STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Alex Kinlaw, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRAYLON L. MORRIS,

APPELLANT

APPELLATE CASE NO. 2023-000608

INITIAL BRIEF OF APPELLANT

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II. Whether the trial court erred in denying Appellant's request to charge the jury on defense of others, where Appellant testified he shot Decedent to protect his children, since the court must give a defense of others charge where there is evidence adduced at trial that the defendant was acting in defense of others?

III. Whether the trial court erred in permitting Appellant to be cross-examined on the content of a confusing email sent by Appellant from the detention center that a "confidential informant is still alive. If you want to help, you know what you can do," since the evidence should have been excluded pursuant to Rule 403, SCRE?

IV. Whether the trial court erred in imposing sentence for possession of a weapon during the commission of a violent crime, where Appellant received a life without parole sentence for the violent crime, since § 16-23-490(A) prohibits the imposition of sentence for the weapon when the defendant has received life without parole for the underlying offense?

STATEMENT OF THE CASE

During the January term of 2022, a Greenville County Grand Jury indicted Appellant for murder and possession of a weapon during the commission of a violent crime. R. *(indictments). The State sought a sentence of life without parole pursuant to S.C. Code Ann. § 17-25-45 based on Appellant's prior convictions. Tr. II, 583, l. 2 – 585, l. 14.

On February 16, 2023, a pretrial hearing on immunity was held pursuant to the Protection of Persons and Property Act (Act). *See* S.C. Code Ann. §§ 16-11-410, 16-11-440(C), and 16-11-450. The immunity hearing was held before the Honorable Alex Kinlaw, Jr. Appellant was represented by Michael S. Gambrell. E. Walker Miller and Jonathan M. Gregory prosecuted the case. Tr. I, 1. The court issued a written order in which it denied immunity on February 22, 2023. R. *(order denying immunity).

Appellant was tried before the Honorable Alex Kinlaw, Jr., and a jury, from April 3 – 6, 2023. Tr. II, 1. Appellant was convicted as indicted, and he was sentenced to serve consecutive terms of life imprisonment without the possibility of parole for murder and five years for the weapons charge. Tr. II, 581, ll. 8-14; Tr. II, 585, ll. 18-24.

This appeal follows.

STATEMENT OF FACTS

Appellant and Michael Jason Deck (Decedent) exchanged angry text messages between June 27 and July 3, 2019. Defense Exhibit #1; Tr. II, 432, l. 21 – 433, l. 3; Tr. II, 437, l. 6 – 439, l. 12. At approximately 1:30 p.m. on July 5, 2019, Decedent was shot and killed by Appellant in the self-checkout area at Walmart on White Horse Road in Greenville. Tr. II, 186, l. 20 – 187, l. 24; Tr. II, 153, l. 23 – 157, l. 4; Tr. II, 161, l. 20 – 163, l. 15. Appellant would testify at trial he shot Decedent in self-defense and in defense of his children.[1] Tr. II, 442, l. 8 – 445, l. 7. Appellant ran out of the Walmart afterwards and was apprehended in a nearby Long John Silver's parking lot. Tr. II, 158, ll. 14-19; Tr. II, 107, l. 17 – 208, l. 20; Tr. II, 212, ll. 5-11. Appellant's gun was never found. Tr. II, 214, ll. 19-24; Tr. II, 237, ll. 3-15.

The shooting was captured on store surveillance cameras. However, the footage did not provide the context of the shooting, which was explained by text messages and Appellant's trial testimony. Decedent had introduced Appellant to a man named Scotty Pope. Appellant explained Pope got jealous of Appellant over a woman, and a few days before the shooting, Pope "turned [Decedent] against me." "Then words got exchanged" between Appellant and Decedent. Tr. II, 397, l. 12 – 399, l. 21. The text messages between the two men were introduced into evidence. *See* R. *(Defense Exhibit #1). On July 3, 2019, Decedent texted Appellant: "I got 12 big boy charges and attempted murder and gonna try to career me out; but **when it goes down I'm shooting it out with them bitches. Ain't shit none of y'all can do to me**. I ain't that pussy boy Scotty so **fuck y'all and this fuckin life**." Tr. II, 437, l. 17 – 438, l. 21 (emphasis added). Appellant testified: "**I took that** [to mean] **when he sees me, he's gonna kill me and my**

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[1] The children were the biological children of Appellant's girlfriend, Heidi, but Appellant referred to them as his children. Tr. II, 396 l. 16 – 397, l. 2; Tr. II, 439, l. 17 – 441, l. 2.

children." Tr. II, 438, l. 14 – 439, l. 18 (emphasis added). Two days later the men saw each other at Walmart.

Appellant testified as follows.

Q . . . And so you're checking out, describe what happens.

