STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENWOOD COUNTY
Court of General Sessions
The Honorable Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2024-001039

THE STATE, Petitioner,

v.

MARK ANTHONY HAILEY, JR., Respondent.

PETITION FOR WRIT OF CERTIOARI

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STATEMENT OF THE ISSUE ON APPEAL

A jury charge is adequate if it conveys the substance of the applicable law. Hailey claimed he shot the victim after the victim pointed a gun at him. The trial court instructed the jury that a person need not retreat if doing so would increase the danger to himself. Did the court abuse its discretion by declining to also charge that one need not wait until an adversary is on "equal terms" to use deadly force?

STATEMENT OF THE CASE

A Greenwood County grand jury indicted Respondent Mark Hailey for murder, carjacking, and possession of a weapon during the commission of a violent crime. He proceeded to jury trial on September 11, 2020, before the Honorable Donald B. Hocker, circuit court judge. Hailey was convicted of murder and possession of a weapon during the commission of a violent crime and sentenced to concurrent terms of 35 and 5 years, respectively. The jury could not reach a verdict on the carjacking charge and a mistrial was declared on that charge. (App.938).

Hailey appealed his conviction. Without holding oral argument, the court of appeals reversed based on the trial court's refusal to give an "equal terms" charge. (App. 1038). The State's petition for rehearing was denied by order filed May 21, 2024. (App. 1054). This petition for writ of certiorari follows.

STATEMENT OF FACTS

In the early morning hours of March 6, 2019, Mark Hailey shot Marty George in the head with a .20 gauge shotgun from a distance of one to three feet, killing him. (App.339–40; 370). He then dumped George's body on the side of an isolated dirt road and drove George's car to Hailey's mother's house. The State's theory of the case was that Hailey was high on methamphetamine and killed George in a bout of drug-induced paranoia.

The fact that Hailey shot George was not contested. Hailey's mother testified Hailey arrived home around 3:00 a.m. and told her he shot someone. (App.169–70). He was crying and acting "strange." Hailey's mother called 911 and told the operator she believed Hailey was "on drugs." (App.171). A body camera video showed the responding officer's initial interactions with Hailey. (App.254; State's Exhibit #1). Hailey displayed bizarre behavior. When police arrived, Hailey was sitting on a couch, crying and shaking, rocking back and forth while reading his bible. He made statements referencing "three dots," "forces of nature," and random numbers. (State's Exhibits #1 and 2; App.256). He told the responding officer the "energy" was out of his mind, it "carried him," and he saw symbols. (State's Exhibit #2 at 5:00–6:00). He told the officer he hurt someone and said there was a force of nature he couldn't reckon with. (State's Exhibit #2 at 5:00–6:20). He told the officer that "what he heard" the day before "took [him] right over to that spot." (State's Exhibit #2 at 6:30). The responding officer believed Hailey was "under the influence of something." (App.255). Hailey's mother told officers that Hailey exhibited this type of behavior when he was high, and that he had been abusing

drugs for seven to nine years. (State's Exhibit #1 at 19:20). Hailey was extremely emotional, shouting "God have mercy on my soul" as officers placed him in the back of a police cruiser before taking him to the hospital. (App.568).

Hailey told officers he shot someone named Marty, and that it happened on Warner Road, a nearby dirt road. (App.267). Officers looked into Marty George's car and observed "brain matter and blood on the inside of the car." (App.279). They also saw a shotgun and BB pistol. (App.279; 302).

Officers searched Warner Road and discovered Marty George's body on the side of the road about five miles from Hailey's mother's house. (App.299). George was shot in the head, with an entry wound behind the right ear and an exit wound at the left eye. (App.292; 319). A forensic pathologist testified that, based on stippling around the wound, the shot was fired from one to three feet away from George's head. (App.333–40). It appeared George's body had been dragged to the ditch on the side of the road. (App.716–19; 601). A forensic toxicologist testified George had methamphetamine in his system at the time of his death. (App.624–64).

