"). Rather, it instructed the jury that it could find the Appellants guilty as an accomplice upon proof that attempted murder was a "natural and probable consequence" of acts done in carrying out a common plan or scheme. This approach has been rejected by courts across the country. *See, e.g., Wilson-Bey v. United States*, 903 A.2d 818, 843-44 (D.C. 2006) (instructing the jury on the "natural and probable consequences" doctrine impermissibly allowed conviction on the theory of aiding and abetting without proof of specific intent mens rea required for the offense was an error of "constitutional magnitude," even when the evidence against the defendant was strong; a juror may have had reasonable doubt as to whether the defendant formed the intent to kill the victim, and under the trial court's instruction, a juror who believed that

defendant's intent was merely to join in an assault on victim could nevertheless reasonably find defendant guilty of aiding and abetting the specific intent crime of premeditated murder); *Sharma v. Nevada*, 118 Nev. 648, 656-57, 56 P.3d 868, 873 (Nev. Sup. Ct. 2002) (reversing the conviction of an alleged aider and abettor for attempted murder (which required a showing of specific intent to kill) because the jury received a "natural and probable consequences" instruction but was not told that the accomplice "must have aided and abetted the attempt *with the specific intent to kill*"). The error here was not harmless.

III. The trial court erred in failing to charge the jury that the Appellants had the right to remain silent, and this error was not cured by charging the jury on this instruction after it reached its verdict.

Standard of Review

"An appellate court will not reverse a trial court's decision regarding a jury instruction absent an abuse of discretion." *White*, 425 S.C. at 311, 821 S.E.2d at 527 (quoting *Stanko*, 402 S.C. at 264, 741 S.E.2d at 714). "When reviewing the trial court's refusal to deliver a requested jury instruction, appellate courts must consider the evidence in a light most favorable to the defendant." *Id.* (quoting *Williams*, 400 S.C. at 314, 733 S.E.2d at 608–09). "The law to be charged to the jury is determined by the evidence presented at trial." *Id.* (quoting *Gaines*, 380 S.C. at 31, 667 S.E.2d at 732). "If there is any evidence to support a jury charge, the trial court should grant the request." *Id.* (quoting *Brown*, 362 S.C. at 262, 607 S.E.2d at 95). "Errors, including erroneous jury instructions, are subject to harmless error analysis." *Burdette*, 427 S.C. at 496, 832 S.E.2d at 578 (citation omitted). "When considering whether an error with respect to a jury instruction was harmless, we must determine beyond a reasonable doubt that the error complained of did not contribute to the verdict." *Id.* (citation and internal quotation omitted).

Argument

"A state trial judge has the constitutional obligation, upon proper request, to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify." *Carter v. Kentucky*, 450 U.S. 288, 305, 101 S. Ct. 1112, 1121–22, 67 L. Ed. 2d 241 (1981). "The freedom of a defendant in a criminal trial to remain silent 'unless he chooses to speak in the unfettered exercise of his own will' is guaranteed by the Fifth Amendment and made applicable to state criminal proceedings through the Fourteenth." *Id.* at 450 U.S. at 305, 101 S. Ct. at 1121 (quoting *Malloy v. Hogan*, 378 U.S. 1, 6, 84 S. Ct. 1489, 1493, 12 L. Ed. 2d 653 (1964)). "And the Constitution further guarantees that no adverse inferences are to be drawn from the exercise of that privilege." *Id.* (citing *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965)).

The Appellants did not testify at trial. The court charged the jury, but it failed to give the "no inference charge" regarding the Appellants' right to remain silent. *See* Tr. 522:20-541:14. The jury then left the courtroom for deliberations. Tr. 541:15. By the time it became apparent that the "no inference charge" was not given, the jury had reached its verdict, completed the written verdict forms, the foreperson certified that "this decision was the unanimous decision of the jury," and the jury provided notice to the bailiff that it had reached a verdict. Tr. 540:12-16; 543:6-13; *see also* Verdict Forms. The court received notice that the jury reached a verdict, but the clerk had not yet published that verdict in the courtroom. Tr. 544:13-14. Although the jury reached its verdict, which was certified by the foreperson, the Court instructed the jury on the "no inference charge" and told it to "continue" its deliberations – even though its deliberations had concluded. Tr. 544:24-546:11. "It is beyond any question that the trial judge's failure to give the requested and subsequently promised jury instruction concerning defendant's decision not to

testify in his own defense constitutes error." *North Carolina v. Ross*, 367 S.E.2d 889, 891 (N.C. Sup. Ct. 1988) (relying on *Carter*, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241).