A I'm checking out. I'm trying to get the kids to stay still 'cause they want to grab, other things, you know, which I don't have a problem with them trying to get the things bagged up so we can leave and then that's when I see Deck come in. **I see he had his hand in his pocket** and I seen—I just know what he's known for and I knew his intentions so I backed up away from my children to make sure they were safe, and that's when he came and approach me.

Q Then what did you do?

A I mean, he—**basically, he came up to me, you know. He had a arrogant attitude about you can kiss your kids goodbye and that's when I reacted with fear and shot him. Then I shot him again**. Then I panicked and I left.

Q **Why did you shoot him two times**?

A **I shot him twice because I wanted to make sure my children was protected about when I left.**

. . .

Q What was the first thing that ran through your mind when you saw him coming in to the self-check out?

A He was coming to kill us.

Q And why did you think that?

A Because the last conversation we had is when it goes down, you know, I perceive that he say he gonna shoot it out with them bitches and fuck all y'all's life and I was perceiving my family life was in danger.

. . .

Q Okay. And I think you testified you saw some—Mr. Deck had his hand in his pocket?

A Correct.

Q What did you perceive that that was?

A That he has a gun on him.

Q And you found out later that he was unarmed?

A Yes, later I did.

. . .

Q Did you feel as though you could have gotten y'all out of there without engaging him?

A No, I couldn't.

Q Why is that?

A Because he came towards me, and I know his intentions was gonna be something violent and harmful towards us and I was just wanted to make sure they was protected.

Tr. II, 442, l. 8 – 445, l. 7.

The video footage from Walmart[2] showed Decedent had a hand in his pocket when he entered Walmart and came in through the self-checkout area rather than the typical area of entry. However, when Appellant shot Decedent, Decedent's hands were in front of him and he was not holding a weapon. Appellant said he was no longer looking at Decedent's hands at that point. Tr. II, 454, l. 12 – 456, l. 20. The video footage showed Appellant distanced himself from the children by moving forward while Decedent moved towards Appellant. The two came face to face and Appellant shot Decedent in the torso. Decedent fell to the ground. Appellant attempted to shoot him again but the gun jammed. Appellant shot Decedent a second time, in the head, while Decedent was on the ground. State's Exhibit #3. As seen, Appellant testified he fired the second shot to ensure the threat had ended. Tr. II, 443, ll. 1-3.

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[2] The video footage from Walmart is State's Exhibit #3 and is on file with this Court.

In contrast, the State proceeded on the theory that the killing was an "execution." Tr. 543, ll. 22-23. It introduced a video recording of Appellant's magistrate court bond hearing,[3] where Decedent's father was present and said he wanted to know why Appellant "completely murdered my son." Appellant replied, "The reason why I murdered your son . . . he introduced me to a poisonous motherfucker, you know Scotty, Scotty Pope his homeboy . . . he got me fucked all the way up. So that's why he's dead . . . that's why. And he threatened to kill my life . . ." State's Exhibit #30. Appellant had pending drug trafficking charges at the time of the shooting. Tr. II, 446, ll. 14-24; Tr. II, 395, ll. 7-16. The State alleged Appellant killed Decedent because Appellant believed Scotty Pope was a confidential informant in the drug case against Appellant, and because Decedent had introduced Appellant and Pope. The State argued Decedent's text message about "shooting it out with them bitches" was an expression of Decedent's intent to kill police officers, not Appellant: "Sounds like he's not—would not get along with the police if they had an encounter again." Tr. II, 542, l. 23 – 544, l. 4; Tr. II, 539, ll. 22-25; Tr. II, 540, ll. 6-11.

Several witnesses from Walmart testified. Asset protection worker Anthony Dubose said Decedent was a known shoplifter and often entered Walmart through different doors. Dubose heard one gunshot and he saw Appellant fire the second shot after clearing the gun when it jammed. Tr. II, 153, l. 12 – 157, l. 4. Customer Hazen George saw a "commotion." "I seen these two men and over [sic] wrestling with one another. And then next thing I know, one shot the other . . ." The two men exchanged words, but Mrs. George could not hear what was said. According to Mrs. George, the men were "scuffling with one another," and the "guy that got shot, he was trying to get away from the other one . . . And he grabbed a hold of him and then shot him." Tr. II, 176, l. 24 – 178, l. 4; Tr. II, 183, l. 8 – 184, l. 6. Cashier Amanda Alderman

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[3] State's Exhibit #30 is the bond court footage and is on file with this Court.

saw Decedent enter the store and walk towards Appellant. Alderman claimed Decedent had an apologetic demeanor. Alderman witnessed Appellant shoot Decedent twice. Tr. II, 249, l. 11-21; Tr. II, 251, l. 6 – 253, l. 16.