The State presented testimony from several witnesses who observed Hailey during the day of the shooting. Stella Burton knew Marty George. She testified George dropped off Hailey at her residence that afternoon. She had never met him before. (App.479). Hailey "walked right past" her into the apartment, which gave her an "uneasy" feeling. (App.481–82). She brought Hailey along to the home of her friend Joey Lawson, where she went to do laundry. (App.484). She observed

Hailey preparing drugs with a needle and can at Lawson's home. (App.485–86). She asked him not to inject drugs inside the house. (App.486). Later, she was alarmed by Hailey's statements that he "had a job to do." (App.486). Burton repeatedly called George and his girlfriend, Joni Kitchens, to come pick up Hailey. She remembered Hailey talking about the colors of the rainbow. (App.488). When George came to pick up Hailey, Burton observed George, Hailey, Lawson and Kitchens smoking methamphetamine together. (App.489). Burton testified she used methamphetamine with George in the past, and that he became "comical" and "docile" when he used, but never aggressive. (App.490). Burton testified Hailey's behavior throughout the day gave her an "eerie, uneasy feeling . . . like it just gave you chill bumps." (App.492).

Joey Lawson testified about his interaction with Hailey that day. He explained that Hailey seemed fairly normal at first, but his demeanor changed within 30–45 minutes and he began acting "strange." (App.514). Hailey went in and out of the bathroom several times and began "mumbling to himself" and reading his bible. (App.514). Hailey became paranoid, asking whether the others were "plotting against him." (App.515). Hailey had some sort of bag with him. (App.515). Lawson echoed Burton's testimony that George did not become aggressive when he used methamphetamine. (App.518).

George's girlfriend, Joni Kitchens, testified to the events of the day. She explained George went to pick up Hailey that afternoon, but she did not go along. (App.535). George came home around 6:00 p.m. without Hailey. They left around

10 p.m. to pick up a friend and then went to pick up Hailey from Lawson's home. (App.540). Kitchens had never met Hailey before. (App.536). When they arrived, Hailey did not want to leave but George convinced him to go. (App.541). The three of them went back to George and Kitchens' home. She testified Hailey began "acting crazy," going in and out of the bathroom, "spacing out," and talking to (and answering) himself. (App.543–45). Around 45 minutes later, George left to take Hailey home.

Kitchens received a phone call from George that left her feeling concerned. (App.551). She believed he made the call from his car. She became more concerned after George did not respond to her text messages. She learned the next morning that he had been killed. (App.551).

Hailey testified in his defense. He denied using methamphetamine on March 5. (App.802). He claimed he killed George in self-defense after George pointed the BB pistol at his face and accused him of stealing something from his bathroom. (App.808). Hailey was seated in the back passenger seat with his shotgun. He testified he had his shotgun with him because he had planned to pawn it earlier in the day. (App.799). Hailey claimed he "probably" loaded the shotgun when George turned down Warner Road and stopped the car. (App.809). He claimed this caused him to fear for his life and he was afraid "something bad was going to happen." (App.809). He admitted he loaded the shotgun before George allegedly pointed the gun at his face. (App.810). Hailey testified he shot George in self-defense when George turned his eyes away when he became distracted by his cell phone ringing.

(App.811–12). He claimed he was "defending himself" when he shot George. (App.812).

Hailey also offered expert testimony from Dr. Amanda Salas, who was qualified as an expert in "general psychiatry, forensic psychiatry, and addiction." (App.698). Salas evaluated Hailey two weeks after the shooting and testified Hailey experienced an "acute stress disorder" brought on by the event. (App.702). She described Hailey's behavior leading up to the incident as "weird," but testified she did not believe Hailey was intoxicated at the time. (App.704–15).

ARGUMENT

The trial court acted within its discretion when it declined to give Hailey's requested charge that one need not wait until he is on "equal terms" with an aggressor to act in self-defense. The court's instruction that "one need not retreat if doing so would increase the danger to himself" was responsive to Hailey's concern about the State's closing argument and adequately covered the applicable law.

