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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Debra R. McCaslin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TREVOR ANTHONY IRVIN,

APPELLANT

APPELLATE CASE NO. 2023-001075

INITIAL BRIEF OF APPELLANT

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2.

Did the trial court err by failing to tailor the self-defense instruction to adequately reflect the facts and theories presented by Appellant, specifically that Appellant did not have to wait before acting in self-defense, when the charge was supported by the evidence and was crucial to the jury's understanding of the law on self-defense?

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Did the trial court abuse its discretion by excluding testimony from Appellant's expert in firearms and use of force when the evidence was admissible pursuant to Rule 702, SCRE, as it would have assisted the jury in this self-defense case in understanding how stress during a deadly force situation affects an individual's decision making process?

STATEMENT OF THE CASE

A Lexington County grand jury indicted Appellant on August 8, 2022 for the offense of murder. R. * (Indictment). His case was called to trial on June 19, 2023 before the Honorable Debra McCaslin, and a jury. Tr. 1. Assistant Solicitors Sutania Fuller and Rhonda Patterson represented the state. John Mobley represented Appellant. Tr. 1.

On June 23, 2023, the jury found Appellant guilty as indicted. Tr. 809, ll. 13-19. He was sentenced to forty-five years' imprisonment. Tr. 827, ll. 8-10.

This appeal follows.

ARGUMENT

1.

The trial court abused its discretion by excluding Appellant's testimony that he was aware the decedent was in a gang since the evidence was relevant to Appellant's state of mind during the confrontation with the decedent, particularly as to whether Appellant had a reasonable apprehension of violence from the decedent, an element of his self-defense case.

Relevant Facts

The state moved pretrial to exclude any evidence the decedent was in a gang. The assistant solicitor argued any such evidence was not relevant and should be excluded pursuant to Rule 403, SCRE, because it is "highly prejudicial."

Defense counsel argued Appellant's belief that he was being attacked by a "violent gang member" was relevant to Appellant's self-defense case. More specifically, counsel argued the evidence was relevant to Appellant's state of mind and whether he "had a reasonable belief of death, of serious bodily injury." He distinguished this case from State v. Sobers, 404 S.C. 263, 744 S.E.2d 588 (Ct. App. 2013), where this Court held the trial judge did not abuse his discretion by finding evidence the decedent and other individuals present during the shooting were members of a gang was not relevant. Counsel explained to the trial court that this Court emphasized in Sobers that the defendant could have offered gang evidence if he could have established the requisite relevancy. However, Sobers, who alleged he acted in self-defense, never testified the mob that surrounded his car was part of a gang. According to Sobers, the mob action caused him to fear for his life and fire his gun, but he never testified that he was more fearful because the mob was part of a gang. Tr. 73, l. 7 – 74, l. 12. Accordingly, the decedent's gang affiliation was not relevant.

Based on the holding in Sobers, defense counsel argued that "if the defendant relates part of his fearfulness to the gang activity, the gang affiliation of the deceased, that makes it relevant because [the evidence] goes to the reasonableness of his apprehension of serious bodily harm." Tr. 72, l. 13 – 74, l. 22.

The assistant solicitor asserted that "the only person who can make that [the decedent's gang affiliation] relevant right now in camera is the defendant, because it's not coming in [the] State's case in chief, we're not going to offer anything about the victim being in a gang. We're not going to offer anything about, oh, the defendant was in fear of the victim because he was in a gang." Tr. 76, l. 24 – 77, l. 5. Consequently, she requested the trial court restrict Appellant from discussing the decedent's gang affiliation during opening statements and cross-examination until the court ruled on the matter. Tr. 79, ll. 10-25.

The trial court refused to rule on the motion pretrial and stated Appellant would have to proffer the evidence later on. Tr. 75, ll. 6-19.

Before Appellant testified before the jury, defense counsel requested to proffer his testimony concerning the decedent's gang affiliation. Counsel explained that Appellant was "prepared to testify" that he knew the decedent was a member of a gang and, critically, as a result of this knowledge, Appellant was more fearful for his life. Tr. 431, l. 23 – 432, l. 18.