The pathologist who autopsied Decedent, Dr. Wassum, testified Decedent was shot once in the abdomen and once in the head. Tr. II, 288, ll. 16-22. Dr. Wassum opined Decedent could have survived the first shot to the abdomen with immediate surgical treatment. Tr. II, 293, l. 17 – 294, l. 1; Tr. II, 298, ll. 5-13.

The State sought to cross-examine Appellant about an email he sent from the detention center to one Jared John Phillips on July 20, 2019. The email was not made an exhibit, but it stated, "several question marks, know of self-defense, that pussy mother fucker text messaged me threats, don't create chaos, the confidential informant is still alive, if you want to help you know what can be done." Tr. II, 485, ll. 1-14.

Defense counsel objected to the cross-examination: "[T]he implication is or the suggestion is that he's referring to Scotty Pope, but that's not clear from that message. And the other fact of the matter is that Scotty Pope is not a confidential informant against Mr. Morris. And so I think it's confusing for the jury, that he's trying to make the connection between that message and the testimony that was given from the hearing in February to what was said at the bond hearing, when that's not—it's not clear from this message who he's referring to." Tr. II, 479, l. 6 – 481, l. 18. Defense counsel argued that Appellant had been arrested on drug charges in November of 2018, and the State could not show that Appellant was talking about this case. "[H]e was arrested on that Pickens County charge back in November of 2018 and this is in July of 2019. You know, to—to make that connection that maybe trying to pull several different

references to make that nexus in that he's referring to Scotty Pope, Scotty Pope here, is just—it's not clear and its confusing." Tr. II, 482, ll. 17-24.

The State argued the information was admissible since, in its view, Appellant was talking about this case. "Judge, the confidential informant information was not released at the time so he wouldn't have known who the confidential informant was. He only had his idea of who it was at the time. We've gone through the testimony from July 3rd, the victim texted the defendant 'Over Scotty." At the bond hearing he talks about Scotty Pope." Tr. II, 481, l. 19 – 482, l. 1. "We had testimony that Scotty Pope is a known confidential informant. And in here, Mr. Morris is clearly talking about his case. He says known self-defense, as he asserts today. And he says text message me threats, as he asserts today." Tr. II, 482, ll. 1-4. "His [sic] clearly connects to the case through all the prior testimony in to here, and also, that in the bond hearing he says that Jason Deck introduced him to Scotty Pope who he states is a known confidential informant." Tr. II, 482, ll. 12-16.

The court did not perform a Rule 403, SCRE analysis, and instead simply ruled the evidence admissible. "Well, I'm, I'm gonna allow, let the jury give whatever weight they want to give to it. They can—they can assess credibility or give whatever weight they would like to give to that, but I'm gonna allow it." Tr. II, 482, l. 25 – 483, l. 4. The solicitor thereafter cross-examined Appellant by reading the substance of the email, and Appellant admitted making the statement. Tr. II, 485, ll. 1-15.

At the conclusion of the case, the court went over its proposed charges. Tr. II, 497, ll. 18-22. The court determined it would charge self-defense and read its proposed "standard self-defense charge." Tr. 502, ll. 2 - 505, l. 13. Part of the court's proposed, standard self-defense charge was: "If the defendant is justified in defending him or herself, or others in firing the first

shot, then the defendant is also justified in continuing to shoot until it is apparent that the danger or [sic] serious bodily injury has completely ended." Tr. II, 505, ll. 7-12.

The solicitor asked that the court also charge a quote from the discussion in *State v. Marin*, 415 S.C. 475, 783 S.E.2d 808 (2016), that: a "person who fatally wounds another, even in self-defense, is not entitled to hasten the victim's death by continuing to pump bullets into the victim's body." *Marin*, 415 S.C. at 482, 783 S.E.2d at 812 (quoting 40 C.J.S. Homicide § 189 (2014)). *Marin* concluded similar language to the court's proposed charge in this case was still good law: "[W]e have previously held that 'when a person is justified in firing the first shot, he is justified in continuing to shoot until it is apparent that the danger to his life and body has ceased.'" *Id.* "[W]e acknowledge that the language *Marin* requested accurately states the law[.]" *Id.*

Importantly, the *Marin* decision did not require a modification of the charge. Nevertheless, the court ruled it would not charge that a defendant justified in firing the first shot could continue firing until it is apparent the danger has ceased. The court incorrectly understood *Marin* to disallow the charge. THE COURT: "So, apparently, the language in this case suggests the modification of the boilerplate language that's been utilized in the past." Tr. II, 508, ll. 4-7. MR. MILLER [the solicitor]: "I believe so, Your Honor." Tr. II, 508, l. 8. Defense counsel noted that the pathologist testified the first shot was not immediately fatal, and that *Marin* did not hold the charge was bad law. Counsel quoted from *Marin* that the requested charge on continuing to shoot until the danger had ceased was "language [that] accurately states the law[.]" Tr. II, 506, ll. 9-13; Tr. II, 509, ll. 10-13; Tr. II, 510, l. 20 – 511, l. 7. The court reiterated that it was relying on *Marin*, and denied the requested charge. Tr. II, 512, ll. 17-23. (The trial court's ultimate instructions to the jury on self-defense are located at R. *(Tr. II, 572, l. 17 – 575, l. 19)).