The court of appeals erred by reversing Hailey's conviction based on the trial court's refusal to charge his requested language that one need not wait until an aggressor is on "equal terms" before acting in self-defense. The trial court acted within its discretion when it instead chose to charge the jury that one need not retreat if by doing so he would increase the danger to himself. The charge given was correct and adequately covered the law applicable to the facts of the case and arguments of counsel. Hailey was not prejudiced because the jury had the proper test to judge Hailey's non-meritorious self-defense claim. This Court should reverse and remand to the court of appeals for consideration of the remaining issues on appeal.

A. Standard of Review.

An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion. State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010). To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant. Id.

B. Discussion.

The trial court's charge was substantially correct and adequately covered the law. The court's decision not to give the language requested by Hailey was within his discretion, and Hailey was not prejudiced.

i. The charge given was substantially correct and adequately covered the law.

In reviewing jury charges for error, the appellate court considers the charge as a whole in light of the evidence and issues presented at trial. A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law. "A jury charge that is substantially correct and covers the law does not require reversal." State v. Mattison, 388 S.C. 469, 478, 697 S.E.2d 578, 583 (2010) (internal citations and quotation marks omitted). The substance of the law is what must be charged to the jury, not any particular verbiage. Id. Failure to give requested jury instructions is not prejudicial error where the instructions given afford the proper test for determining the issues. Id. If the trial judge refuses to give a specific charge, there is no error if the charge given sufficiently covers the substance of the request. Id.

The trial court's instructions correctly stated the elements of self-defense as laid out in State v. Goodson, 312 S.C. 278, 280, 440 S.E.2d 370, 372 (1994). The court in this case instructed the jury:

> Self-defense is a complete defense and, if it is established, you must find the defendant not guilty. The State has the 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 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 the evidence,

including the evidence of self-defense, then you must find the Defendant guilty.

The elements of self-defense are as follows and, again, the Defendant has no burden to prove self-defense but the burden is on the State to disprove self-defense beyond a reasonable doubt. And there are four elements. The first is without fault. First, the Defendant must be without fault in bringing on the difficulty. If the Defendant's conduct was the 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 or that the Defendant actually believed he was in imminent danger of death or serious bodily injury. The third element is reasonableness. If the Defendant was actually in imminent danger it must be shown that the circumstances would have 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 danger of death or serious bodily injury it must be shown that a reasonably prudent person of ordinary firmness and courage would have 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 case and the crime including the physical condition and characteristics of the Defendant and the deceased.

And the last element of self-defense is no other way to avoid the danger. 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. An individual [h]as no duty to retreat if by doing so the danger of being killed or suffering serious bodily injury would increase.

(App.919–21).

The court's charge correctly explained the applicable law. The instruction made perfectly clear that if Hailey's version of events was true, he would be entitled to acquittal because he was in apparent danger of imminent death or serious bodily injury and was not required to retreat. Given Hailey's straightforward testimony

that George pointed a gun at his face, and that he was "defending himself," the charge was adequate to explain the law of self-defense under the facts of this case. See State v. Marin, 415 S.C. 475, 481, 783 S.E.2d 808, 812 (2016) (finding no error in refusal to give requested charge, even though it was a correct statement of law, where correct "rule was sufficiently encompassed in the jury charge provided by the trial court"); see also Mattison, 388 S.C. at 484, 697 S.E.2d at 586 (affirming trial court's refusal to give instruction encompassing correct statement of law where charge as a whole "sufficiently covered the substance" of applicable legal principles) (citing State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998) and State v. Austin, 299 S.C. 456, 458–59, 385 S.E.2d 830, 831–32 (1989) (explaining charge as given was "sufficiently clear")).