The assistant solicitor argued the evidence was not relevant and was a "blatant attempt to assassinate the character of the victim." She suggested the evidence was "fabricated" because Appellant did not mention the decedent's gang affiliation during his statement to law enforcement shortly after his arrest. While Appellant stated he acted in self-defense during his statement and that the decedent attacked him first, Appellant did not say he was more fearful because the decedent was in a gang. Because Appellant did not mention the decedent's gang

membership previously, the solicitor suggested Appellant must have made it up. She also argued the evidence should be excluded pursuant to Rule 403, SCRE. Tr. 434, l. 3 – 436, l. 10.

Appellant testified *in camera* that the decedent "would boast about being in a gang." He "would express openly about" being a "member of . . . one of the most notorious gangs in South Carolina." Appellant explained that the decedent told him "that he could have me gone." Appellant did not know if this meant "gone from the job [at the House of Raeford] or having stuff done to me through his gang or he would do it himself." Appellant testified that his knowledge of the decedent's gang affiliation made him more fearful of the decedent on the day of the shooting. His knowledge "made everything more of a . . . terrorizing situation or a fearful situation." Tr. 445, l. 6 – 446, l. 24.

On cross-examination during the proffer, Appellant testified that he did not tell his supervisor at the House of Raeford or the police that the decedent threatened to harm him or have members of his gang harm him. However, he clarified that the threats occurred on the day of the shooting. Specifically, Appellant testified, "On that day he threatened to kill me and have things done to me by members of his gang." This occurred at the gas station shortly before the shooting. Tr. 447, l. 6 – 449, l. 14; Tr. 451, l. 22 – 452, l. 2.

Appellant further testified that other employees at the House of Raeford were members of the decedent's gang and the decedent "helped plenty of gang members at the job." While Appellant never witnessed any violence committed by the decedent or his gang, he heard "them talk about stuff that they did." Tr. 453, l. 10 – 454, l. 23. However, on the day of the shooting, there were no other gang members in the parking lot and no one beside the decedent threatened him. Tr. 455, l. 13 – 456, l. 13.

After the proffer, defense counsel argued Appellant's testimony that the decedent's gang affiliation was "a basis for him being fearful of the deceased" should be admitted. He maintained that the solicitor could cross-examine Appellant about the "legitimacy" of his belief or fear. Counsel concluded Appellant should be permitted to testify to the "facts and circumstances that were a reasonable basis for him to believe his life was in danger and be fearful of the deceased." Tr. 457, l. 17 – 458, l. 4.

The assistant solicitor continued to argue the evidence was irrelevant. She maintained there was "no suggestion here that gang influence played any part of this shooting." She also argued Rule 403 should "keep that out." Tr. 458, l. 5 – 459, l. 13.

After taking the matter under advisement overnight, the trial court ultimately held the evidence was inadmissible. It stated, "The Defendant was proffered yesterday on the stand. He testified that the victim belonged to a gang, that there were employees at the chicken plant that were also gang members, that some of them wore red bandanas. And maybe this victim bragged about committing robberies and shootings. However, he also testified that in the two years that he worked with him [the decedent], he really had no problems with him. That it was the day of the incident that he felt that the victim threatened him. I find the defendant has failed to show the relevance of any possible gang association with this shooting." Tr. 474, l. 5 – 475, l. 4. In support of its ruling, the court cited to State v. Robinson, 438 S.C. 421, 882 S.E.2d 883 (Ct. App. 2023), Johnson v. State, 433 S.C. 550, 860 S.E.2d 696 (Ct. App. 2021), and State v. Perry, 430 S.C. 24, 842 S.E.2d 654 (2020). Pursuant to these cases, the court asserted the evidence had to be "logically relevant" to a "material factor." In Johnson, the court emphasized there "was a critical connection between gang activity and the incident itself." Tr. 475, ll. 4-10.

Standard of Review

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." State v. Sobers, 404 S.C. 263, 267, 744 S.E.2d 588, 590 (Ct. App. 2013) (quoting State v. Saltz, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001)). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Id. at 267-68, 744 S.E.2d at 590 (quoting State v. Jennings, 394 S.C. 473, 477-78, 716 S.E.2d 91, 93 (2011)).

Discussion

The trial court abused its discretion by excluding Appellant's testimony that he was aware the decedent was in a gang since the evidence was relevant to Appellant's state of mind during the confrontation with the decedent, particularly as to whether Appellant had a reasonable apprehension of violence from the decedent, an element of his self-defense case.