Defense counsel next requested a charge on defense of others based on Appellant's testimony that he shot to protect his family. The court ruled it would not charge defense of others since Appellant had run out of the store after the shooting. Tr. II, 516, l. 21 – 517, l. 21.

As seen, Appellant was convicted as indicted, and he was sentenced to life without parole for murder and five years consecutive for possession of a weapon during the commission of a violent crime. Tr. II, 581, ll. 8-14; Tr. II, 585, ll. 18-24.

ARGUMENT

I. The trial court erred in refusing to charge the jury that if the defendant is justified in defending him or herself, or others in firing the first shot, then the defendant is also justified in continuing to shoot until it is apparent that the danger of serious bodily injury has completely ended, where Appellant testified he shot Decedent twice to ensure his children were protected, since the court was required to charge the jury on a correct and applicable principle of law.

The trial court must give a jury instruction when, in the light most favorable to the defendant, there is any evidence to support the charge. Appellant said he fired the second shot to make sure his children were protected. The court erred when it refused to instruct the jury in that if the defendant is justified in in firing the first shot, the defendant is justified in continuing to shoot until it is apparent that the danger of death or serious bodily injury has completely ended. There was evidence to support the charge.

Standard of review

In criminal cases, the appellate court sits to review errors of law only. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court "is bound by the [circuit] court's factual findings unless they are clearly erroneous." *Id.* Appellate courts do not re-evaluate the facts based on their own view of the preponderance of the evidence but simply determine whether the circuit court's ruling is supported by any evidence. *State v. Wilson*, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). "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).

Discussion

"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. Mattison*, 388 S.C. 469, 478, 697 S.E.2d 578, 583 (2010) (internal citations omitted). "The law to be charged to the jury is determined by the evidence presented at trial." *State v. Hill*, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). 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. *State v. Williams*, 400 S.C. 308, 314, 733 S.E.2d 605, 608-09 (Ct. App. 2012) (citing *State v. Cole*, 338 S.C. 97, 101, 525 S.E.2d 511, 512-13 (2000)). "In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." *State v. Adkins*, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003).

"If there is any evidence to support a jury charge, the trial judge should grant the request." *State v. Brown*, 362 S.C 258, 262, 607 S.E.2d 93, 95 (Ct. App. 2004). "It is error for the trial court to refuse to give a requested instruction which states a sound principle of law when that principle applies to the case at hand, and the principle is not otherwise included in the charge." *Clark v. Cantrell*, 339 S.C. 369, 390, 529 S.E.2d 528, 539 (2000). "A request to charge a correct statement of the law on an issue raised by the indictment and the evidence presented at trial should not be refused." *State v. Austin*, 299 S.C. 456, 458, 385 S.E.2d 830, 831 (1989). "However, if the trial judge refuses to give a specific charge, there is no error if the charge actually given sufficiently covers the substance of the request." *Id.*

"To establish self-defense, the defendant must establish (1) he was without fault in bringing on the difficulty; (2) he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) a reasonably prudent person of ordinary firmness and

courage would have entertained the same belief; and (4) he had no other probable means of avoiding the danger." *State v. Long*, 325 S.C. 59, 62, 480 S.E.2d 62, 63 (1997) (citing *State v. Bruno*, 322 S.C. 534, 473 S.E.2d 450 (1996)). Once raised by the defense, the State must disprove self-defense beyond a reasonable doubt. *State v. Bixby*, 388 S.C. 528, 553, 698 S.E.2d 572, 585 (2010).