Whether the error was harmless beyond a reasonable doubt "can only be properly considered in the context of [the Supreme Court's] solemn admonishment," stated as follows:

> Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law. *Such instructions are perhaps nowhere more important than in the context of the Fifth Amendment privilege against compulsory self-incrimination, since too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are ... guilty of crime....*

Ross, 367 S.E.2d at 892 (quoting *Carter*, 450 U.S. at 302, 101 S.Ct. at 1120).

The jury, having been told in opening statements that the Appellants acted in defense of their own lives, had an expectation that was never met – namely, that the Appellants would present evidence as why they stabbed the victims. Tr. 137:1-13 (opening statements, stating "[The Appellants] leave as the bar is closed. And when they get outside, Orlando Lopez, Jhefrey Colorado, and Javier Solis are lying in wait, waiting to attack [the Appellants]. That's what they were waiting on. Unfortunately, they picked the wrong individuals to wait and attack. Unfortunately [sic], for [the Appellants], one of them had something that they could defend themselves with and they did. That's what really - - that's what really happened. Now, ladies and gentlemen, you cannot be the instigator and the victim, but that's what they're attempting to do"); *see also Ross*, 367 S.E.2d at 893 ("The jury, having been told at the outset of this case essentially that this defendant committed the killings, but did so only in defense of his own life, had an expectation that was never met-namely, that defendant would present evidence as to why he killed the victims"). "It cannot be gainsaid that, when the jury's expectation was not met, the omitted jury instruction [concerning the defendant's decision not to testify] loomed particularly large." In context of the "general importance of the constitutional right implicated by the omitted

instruction," and the case-specific scenario of the jury being told that the Appellants acted in defense of their own lives, the error was not harmless beyond a reasonable doubt. *See Ross*, 367 S.E.2d at 893.

Moreover here, the State exacerbated this error by commenting in its closing on the lack of self-defense and how the Appellants "put up no evidence." Tr. at 470:20-471:6 ("That's what I'm asking today that you do, is use simply your common sense in this case. You will not hear any type of charge to you on the law of self-defense. … You will not hear anything about that from the judge who charges you on the law. You may hear a claim from the defense on that. I have first argument because they put up no evidence, which is their right."); Tr. 471:10-24 ("Somehow or another, I anticipate that they're going to bring to you and say that these two individuals, Javier and Mr. Colorado, Orlando, had some kind of fault in this. … There is nothing in the record to that effect. And the reason why is because it's not a valid claim …"); Tr. 493:6-9 ("They want to come in here and argue to you self-defense. Let me tell you, self-defense, there's no evidence of that mind you …"); *see also State v. Arther*, 290 S.C. 291, 297–98, 350 S.E.2d 187, 191 (1986) ("This Court has repeatedly admonished that the prosecution must not comment directly *or indirectly* on a defendant's failure to take the stand.") (emphasis added). As stated by the Supreme Court in *Carter*: "Jurors are not lawyers; they do not know the technical meaning of 'evidence.' They can be expected to notice a defendant's failure to testify, and, without limiting instruction, to speculate about incriminating inferences from a defendant's silence." *Carter*, 450 U.S. at 303–04, 101 S. Ct. at 1121. This error was not harmless beyond a reasonable doubt.

IV. The State failed to disclose information and evidence in violation of *Brady* and Rule 5, SCRCrimP, requiring reversal.