As a general rule, all relevant evidence is admissible. Rule 402, SCRE. "'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. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . ." Rule 403, SCRE. Unfair prejudice pursuant to Rule 403 "is the tendency of the evidence to suggest a decision based on something other than the legitimate probative force of the evidence." State v. Phillips, 430 S.C. 319, 328, 844 S.E.2d 651, 656 (2020) (citing State v. Gray, 408 S.C. 601, 616, 759 S.E.2d 160, 168 (Ct. App. 2014)); See State v. Torres, 390 S.C. 618, 623, 703 S.E.2d 226, 228-229 (2010).

Appellant testified *in camera* that the decedent "would boast about being in a gang." He "would express openly about" being a "member of . . . one of the most notorious gangs in South Carolina." Appellant explained that the decedent told him "that he could have me gone." Appellant did not know if this meant "gone from the job [at the House of Raeford] or having stuff done to me through his gang or he would do it himself." Appellant later clarified that the decedent made threats related to his gang on the day of the shooting. Specifically, Appellant testified, "On that day he threatened to kill me and have things done to me by members of his gang." This occurred at the gas station shortly before the shooting. Appellant testified that his knowledge of the decedent's gang affiliation made him more fearful of the decedent on the day of the shooting. His knowledge "made everything more of a . . . terrorizing situation or a fearful situation." Tr. 445, l. 6 – 446, l. 24; Tr. 447, l. 6 – 449, l. 14.

This evidence was relevant to Appellant's state of mind during the confrontation with the decedent. It was also relevant as to whether Appellant's fear of great bodily injury or death was reasonable, a critical element of his defense. See State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984) ("There are four elements required by law to establish self-defense . . . First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. *Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life.* Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or

sustaining serious bodily injury than to act as he did in this particular instance. If, however, the defendant was on his own premises he had no duty to retreat before acting in self-defense.") (emphasis added).

The decedent's gang affiliation and threats related to his gang logically created some apprehension of the decedent by Appellant. The trial court abused its discretion by excluding this relevant evidence which was probative of Appellant's defense. Our Supreme Court has been protective of a defendant's right to present a complete self-defense case when he is charged with murder, and to have a fully charged jury if the charge went to the jury. See State v. Dickey, 394 S.C. 491, 716 S.E.2d 97 (2011); State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989); State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978).

Moreover, the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice *to the state*. See Rule 403, 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."). For the same reasons the evidence was relevant, as argued above, the evidence was probative. It was essential to Appellant's self-defense case. Additionally, there was little, if any, prejudice to the state, let alone *unfair* prejudice. Appellant did not seek to admit the evidence to "assassinate" the decedent's character. He only sought to use the evidence to show why his apprehension of the decedent was reasonable.

The trial court's citation to State v. Robinson, 438 S.C. 421, 882 S.E.2d 883 (Ct. App. 2023) and State v. Perry, 430 S.C. 24, 842 S.E.2d 654 (2020) was misplaced as these cases address the admission of prior bad act evidence pursuant to Rule 404(b), SCRE. Additionally,

Johnson v. State, 433 S.C. 550, 860 S.E.2d 696 (Ct. App. 2021), which was also cited by the trial court, concerned the admission of the *defendant's* gang affiliation and is easily distinguishable from this case.

However, State v. Sobers, 404 S.C. 263, 744 S.E.2d 588 (Ct. App. 2013), which was cited by defense counsel at trial, is directly on point. In Sobers, this Court held the trial judge did not abuse his discretion by finding evidence the decedent and other individuals present during the shooting were members of a gang was not relevant. In so holding, this Court emphasized that Sobers, who alleged he acted in self-defense, never testified the mob that surrounded his car was part of a gang. According to Sobers, the mob action caused him to fear for his life and fire his gun, but he never testified that he was more fearful because the mob was part of a gang. Tr. 73, l. 7 – 74, l. 12. Accordingly, the decedent's gang affiliation was not relevant.

In this case, however, Appellant specifically testified that the decedent's gang affiliation caused him to fear the decedent and increased his apprehension of violence from the decedent. Consequently, it was relevant to Appellant's self-defense case and should have been admitted.

Respectfully, because the trial court abused its discretion by excluding this relevant evidence, this Court should reverse Appellant's conviction and remand for a new trial.

2.

The trial court erred by failing to tailor the self-defense instruction to adequately reflect the facts and theories presented by Appellant, specifically that Appellant did not have to wait before acting in self-defense, when the charge was supported by the evidence and was crucial to the jury's understanding of the law on self-defense.