The court of appeals held the trial court abused its discretion by not also including an "equal terms" charge. See State v. Rash, 182 S.C. 42, 50, 188 S.E. 435, 438) (1936) (quoting approvingly from charge explaining the duty to retreat which instructed the jury that one may act in self-defense to prevent his adversary from "getting the drop on him" and finding failure to give additional requested charge was not prejudicial); State v. Hendrix, 270 S.C. 653, 659–61, 244 S.E.2d 503, 506–07 (1978) (in context of directed verdict, explaining "[o]nce the appellant'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"). The court of appeals relied on State v. Starnes, 340 S.C. 312, 319, 531 S.E.2d 907, 911 (2000). There, this court reversed because the trial court refused to provide the jury with more specific instructions

regarding self-defense beyond the basic self-defense charge, and specifically did not include any "equal terms" language. But it is important to note that the Starnes trial court refused to give any supplemental instructions beyond the standard self-defense charge, which merely lays out the four elements of self-defense. The same is true of State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989), State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997), and State v. Day, 341 S.C. 410, 535 S.E.2d 431 (2000), where the trial court treated the Davis charge as the "exclusive self-defense charge" and refused to supplement his instructions beyond that basic instruction. Fuller, 297 S.C. at 443, 377 S.E.2d at 330 (citing State v. Davis, 282 S.C. 45, 317 S.E.2d 452 (1984)).

That is not the case here. The trial court supplemented the standard charge following the State's closing argument in response to Hailey's concern that the State made a "duty to retreat" argument, explaining to the jury that an individual need not retreat from an adversary if doing so would increase the danger to himself. As will be discussed below, this charge was directly responsive to Hailey's concerns and the State's closing argument. The court did not treat the Davis charge as the "exclusive self-defense charge," even though the standard charge would have been sufficient to explain the law of self-defense based on the facts of this case.

Because the substance of the law was correctly charged, particularly in the instruction that a person need not retreat if doing so would increase the danger to himself, this is not a case where the court "completely omitted applicable principles of self-defense law." Marin, 415 S.C. at 483, 783 S.E.2d at 813. Because the charge

given was substantially correct and adequately covered the law, the court's refusal to give the "equal terms" charge does not require reversal. See Marin, 415 S.C. at 483, 783 S.E.2d at 813 ("While the 'continuing to shoot' charge may have been appropriate, its absence does not mandate reversal.").

ii. The charge given was responsive to Hailey's concern about the State's closing argument, and the court's decision about which language to charge was within its discretion.

Contrary to Hailey's argument on appeal, the "equal terms" charge did not reflect a central issue in the case. Defense counsel apparently did not believe so because he did not request the charge at the charge conference prior to closing arguments. (App.851–52; 954–61). Hailey only requested the "equal terms" charge after the State argued in closing that, even under his version of the facts, Hailey could have retreated rather than resorting to deadly force. (R.p.860). Following the State's closing argument, Hailey requested the "equal terms" charge, along with an instruction that a person has "no duty to retreat if doing so would increase the danger to himself." Defense counsel explicitly stated he was requesting the additional instructions because the State argued that Hailey had a duty to retreat. He argued, "I never thought in my mind that the State would ever argue that when you are two miles down a deserted road that you have some ability to retreat from that situation . . . ." (App.879).

The trial court's instruction that an "individual [h]as no duty to retreat if by doing so the danger of being killed or suffering serious bodily injury would increase" was directly responsive to Hailey's concern about the State's closing argument.

Because Hailey explicitly requested additional instructions in response to the State's argument that Hailey could have retreated, the trial court understandably chose the jury charge most directly related to that point. His instruction directly and adequately addressed defense counsel's stated purpose for requesting a supplemental charge in addition to the agreed-upon self-defense charge discussed during the charge conference. This decision was within the trial court's discretion. See Mattison, 388 S.C. at 479, 697 S.E.2d at 584 ("An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion.").

iii. Hailey was not prejudiced.

As discussed above, the charge given was sufficient to explain the applicable law to the jury. But beyond that, the charge did not change the outcome of trial because Hailey's story was simply unbelievable and rightly rejected by the jury. See Marin, 415 S.C. at 482, 783 S.E.2d at 812 (explaining that to "warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant"). The jury decided this case on the overwhelming evidence presented, and it is not reasonable to believe the jury would have acquitted Hailey if only they had been given the "equal terms" charge. See State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (explaining error is harmless when it "could not reasonably have affected the result of the trial").