In charging self-defense, the trial court must "consider the facts and circumstances of the case at bar in order to fashion an appropriate charge." *State v. Fuller*, 297 S.C. 440, 443, 377 S.E.2d 328, 330 (1989). "[A] defendant, in a self-defense case, has the right to act on appearances." *Id.* at 443, 377 S.E.2d at 331."[W]ords accompanied by hostile acts may establish self-defense. *Id.* at 444, 377 S.E.2d at 331. "[A]n individual ha[s] no duty to retreat if by doing so he would increase his danger of being killed or suffering serious bodily injury." *Id.*

In this case, the court erred by failing to allow the facts and circumstances of the case to dictate the proper jury charges. *Fuller*, 297 S.C. at 443, 377 S.E.2d at 330. This was because the court mistakenly believed the prosecutor's incorrect argument that *State v. Marin* precluded the requested charge. In *State v. Marin*, 415 S.C. 475, 481, 783 S.E.2d 808, 812 (2016), the Supreme Court addressed whether a trial court "committed reversible error by failing to charge the jury that one who is acting in self-defense and has the right to fire a first shot has the right to continue shooting until it is apparent that the danger of death or serious bodily injury has ended." The Supreme Court confirmed the requested instruction was good law: "we acknowledge that the language Marin requested accurately states the law." *Id.*, 415 S.C. at 482, 783 S.E.2d at 812. However, the Supreme Court concluded the failure to give the charge was not reversible since, in that case, the same principle was encompassed by other instructions:

> While the 'continuing to shoot' charge may have been appropriate, its absence does not mandate reversal. The essence of the charge

> was encompassed in the jury instructions, particularly the instruction that 'a person may use such force as is reasonably necessary even to the point of taking human life where such is reasonable.'

Id., 415 S.C. at 483, 783 S.E.2d at 813. "[A] trial court need not use the precise verbiage requested by a party as long as the legal principle is included in the charge." *Id.*, 415 S.C. at 485-86, 783 S.E.2d at 814.

As seen, Appellant requested a charge that: "If the defendant is justified in defending him or herself, **or others** in firing the first shot, then **the defendant is also justified in continuing to shoot** until it is apparent that the danger [of] serious bodily injury has **completely ended**." Tr. II, 505, ll. 7-12.

This jury did not receive the instruction that it received in *Marin*, which was held to be an effective substitute, that "a person may use such force as is reasonably necessary even to the point of **taking human life** where such is reasonable."

This jury did receive a charge that: "The defendant has the right to use as much force as appear [sic] to be necessary for complete protection in which a person of ordinary and—ordinary reason and firmness would have believed to be needed to prevent death or serious bodily injury." Tr. II, 575, ll. 9-13.

Critically, this jury did not receive any instruction that a person in could continue to use force even to the point of killing a person (i.e., until the point when it appears the danger has completely ended), in two important respects. First, it was not charged that such force could be used in defense of others. Second, it was not charged that such force could be used by a defendant who reasonably believed he was in danger (instead of a defendant who actually was in danger). Although the court used the term "fatal blow" once, it was only in connection with someone who was actually in imminent danger. **The trial court did not at any point charge the**

jury on the applicable principle that one could be justified in continuing to shoot (i.e., using deadly force) when acting in defense of others. Nor did the trial court at any point charge the jury on the principle that one who reasonably believed he was in imminent danger (as opposed to one who actually was in imminent danger) and had the right to use force, had the right to use deadly force—that he was allowed to continue shooting until it was apparent the danger had completely ended. In the light most favorable to Appellant, there was evidence to support the requested charge. *Williams*, 400 S.C. at 314, 733 S.E.2d at 608-09; *Austin*, 299 S.C. at 458, 385 S.E.2d at 831. The facts and circumstances of this case required the charge. *Fuller*, 297 S.C. at 443, 377 S.E.2d at 330; *Marin*, 415 S.C. at 482, 783 S.E.2d at 812.

The error requires reversal. "[T]o warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." *State v. Burkhart*, 350 S.C. 252, 263, 565 S.E.2d 298, 304 (2002). "Failure to give requested jury instructions is not prejudicial error where the instructions given afford the proper test for determining the issues." *Id.* at 263, 565 S.E.2d at 304. The instructions given did not provide the jury with the proper law for determining the issues. The essence of the charge Appellant requested was not encompassed in other instructions. The jury could have found Appellant was: without fault in bringing about the difficulty; believed he and his family were in imminent danger, a reasonably prudent person of ordinary firmness and courage would have believed the same; there were no other means to avoid the danger; and when Appellant fired the second, deadly shot he did so to ensure his children were protected. The jury was not instructed that if it found this scenario was what happened, then Appellant was justified in firing the second shot; justified in using deadly force. (The error in refusing to give this requested instruction is

magnified by the problem discussed in Issue 3 below, that the jury was not charged on defense of others at all.) Appellant was prejudiced. *Burkhart*, 350 S.C. at 263, 565 S.E.2d at 304.

II. The trial court erred in denying Appellant's request to charge the jury on defense of others, where Appellant testified he shot Decedent to protect his children, since the court must give a defense of others charge where there is evidence adduced at trial that the defendant was acting in defense of others.