Relevant Facts

Appellant requested the trial court charge the jury that he did not have to wait before acting in self-defense. Defense counsel cited to State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997) in support of his request. Tr. 691, l. 5 – 699, l. 12. The assistant solicitor objected to the charge. She argued the instruction that the defendant has a right to act on appearances, which the court had already agreed to charge, "covers that." Tr. 697, ll. 12-22.

Defense counsel disagreed. He asserted, "But there's also the argument by the state that even if he [the decedent] was going for his [Appellant's] gun, my client could've exercised a number of other options before firing. . . . [S]o my point is, he [Appellant] doesn't have to hesitate to act if he believes he's in imminent danger. If he - - once he has that belief, he does not have to hesitate. The law does not require that. . . . The jury needs to understand that if he [Appellant] believed he's in imminent danger at that point, he did not have to hesitate." Tr. 701, ll. 15-25.

The trial court found the requested charge only applies when the defendant and the victim are both armed. It asserted, "I think what the Court in those cases [State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997) and State v. Rash, 182 S.C. 42, 188 S.E. 435 (1936)] is saying is when both are armed you don't have to wait." It concluded that "if he [Appellant] believed that the victim was going for his gun, then he had a right to act on it. I think that [the right to act on

appearances charge] covers it. And that's what I'm charging." Tr. 702, l. 10 – 703, l. 4. Consequently, the court refused to charge the requested instruction.

The trial court ultimately charged the jury on self-defense as follows:

> The defendant has raised the defense of self-defense. Self-defense is a complete defense, and if it is established, you must find the defendant not guilty. The state has a burden of disproving self-defense by proof beyond a reasonable doubt.
>
> If you have a reasonable doubt of the defendant's guilt after considering all of the evidence, including the evidence of self-defense, then you must find the defendant not guilty. On the other hand, if you have no reasonable doubt of the defendant's guilt after considering all of the evidence, including the evidence of self-defense, then you must find the defendant guilty.
>
> The elements of self-defense are as follows. First, the defendant must be without fault in bringing on the difficulty. If the defendant's conduct was a type which was reasonably calculated to and did provoke a deadly assault, the defendant would be at fault in bringing on the difficulty and would not be entitled to an acquittal based on self-defense.
>
> The second element of self-defense is that the defendant was actually in imminent danger of death or serious bodily injury. If the defendant was actually in imminent danger, it must be shown that the circumstances would've warranted a person of ordinary firmness and courage to strike the fatal blow to prevent death or serious bodily injury.
>
> If the defendant believed he was in imminent - - imminent danger of death or serious bodily injury, it must be shown that a reasonably prudent person of ordinary firmness and courage would've had the same belief. In deciding whether the defendant actually was or believed he was in imminent danger of death or serious bodily injury, you should consider all the facts and circumstances surrounding the crime, including the physical condition and characteristics of the parties involved.
>
> The defendant does not have to show that he was actually in danger. It is enough if the defendant believed he was in imminent danger and a reasonably prudent person of ordinary firmness and courage would have had the same belief.
>
> The defendant has a right to act on appearances even though the defendant's beliefs may have been mistaken. It is for you to decide whether the defendant's fear of immediate danger of death or serious bodily injury was reasonable and would've been felt by an ordinary person in the same situation.

> Words accompanied by hostile acts may, depending on the circumstances, establish self-defense. Evidence of prior difficulties between the defendant and the victim may be considered in deciding whether a threat existed, whether the defendant had a reason to believe a threat existed and how serious that threat was.
>
> The final element of self-defense is that the defendant had no other probable way to avoid the danger of death or serious bodily injury than to act as the defendant did in this particular instance.
>
> Self-defense is not available to a person who uses language which is so contemptuous that a reasonable person would expect it to bring on a physical encounter and which did actually contribute to the physical encounter.

Tr. 796, l. 17 – 799, l. 2.

Standard of Review

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

"When reviewing the circuit court's refusal to deliver a requested jury instruction, appellate courts must consider the evidence in a light most favorable to the defendant." Id. at 314, 733 S.E.2d at 608-609 (citing Cole, 338 S.C. at 101, 525 S.E.2d at 512-513). "If there is any evidence in the record from which it could reasonably be inferred that the defendant acted in self-defense, the defendant is entitled to instructions on the defense, and the [circuit court's] refusal to do so is reversible error." Id. at 314, 733 S.E.2d at 609 (quoting State v. Day, 341 S.C. 410, 416-417, 535 S.E.2d 431, 434 (2000)) (alteration in original).