Standard of Review

"Once a *Brady* violation is established, reversal is required." *State v. Kennerly*, 331 S.C. 442, 453, 503 S.E.2d 214, 220 (Ct. App. 1998), *aff'd*, 337 S.C. 617, 524 S.E.2d 837 (1999) (citing *Kyles v. Whitley,* 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)). "Once a Rule 5 violation is shown, reversal is required only where the defendant suffered prejudice from the violation." *Id.*, 331 S.C. at 453-54, 503 S.E.2d at 220 (citing *State v. Trotter,* 322 S.C. 537, 473 S.E.2d 452 (1996); *State v. Wilkins,* 310 S.C. 81, 425 S.E.2d 68 (Ct. App. 1992)).

Argument

"The *Brady* disclosure rule is grounded in the defendant's fundamental right to a fair trial mandated by the Due Process Clause of the Fifth and Fourteenth Amendments." *Kennerly*, 331 S.C. at 452, 503 S.E.2d at 219–20. "It requires the prosecution to disclose evidence that is: 1.) in its possession; 2.) favorable to the accused; and 3.) material to guilt or punishment." *Id.* (citations omitted). The focus of *Brady* is not solely on the disclosure of "evidence;" rather, it requires the disclosure of "information." *See, e.g., State v. Osborne*, 289 S.C. 142, 144, fn. 1, 345 S.E.2d 256, 257, fn. 1 (Ct. App. 1986) (discussing what "prosecutorial information" must be disclosed under *Brady*); *Kennerly*, 331 S.C. at 453, 503 S.E.2d at 220 (discussing whether certain information was material under *Brady*); *United States v. Rodriguez,* 496 F.3d 221, 226 (2d Cir. 2007) ("The obligation to disclose information covered by the *Brady* and *Giglio*[1] rules exists without regard to whether that information has been recorded in tangible form"); *Gibson v. State*, 334 S.C. 515, 527, 514 S.E.2d 320, 326 (1999) ("The *Brady* analysis focuses upon *facts* known to the State …"). The *Brady* rule applies regardless of how a state has chosen to structure its discovery

[1] *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

process. *Youngblood v. West Virginia*, 547 U.S. 867, 870, 126 S.Ct. 2188, 2190, 165 L.Ed.2d 269 (2006).

"The requirements of Rule 5, as opposed to the constitutional dictates of *Brady,* are judicially created discovery mechanisms for use in criminal proceedings." *Kennerly*, 331 S.C. at 453, 503 S.E.2d at 220. "This rule clearly applies to evidence within the actual possession of the prosecution and seems to also apply to evidence within the possession of other government agencies." *Id.* (citing *State v. Gulledge*, 326 S.C. 220, 487 S.E.2d 590 (1997)); *see also* Rule 5, SCRCrimP. "Once a Rule 5 violation is shown, reversal is required only where the defendant suffered prejudice from the violation." *Id.* at 453-54 (citations omitted).

This case involved a four-on-two fight where self-defense was clearly an issue at the outset. *See supra*, *see also* Tr. at 301:19-303:17 (Officer Cassel testified that when he arrived at the scene, he saw Lopez and Solis with stab wounds, and Colorado told him that he had a "club or a stick" that Colorado used against the Appellants). The State, including law enforcement, had a duty to preserve evidence of self-defense. *See*, *e.g.*, *State v. Moses*, 390 S.C. 502, 519, 702 S.E.2d 395, 404 (Ct. App. 2010) (discussing *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988) and the duty of the State to preserve relevant evidence). The State preserved evidence of Lopez and Solis' wounds, as they knew the relevance of such wounds. *See*, *e.g.*, Tr. 231:1-232:7 (State introducing photographs of the victims' injuries into evidence at trial). However, it did not preserve or disclose evidence or information regarding the Appellants' injuries.

Sometime after the warrants were issued for the Appellants' arrest, they were located in Florida. The State of Florida took them into custody, and they were extradited to South Carolina. Tr. 72:16-73:16; 74:14-77:4. The State did not produce any of the Florida law enforcement

records or information to the defense. These law enforcement records included the Appellants' statements to Florida law enforcement regarding their medical condition and medical records consisting of those statements. Tr. 92:5-93:25.