The trial court must give a jury instruction when, in the light most favorable to the defendant, there is any evidence to support the charge. Appellant testified he shot Decedent in fear for his life and the lives of his family members. The court's refusal to instruct the jury on defense of others was error given Appellant's testimony that he shot to protect his children.

Standard of review

In criminal cases, the appellate court sits to review errors of law only. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court "is bound by the [circuit] court's factual findings unless they are clearly erroneous." *Id.* Appellate courts do not re-evaluate the facts based on their own view of the preponderance of the evidence but simply determine whether the circuit court's ruling is supported by any evidence. *State v. Wilson*, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). "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).

Discussion

"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. Mattison*, 388 S.C. 469, 478, 697 S.E.2d 578, 583 (2010) (citations omitted). "The law to be charged to the jury is determined by the evidence presented at trial." *State v. Hill*, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). "A request to charge a correct statement of the law on an issue raised by the indictment and the evidence

presented at trial should not be refused." *State v. Austin*, 299 S.C. 456, 458, 385 S.E.2d 830, 831 (1989). "In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." *State v. Adkins*, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003). "It is error for the trial court to refuse to give a requested instruction which states a sound principle of law when that principle applies to the case at hand, and the principle is not otherwise included in the charge." *Clark v. Cantrell*, 339 S.C. 369, 390, 529 S.E.2d 528, 539 (2000). "If there is any evidence to support a jury charge, the trial judge should grant the request." *State v. Brown*, 362 S.C 258, 262, 607 S.E.2d 93, 95 (Ct. App. 2004). The trial court must consider the facts and circumstances of the case in order to fashion a proper charge. *State v. Fuller*, 297 S.C. 440, 443, 377 S.E.2d 328, 330 (1989). 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. *State v. Williams*, 400 S.C. 308, 314, 733 S.E.2d 605, 608-09 (Ct. App. 2012) (citing *State v. Cole*, 338 S.C. 97, 101, 525 S.E.2d 511, 512-13 (2000)).

"Under the theory of defense of others, one is not guilty of taking the life of an assailant who assaults a friend, relative, or bystander if that friend, relative, or bystander would likewise have the right to take the life of the assailant in self-defense." *State v. Starnes*, 340 S.C. 312, 322-23, 531 S.E.2d 907, 913 (2000) (citing *State v. Long*, 325 S.C. 59, 480 S.E.2d 62 (1997)). A person is justified in acting in self-defense if: "(1) he was without fault in bringing on the difficulty; (2) he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) a reasonably prudent person of ordinary firmness and courage would have entertained the same belief; and (4) he had no other probable means of avoiding the danger." *State v. Long*, 325 S.C. at 62, 480 S.E.2d at 63 (citing *State v. Bruno*, 322 S.C. 534, 473

S.E.2d 450 (1996)). Once raised by the defense, the State must disprove self-defense beyond a reasonable doubt. *State v. Bixby*, 388 S.C. 528, 553, 698 S.E.2d 572, 585 (2010).

"[U]nder the law of self-defense, a person may not only take life in his own defense but also in defense of a relative." *State v. Sales*, 285 S.C. 113, 114, 328 S.E.2d 619, 620 (1985). "[I]n order for the trial court to give a defense of others charge, there must be some evidence adduced at trial that the defendant was indeed lawfully defending others." *Douglas v. State*, 332 S.C. 67, 73, 504 S.E.2d 307, 310 (1998). In *State v. Starnes*, 340 S.C. at 323, 531 S.E.2d at 913, the Supreme Court found the defendant was not entitled to a charge on defense of others because Starnes did "not suggest he shot" in order to protect another. The Supreme Court in *Starnes* cited *State v. Alford*, 264 S.C. 26, 212 S.E.2d 252 (1975), *overruled on other grounds by State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009), for the holding that a defendant is not entitled to a defense of others charge "where defendant did not testify he was shooting for a purpose other than to protect himself . . ." *Id.*

The court's failure to instruct the jury on defense of others was error. In the light most favorable to Appellant, there was evidence to support a charge on defense of others. Appellant testified he acted in self-defense, to protect his family, and he specifically mentioned his children. Appellant testified Decedent threatened to kill his children in text messages and when he approached Appellant at the Walmart. The jury could have found that the children were not at fault in bringing on the difficulty, Appellant believed the children were in danger, a reasonably prudent person of ordinary firmness and courage would have believed the children were in danger, and there was no other way to avoid the danger. *Starnes*, 340 S.C. at 322-23, 531 S.E.2d at 913.