Discussion

The trial court erred by failing to tailor the self-defense instruction to adequately reflect the facts and theories presented by Appellant, specifically that Appellant did not have to wait before acting in self-defense, when the charge was supported by the evidence and was crucial to the jury's understanding of the law on self-defense.

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

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

charge, which only included the standard self-defense instruction as outlined by our Supreme Court in Davis along a the charge on the right to act on appearances, was incomplete because the trial judge failed to charge on the decedent's substance abuse or his prior acts of violence. Id. Ultimately, the Court reversed Day's convictions and remanded for a new trial.

In State v. Nichols, 325 S.C. 111, 116-117, 481 S.E.2d 118, 121 (1997), the defendant argued the trial judge's instructions on the law of self-defense were inadequate under State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989), where the judge instructed the jury solely on the common law elements of self-defense. Nichols objected to the charge and requested additional instructions on: (1) the right to act on appearances; (2) relevance of prior difficulties; and (3) that a person does not have to wait before acting in self-defense. Id. at 117, 481 S.E.2d at 121. Nichols contended the trial judge's refusal to give further instructions was reversible error. Our Supreme Court agreed. Id.

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

Court held Nichols was entitled to a charge that he did not have to wait before acting in self-defense since Nichols testified he thought he saw a gun in the deceased's hand and did not wait for the deceased to fire or aim at him. Id. (citing State v. Rash, 182 S.C. 42, 188 S.E. 435 (1936)). Accordingly, the Supreme Court reversed Nichols conviction and remanded for a new trial. Id. at 118, 481 S.E.2d at 122.

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

The Court determined Hendrix was not at fault in bringing on the difficulty since he armed himself on his own land in a legal manner after he was threatened. Id. at 659, 244 S.E.2d at 506. The Court further found the second and third elements of self-defense were established since the evidence showed Hendrix was actually in imminent danger of losing his life. Id. at 659-660, 244 S.E.2d at 506. Having no duty to retreat because he was on his own property and being without fault in bringing on the fatal confrontation, the Court held Hendrix was warranted in reacting to the situation with force. Id. at 660, 244 S.E.2d at 507. In so holding, and relevant to this case, the Court emphasized, "Once [Hendrix's] right to fire in self-defense arose, he was not required to wait until his adversary was on equal terms or until he fired or aimed his weapon." Id. at 660-661, 244 S.E.2d at 507. This is significant since the evidence showed Hendrix shot the decedent when he was distracted by his neighbor's scream.

In this case, as in Day and Nichols, the trial court erred by refusing to instruct the jury on the specific element of self-defense requested by Appellant since it was applicable to Appellant's account of what occurred. Appellant testified that the decedent confronted him at his vehicle and threatened to take Appellant's firearm. The decedent then reached for the gun. Appellant explained that as soon as the decedent tried to reach for Appellant's gun, Appellant grabbed the gun and backed up. Appellant backed up as far as he could until his back was up against his car. Appellant testified that the decedent then tried to take Appellant's legs out from under him. The decedent tried to "lift and drop" Appellant. Appellant felt his "legs start to lift from under [him]." Appellant testified that he knew if the decedent got his gun, he would use it on Appellant and Appellant "could be shot and killed." So before the decedent was able to take Appellant's gun, Appellant "shot as fast as [he] could." Tr. 540, l. 16 – 541, l. 25.

Based on Appellant's account of what occurred, it was crucial for the jury to understand that Appellant was not required "to wait until his assailant gets the drop on him" and that he had a "right to act under the law of self-preservation and prevent his assailant from getting the drop on him." See Rash, 182 S.C. at 42, 188 S.E. at 438. As our Supreme Court stated in Day, "A self-defense charge is erroneous where the trial court fails to charge on elements of the defense which were applicable to the issues raised by the defendant." Day, 341 S.C. 410, 418, 535 S.E.2d 431, 435 (2000) (citing Fuller, 297 S.C. 440, 377 S.E.2d 328). Since the trial court failed to charge an important element of self-defense relevant to Appellant's account of what occurred, respectfully this Court should hold the trial court erred and reversed Appellant's conviction.