On day two or three of the trial, the State told defense counsel that because the records contained protected HIPAA information, the Appellants would need to sign a proposed Order drafted by the State. Tr. 90:5-7; 92:4-19. Defense counsel objected to the proposed Order because (1) the State had already violated *Brady* and (2) the way the proposed Order was written would send the medical records to the State instead of to the defense or to the court for an *in camera* hearing, which runs afoul to *State v. Blackwell*, 420 S.C. 127, 154, 801 S.E.2d 713, 727-28 (2017). Tr. 92:4-93:25.

The *Brady* rule extends to these Florida law enforcement records, which included the Appellants' medical records and their statements with law enforcement concerning their medical condition. *Kennerly*, 331 S.C. at 452, 503 S.E.2d at 220 ("The *Brady* rule extends to evidence that is not in the actual possession of the prosecution but known by others acting on the government's behalf in the particular case, including the police."). The State had the duty to learn of this favorable evidence known to Florida law enforcement, who was acting on the State's behalf. *Whitley*, 514 U.S. at 438, 115 S.Ct. at 1567 ("[T]he individual prosecutor has the duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police."); *see also* Rule 5(1)(A), SCRCrim.P. It was material to the Appellants' guilt, as evidence of the Appellants' injuries would show that they acted in self-defense. *See Day*, 341 S.C. at 416–17, 535 S.E.2d at 434 ("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 trial judge's refusal to do so is reversible error."). The

Appellants also suffered prejudice because the Court denied their request to charge the jury on self-defense.

Sometime after the Appellants were extradited to South Carolina, Officer Urbina activated his body camera and read the Appellants' warrants to them in Spanish. Tr. 55:1-5. This video recording would have shown any injuries that the Appellants still had when they arrived in South Carolina, three weeks after the incident. Tr. 62:7-20. However, three days into trial, the State determined that it could not produce this video recording because it never downloaded the video from Officer Urbina's body camera. Tr. 82:16-83:6; 90:5-7. The exculpatory value of this video was apparent before it was destroyed. *See supra*. The Appellants could not obtain other evidence of comparable value by other means. *See State v. Moss*, 390 S.C. 502, 518, 702 S.E.2d 395, 404 (Ct. App. 2010).

Officer Cassel also activated his body camera when he spoke with the victims and witnesses soon after the event, whose statements were being translated from Spanish to English by Officer Nunez (who was Officer Cassel's trainee). Tr. 325:2-5; 327:23-328:12. The State never produced Officer Cassel's video recording to the Appellants, because again, it never downloaded the video from Officer Cassel's body camera. Tr. 82:16-83:6; 90:5-7.[2] The exculpatory value of this video was apparent before it was destroyed because of the translations that were taking place as to multiple witnesses, and the Appellants could not obtain other evidence of comparable value by other means. Tr. 19:16-21:22; s*ee also Moss*, 390 S.C. at 518, 702 S.E.2d at 404. The Appellants would have been able to use the witnesses' statements at length as impeachment evidence, as it was apparent that numerous mistranslations had been

[2] The prosecutor's assertion that Officer Cassel's video was never downloaded contradicted Officer Cassel's testimony during the *Bigger's* hearing that his video had been downloaded. Tr. 17:1-19:3.

made in the evidence presented at trial. The State even attempted to minimize the mistranslations, asserting in its closing that the defense was "nit-picking" and utilizing a "spitball defense." Tr. 476:10-21 ("Ladies and gentlemen, the interpreters are not perfect. These interpretations are going person, the interpreter, to the person, back to the interpreter. … Things are misinterpreted. … The interpreters are interpreting that their way, but we do not know how that was interpreted, but nit-pick once again. Spitball defense."). Reversal is required.

CONCLUSION

Based on the foregoing, the Appellants respectfully request that this Court reverse their convictions for attempted murder and remand for a new trial. The Court should also reverse their convictions for possession of a weapon during a violent crime and remand for a new trial. *See State v. Smith*, 430 S.C. 226, 230, n.4, 845 S.E.2d 495, 497 (2020) ("However, given that we reverse [the defendant's] conviction for attempted murder, we must also reverse and remand his conviction for the possession of a weapon during the commission of a violent crime. [The defendant] must be re-convicted of committing a violent crime before he can properly be found to have illegally possessed a weapon during that crime.").

Respectfully submitted,

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