Hailey's conspicuously brief description of the shooting on direct examination simply did not make sense. Hailey testified he was sitting in the rear passenger seat and George was in the driver's seat. George stopped the car, turned around,

and pointed a BB gun at Hailey's face. George became distracted by his cell phone and "turned." (App.811). On cross-examination, Hailey testified the cell phone was in George's lap, and that George lowered the gun when he became distracted. (App.831). He then "brought [the gun] back up." (App.831; 834). Hailey claimed when George started to raise his gun again, he shot him. (App.846). Hailey admitted he had already loaded the shotgun before George ever pointed the BB gun at him. (App.831).

The glaring inconsistency in Hailey's story is the location of the gunshot entry and exit wound which showed Hailey shot George in the back right area of his head, behind the ear, with an exit wound at the left eye. Even if George turned his head to look at the cell phone in his lap as Hailey claimed, the trajectory still would not line up. George would have had to turn his head all the way around to face forward (if not slightly to the left) in order for Hailey to shoot him behind the right ear with an exit wound at the left eye. (App.866). It would not make sense for George to turn completely around (with his head pointed towards the driver's side window) while threatening someone with a gun, and continue looking in the opposite direction as he "brought [the gun] back up." Hailey testified George knew Hailey was carrying a shotgun. (App.822). Further, Hailey never testified George turned all the way around. He testified George became distracted by the cell phone that was in his lap. (App.831). If he shot George during the scenario he described, he would have had to shoot him in the face. Hailey's story was inconsistent with the physical evidence.

There was also strong circumstantial evidence of guilt, such as Hailey's bizarre behavior before and after the shooting. Several witnesses testified to Hailey's strange, chilling behavior before the incident. (App.481–82, 492, 543–45). Equally damning were the police body camera videos wherein Hailey does not claim self-defense, but instead expresses intense guilt and gives incriminating statements such as the statement that a noise "led" him to the spot where he shot George. (State's Exhibit #2 at 6:30 and 11:00). Hailey's mother and aunt described his paranoid behavior and persistent belief that people were out to get him. (State's Exhibit #2 at 21:00). Hailey's mother attributed the behavior to drug use. (State's Exhibit #2 at 23:50).

Hailey's story was contrived for trial. The unbelievable story, along with the other discrediting evidence presented as to Hailey's bizarre behavior and drug use and the physical evidence showing his testimony was a lie, caused him to be convicted. The court's decision to give the "no duty to retreat" charge rather than the "equal terms" charge had no effect on the outcome of the case. This Court should reverse the court of appeals and remand this case for consideration of the remaining issues on appeal.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that this Court should grant the petition for certiorari and reverse the court of appeals.

Respectfully submitted,

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June 26, 2024

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APPEAL FROM GREENWOOD COUNTY

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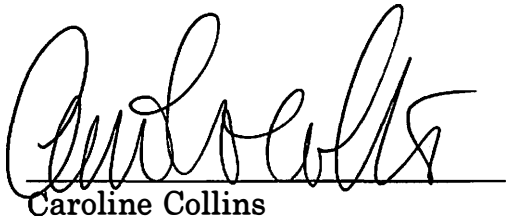
MARK ANTHONY HAILEY, JR., Respondent.

PROOF OF SERVICE

I, Caroline Collins, certify that I have served the within Petition for Writ of Certiorari and Appendix on Lara M. Caudy, Esquire, counsel of record for Respondent, by electronic mail to the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served.

This 26th day of June, 2024.



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Message

Good Afternoon Ms. Caudy,

Attached please find the Petition for Writ of Certiorari to the Court of Appeals and Appendix in The State v. Mark Anthony Hailey, Jr. (2024-001039). This will be submitted to the South Carolina Supreme Court and Court of Appeals via the AIS OneDrive System.

If you will, please confirm receipt.

Thank you,

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