3.

The trial court abused its discretion by excluding testimony from Appellant's expert in firearms and use of force since the evidence was admissible pursuant to Rule 702, SCRE, as it would have assisted the jury in this self-defense case in understanding how stress during a deadly force situation affects an individual's decision making process.

Relevant Facts

Appellant sought to admit expert testimony from Scott Ballard on use of force. Ballard is a consultant for "use of force and firearm" as well as self-defense. He also owns a private security company. Tr. 655, ll. 1-3. Ballard was in the Navy for six years and worked for the Office of Naval Intelligence as a behavioral analyst. After he left the Navy, Ballard worked for Seven P International, a "protective security company that recruited, trained, and installed private security personnel in protective roles around the world." Tr. 655, l. 17 – 656, l. 4. He then went to work for Sig Sauer Academy. He was a master firearms instructor and taught classes to civilians. In order to become a master firearms instructor, he had to become certified as an instructor in pistol, rifle, shotgun, and force on force. Ballard explained that "force on force is scenario-based training" based on "real world scenarios." Such training involves simulating "live combat situations or live fire situations," which "forces decision making." Tr. 656, l. 5 – 657, l. 21.

Ballard explained that he has experience investigating shootings. This was part of his responsibilities in the Navy as a behavioral analyst and while he was working at Seven P International. One of his primary functions as director of training at Seven P International "was to review all after action reports to verify whether or not the use of force was in compliance with company standards." Tr. 658, ll. 12-20.

Ballard further asserted that in the field of use of force, there are national standards and accepted principles regarding firearm safety and use of force. Such guidelines are administered by the National Rifle Association (NRA) and the International Chiefs of Police Association (IALEFI). Tr. 659, ll. 18-24.

Ballard explained that a "deadly force situation" is "anything that involves the application or use of deadly force. So meaning the - - imminent and unavoidable risk of grave bodily injury or death to a person or innocent persons." Tr. 660, ll. 17-22. He testified that there are "accepted principles" in his field regarding "how people are going to react" in a deadly force situation. Ballard explained that "we can predict that behavior when [individuals are] placed under those severe levels of stress." He has personally investigated 147 shootings while working with Seven P. Tr. 660, l. 23 – 661, l. 9.

Ballard testified that he has been qualified in a Court of law in the United States and in South Carolina. He has been qualified as an expert in firearms, use of force, self-defense, external and internal ballistics, and the "psychology of the gunfight." The "psychology of the gunfight" entails "What goes on in the person's head? Decision making? You know, base don what we train people to do . . . in those situations. Not - - not offering opinions based on what somebody was thinking, but what we have garnered from people's behavioral analysis, so that we know that humans are humans, and they are going to act a certain way when placed under severe levels of stress." Tr. 661, l. 18 – 662, l. 9.

After proffering Ballard's qualifications, defense counsel requested the trial court qualify him as "an expert in firearms, use of force, and allow him to testify regarding the physiological effects on individuals in deadly force situations as it relates to their decision making." Tr. 669, ll. 20-24. The court indicated that it had "no doubt that he's an expert." However, the court

wanted to hear "what it is that he offers to this case that's not going to be confusing to this jury." Tr. 669, l. 25 – 670, l. 3. Consequently, counsel proffered additional testimony from Ballard.

Ballard explained that a "deadly force situation is an extreme that draws back to basic human instincts for self-preservation. It's primal instinct. So what happens with that is, is that they become singularly focused on the threat, the individual thing that's happening to them, that is causing them to believe that they could be losing their life. Now, that creates a lot of issues with regards to how the body responds. It responds with auditory exclusion. It responds with elevated heart rate. It responds with . . . high levels of blood pressure that if they were sustained, the person would probably black out and suffer a stroke. It has a tremendous impact on decision making, which leads to you know, a whole host of problems." Tr. 670, l. 19 – 671, l. 11.

He further testified that the stress a person experiences during a deadly force situation will cause the individual to have tunnel vision and impact the brain's ability to process the information it is receiving. The "brain starts to go into self-preservation mode." The individual starts "to think about too many things and they end up with basically what we call analysis paralysis. There's too many things going on. The stress won't let them calm down enough to actually think. And it interferes with . . . . their decision making functions." Tr. 671, l. 23 – 672, l. 20. He concluded, "The brain just isn't processing it as fast as the body's reacting." Tr. 673, ll. 6-7.