This Court has stated that both "the defender and defended" must meet the elements of self-defense in a defense of others case. *State v. Otts*, 424 S.C. 150, 159, 817 S.E.2d 540, 545 (Ct. App. 2018). However, that cannot be true in the case of a child who does not know she is in danger when her parent does. For example, if a parent was with her toddler when her toddler was snatched by a stranger who held a knife to the child's throat, the parent would be able to use deadly force to save her child, even if the child was too young to understand the danger she was in or thought it was just a game. In this case, like the above example, there was evidence Appellant reasonably believed the children were in danger based on the text messages and Decedent's comment when the two men came face to face in Walmart. A requirement that the other meets the elements of self-defense does not bar Appellant from a charge on defense of others here, it instead exists to bar defense of others from applying when the other could not have asserted self-defense by reason of having brought about the difficulty. *See, e.g.*, *State v. Jackson*, 384 S.C. 29, 41, 681 S.E.2d 17, 23 (Ct. App. 2009) (Cureton, A.J. dissenting) (citing 40 Am.Jur.2d Homicide, § 168 (2008)) ("one cannot justify a homicide on the ground of necessity in the defense of another when the other person could not have asserted self-defense by reason of having provoked the encounter"); *State v. Hays*, 121 S.C. 163, 113 S.E. 362, 363 (1922) (trial court properly charged jury that defense of a relative, friend, or bystander may apply provided that, among other things, "both the person assailed and the person coming to his defense were without legal fault in bringing on the difficulty").

The evidence admitted at trial presented a jury issue on the defense of others. *Cf. State v. Long*, 325 S.C. at 64, 480 S.E.2d at 64 (defendant was not entitled to jury charge on defense of others because there was no evidence he was defending others when he shot victim; there was no evidence victim threatened the other people in defendant's home); *Bozeman v. State*, 307 S.C.

172, 176, 414 S.E.2d 144, 146 (1992) (record supported self-defense charge rather than defense of others charge where immediately preceding the shooting, victim swung a knife at petitioner and not at petitioner's brother); *State v. Norris*, 253 S.C. 31, 38, 168 S.E.2d 564, 567 (1969) ("The rule in this State is that a father has the right to defend his daughter from death or receiving serious bodily harm at the hands of a person who makes a malicious and unprovoked assault upon her. The right of the father to defend his daughter is coextensive with the right of the daughter to defend herself.").

Moreover, the court erred by concluding Appellant was not entitled to the instruction because he ran out of the Walmart. Remaining on the scene is not a prerequisite required by law in order to get the charge. The court should have given the charge. *Brown*, 362 S.C. at 262, 607 S.E.2d at 95; *Williams*, 400 S.C. at 314, 733 S.E.2d at 608-09; *Starnes*, 340 S.C. at 322-23; 531 S.E.2d at 913; *Fuller*, 297 S.C. at 443, 377 S.E.2d at 330.

The error was prejudicial. "[T]o warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." *State v. Burkhart*, 350 S.C. 252, 263, 565 S.E.2d 298, 304 (2002). "Failure to give requested jury instructions is not prejudicial error where the instructions given afford the proper test for determining the issues." *Id.* at 263, 565 S.E.2d at 304. The case presented a jury question on whether defense of others justified the conduct. The instructions that were given did not provide the jury with the proper test for determining the issues. The failure to give this charge was magnified by the court's refusal to give the charge discussed in Issue I, above. Both charges discussed defense of others. The jury was not charged on defense of others at all. The error was reversible. *Starnes*, 340 S.C. at 322-23, 531 S.E.2d at 913; *Burkhart*, 350 S.C. at 263, 565 S.E.2d at 304.

III. The trial court erred in permitting Appellant to be cross-examined on the content of a confusing email sent by Appellant from the detention center that a "confidential informant is still alive. If you want to help, you know what you can do," since the evidence should have been excluded pursuant to Rule 403, SCRE.

The court erred by not performing Rule 403 balancing. The email content was inadmissible since evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

Standard of review

The admission of evidence is within the circuit court's discretion and will not be reversed on appeal absent an abuse of that discretion." *State v. Dickerson*, 395 S.C. 101, 116, 716 S.E.2d 895, 903 (2011). "A trial court has particularly wide discretion in ruling on Rule 403 objections." *State v. Lee*, 399 S.C. 521, 527, 732 S.E.2d 225, 228 (Ct. App. 2012); *see also State v. Dial*, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013) ("A trial judge's decision regarding the comparative probative value and prejudicial effect of relevant evidence should be reversed only in exceptional circumstances." (citation omitted)).

Discussion

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible." Rule 402, SCRE. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the

danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE.