When questioned by the trial court, Ballard explained that both police officers and private citizens are human beings and, while trained differently, both will react "in a very similar manner." He asserted that "vocation doesn't matter" and the physiological effects that result from a deadly force situation are the same for the majority of individuals. Tr. 673, l. 24 – 675, l. 13.

The court and the assistant solicitor agreed that Ballard was qualified as an expert. However, the court found his testimony would confuse the jury. She concluded his testimony would not assist the jury in determining a fact at issue. Tr. 676, ll. 4-24.

Defense counsel argued Ballard's testimony was relevant as to how a person responds under the stress of a deadly force situation. He asserted, "The Defendant shot an unarmed man a substantial number of times. This testimony would help the jury understand how something like that could happen, because on one hand it might be perceived that this individual was making conscious and deliberate malicious choices. One the other hand, if he is under the stress of a deadly force situation and all these factors, the stress of the situation is affecting what he's observing, his decision making and how that's being processed in this short time period, and that would be helpful for the jury to understand what was going on at the time, and would explain possibly why this individual was moving forward and why he was continuing to fire on somebody that was unarmed." Tr. 677, l. 2 – 679, l. 19.

The court ultimately excluded the testimony. It found it would "be absolutely confusing to the jury." The court was also concerned Ballard would "be stepping into the state of mind of the Defendant and the victim in this case." Tr. 680, l. 16 – 681, l. 6.

Standard of Review

"The question of whether to admit or exclude testimony of an expert witness is within the discretion of the trial court. Absent a clear abuse of discretion amounting to an error of law, the trial court's ruling will not be disturbed on appeal." State v. Jarrell, 350 S.C. 90, 101, 564 S.E.2d 362, 369 (Ct. App. 2002) (quoting State v. Weaverling, 337 S.C. 460, 474, 523 S.E.2d 787, 794 (1999)).

Discussion

The trial court abused its discretion by excluding Ballard's expert testimony on firearms and use of force since his testimony was admissible pursuant to Rule 702, SCRE, and relevant to Appellant's self-defense case. Expert testimony is governed by Rule 702, SCRE, which provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 702, SCRE.

"Expert testimony may be used to help the jury to determine a fact in issue based on the expert's specialized knowledge, experience, or skill and is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge. Stated differently, expert evidence is required where a factual issue must be resolved with scientific, technical, or any other specialized knowledge." Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010) (emphasis added). In Watson, our Supreme Court provided a three prong test that a trial court must consider in executing its gatekeeping duties before allowing a jury to hear expert testimony. Id. at 446, 699 S.E.2d 169, 175. The Court asserted:

> [E]xpert testimony receives additional scrutiny relative to other evidentiary decisions. Specifically, in executing its gatekeeping duties, the trial court must make three key preliminary findings which are fundamental to Rule 702 before the jury may consider expert testimony. First, the trial court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury. Next, while the expert need not be a specialist in the particular branch of the field, the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter. Finally, the trial court must evaluate the substance of the testimony and determine whether it is reliable.

Id. at 446, 699 S.E.2d 169, 175 (emphasis added and internal citations omitted).

Ballard's testimony should have been admitted pursuant to Rule 702, SCRE. Both the trial court and the state agreed during trial that Ballard was properly qualified. There was also no concerns below that Ballard's testimony was unreliable. Moreover, the subject matter is clearly beyond the ordinary knowledge of the jury. Ballard's testimony would have assisted the jury in this self-defense case in understanding how stress during a deadly force situation can affect an individual's decision making process. Consequently, all three factors under Rule 702 were satisfied.

Based on the record, it appears the trial court excluded Ballard's testimony pursuant to Rule 403, SCRE. Rule 403 states, "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." Ballard's testimony was probative to explain, in part, how stress during a deadly force situation may affect an individual's decision making process. Unlike the trial court found, it was not confusing. His testimony was straightforward and could have been used by the jury to evaluate whether the state disproved self-defense beyond a reasonable doubt. Simply put, its probative value was not substantially outweighed by confusion of the issues.

Respectfully, this Court should hold the trial court abused its discretion by excluding Ballard's testimony, reverse Appellant's conviction, and remand for a new trial.

CONCLUSION

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

Respectfully Submitted,

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Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of May, 2024.