"Unfair prejudice means an undue tendency to suggest decision on an improper basis, such as an emotional one." *State v. Saltz*, 346 S.C. 114, 127, 551 S.E.2d 240, 247 (2001). "The determination of whether the danger of unfair prejudice outweighs the probative value of evidence must be based on the entire record and will turn on the facts of each case." *State v. Holland*, 385 S.C. 159, 171, 682 S.E.2d 898, 904 (Ct. App. 2009) (quoting *State v. Lyles*, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008)). "Whether the subject is contrary character trait evidence under Rule 404(a)(1) or impeachment of a witness under Rule 607, Rule 403 requires the evidence offered to be proportional to the evidence that gave rise to its admissibility. We have guarded against thinly-veiled attempts to show propensity initiated under the guise of an attempt at impeachment." *State v. Williams*, 430 S.C. 136, 151, 844 S.E.2d 57, 65 (2020) (cleaned up).

The court should have performed an on-the-record 403 analysis. *See Hamrick v. State*, 426 S.C. 638, 652, 828 S.E.2d 596, 603 (2019) ("if the trial court was concerned the video would mislead the jury, it was required to conduct an on-the-record Rule 403 analysis"); *State v. Benton*, Op. No. 28185 (S.C. Sup. Ct. filed Jan. 17, 2024) (Howard Adv. Sh. No. 2 at 23) (trial court should have placed Rule 403 analysis on the record, since "on-the-record arguments and rulings enable judicial review and allow the parties and the public to better understand the rulings").

This evidence should have been excluded pursuant to Rule 403, SCRE, since the State did not make the connection that Appellant was talking about Scotty Pope in the email. As

defense counsel noted, Appellant had drug charges pending in Pickens County at the time. In *State v. Gregory*, 198 S.C. 98, 16 S.E.2d 532, 533 (1941), the defendant was charged with embezzling water works funds. The Supreme Court found the trial court properly excluded evidence that was "unconnected" with the pilfered accounts upon which the State sought conviction, to guard against the confusion of the jury by the injection of collateral issues. *Id.*, 198 S.C. at 98, 16 S.E.2d at 533. In this case, like in *Gregory*, the needed connection was missing.

The admission of the email's content was confusing, and any arguable probative value was substantially outweighed by the danger of confusing the issues and thus unfairly prejudicing Appellant. The email sounded incredibly threatening and sinister: "the confidential informant is still alive, if you want to help you know what can be done." The court should not have permitted Appellant to be cross-examined about this matter. Rule 403, SCRE.

IV. The trial court erred in imposing sentence for possession of a weapon during the commission of a violent crime, where Appellant received a life without parole sentence for the violent crime, since § 16-23-490(A) prohibits the imposition of sentence for the weapon when the defendant has received life without parole for the underlying offense.

Appellant's five-year sentence for possession of a weapon during the commission of a violent crime was an unlawful sentence since he was sentenced to life without parole (LWOP) for the underlying violent crime. Although there was no objection below, this Court may correct the error of law.

Standard of review

"In criminal cases, the appellate court sits to review errors of law only." *State v. Vick*, 384 S.C. 189, 197, 682 S.E.2d 275, 279 (Ct. App. 2009) (quoting *State v. Wilson*, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001)). The appellate court is "bound by the trial court's factual findings unless they are clearly erroneous." *Id.* (quoting *Wilson*, 345 S.C. at 5-6, 545 S.E.2d at 829). The reviewing court "does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence." *State v. Slocumb*, 412 S.C. 88, 91, 770 S.E.2d 436, 438 (Ct. App. 2015). "A sentence will not be overturned absent an abuse of discretion when the ruling is based on an error of law or a factual conclusion without evidentiary support." *In re M.B.H.*, 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010).

Discussion

Appellant was convicted of the underlying violent crime—murder—and he was sentenced to life without parole for the murder. Therefore, he should not have been sentenced for the weapon. S.C. Code Ann. § 16-23-490(A) prohibits the imposition of a five-year sentence for

possession of a weapon during the commission of a violent crime when the defendant has received an LWOP sentence for the underlying offense. *See* § 16-23-490(A) (explaining that under this statute the "five-year sentence does not apply in cases where the death penalty or a life sentence without parole is imposed for the violent crime").

Although this matter was not raised below, this Court can vacate the sentence in the interest of judicial economy. *See State v. Plumer*, 439 S.C. 346, 351, 887 S.E.2d 134, 137 (2023) ("[W]hen a trial court imposes what the State concedes is an illegal sentence, the appellate court may correct that sentence on direct appeal or remand the issue to the trial court even if the defendant did not object to the sentence at trial and even if there is no real threat of incarceration beyond the limits of a legal sentence."). Appellant's sentence was not permitted by law. Appellant respectfully asks this Court to vacate the five-year sentence.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his convictions and sentences and remand for a new trial (Issues I – III). Appellant further respectfully requests this Court vacate his five-year sentence for possession of a weapon during the commission of a violent crime (Issue IV).

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ATTORNEY FOR APPELLANT

This 22nd day of April, 2024.