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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Honorable Clifton Newman, Circuit Court Judge
Appellate Case No. 2022-001603

THE STATE,

Respondent,

vs.

TIMOTHY MATTHEW VOEGELI,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I.

"Is the statute criminalizing domestic violence in the second degree unconstitutionally overbroad in violation of Appellant's right to privacy of the Fourteenth Amendment to the United States Constitution because it does not provide a time period nor definition for cohabitation specifically 'male and female who are cohabiting or formerly have cohabited,' therefore improper labeling former relationships as falling within the definitions of this act?"

II.

"In violation of Appellant's right to due process of law, did the trial judge err in failing to instruct the jury regarding self-defense where evidence was presented of self-defense, the jury required instructions regarding how to analyze such evidence, and instructions were necessary to ensure the burden of proof remained on the state in light of the presentation of self-defense evidence?"

COUNTER-STATEMENT OF ISSUES ON APPEAL

I.

To the extent Appellant is contending South Carolina's domestic violence laws are violative of his constitutional right to privacy, was that particular issue properly preserved for appellate review when it was neither raised to nor ruled upon by the trial judge? Furthermore, to the extent Appellant is contending those laws are unconstitutionally vague or overbroad, did the trial judge somehow err by rejecting that contention when our state's domestic violence laws are neither vague nor overbroad in a constitutional sense?

II.

Did the trial judge somehow abuse his discretion by declining to instruct the jury on self-defense when the evidence and testimony presented during trial did not establish Appellant caused physical harm or injury to a household member while acting in self-defense and, instead, supported a conclusion Appellant either unlawfully injured his victim without justification or did not cause any physical harm or injury to her at all such that a jury instruction on self-defense was neither necessary nor warranted under the circumstances involved?

STATEMENT OF THE CASE

In August of 2020, Appellant Timothy Matthew Voegeli was arrested following an investigation into a report he assaulted a woman inside his home. In December of 2020, the Richland County Grand Jury indicted Appellant for second-degree domestic violence. On October 31, 2022, a jury trial was commenced in the Richland County Court of General Sessions with the Honorable Clifton Newman, circuit court judge, presiding. At the conclusion of the two-day trial, the jury convicted Appellant of the lesser-included offense of third-degree domestic violence. Following the verdict, the trial judge sentenced Appellant to a thirty-day term of imprisonment. Appellant then timely filed a notice of appeal.

STATEMENT OF FACTS

A little after midnight on August 24, 2020, Officer Braylyn Salmond of the Columbia Police Department was dispatched to an address on Beaufort Street in Columbia in response to a report of a domestic incident that had occurred earlier that night.[1] (Tr. pp. 47-49; p. 109; State's Ex. # 1 (911 Call Recording)). Upon arriving at the scene, Officer Salmond made contact with Erika Hall ("Victim"), the complainant, outside the home of a neighbor who had allowed her to use his phone to call the police. (Tr. pp. 49-50; p. 103; p. 105). At that time, Victim was disheveled, seemed "very upset," and was holding a blood-soaked rag to her face. (Tr. p. 50; p. 63; State's Ex. # 3 (Photograph)). In addition to that, Victim's nose was bleeding, and she had what appeared to be fresh injuries to her face—including a scratch on her cheek and a spot of discoloration underneath her eye—that led the officer to believe she had recently been in a "tussle" or "struggle" with someone. (Tr. p. 51; p. 53; pp. 58-59; p. 88; State's Ex. # 2 (Photograph)). Officer Salmond proceeded to speak with Victim to find out what was going on, and Victim reported she had been struck in the face by Appellant, her boyfriend at the time, after the two had been drinking together that night.[2] [3] (Tr. p. 53; p. 88; p. 93; p. 98; p. 105; p. 121; p. 126). Officer Salmond then attempted to make contact with Appellant at his apartment, but Appellant was gone by that point. (Tr. pp. 53-54; p. 61; p. 98).

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[1] By the time of trial, Officer Salmond was working as a deputy with the Richland County Sheriff's Office. (Tr. p. 47).

[2] Earlier, Victim had provided a consistent account during the 911 call, advising the dispatcher her boyfriend hit her in the face. (State's Ex. # 1 (911 Call Recording)).

[3] At the time of the incident, Victim was sixty-five inches tall and weighed roughly one-hundred-eighty pounds. (Tr. p. 96). Meanwhile, Appellant was four inches taller than Victim and outweighed her by approximately *eighty* pounds. (Tr. p. 97).

As the investigation into the incident continued, Appellant—once he could be located—was arrested for domestic violence on the following day. (Tr. p. 54; p. 61; p. 123). Subsequent to that, Appellant was indicted for second-degree domestic violence,[4] and he elected to proceed forward to trial. (Tr. p. 6; Indictment).

During trial, Victim recounted the details of the incident and identified Appellant as the person who punched her in the face. (Tr. pp. 92-126). Conversely, Appellant testified on his own behalf, denied ever hitting Victim during the incident, and claimed she actually assaulted him. (Tr. pp. 142-163).

After all the testimony and evidence had been presented, the solicitor and defense counsel presented their closing arguments, and the trial judge instructed the jury on the applicable law. (Tr. pp. 176-210). The case was then submitted to the jury. (Tr. p. 212). Ultimately, after roughly ninety minutes of deliberations, the jury unanimously convicted Appellant of the lesser-included offense of third-degree domestic violence.[5] (Tr. p. 212; p. 215).

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[4] Appellant was charged with second-degree domestic violence because Victim reported he forcibly took her phone from her after punching her in the face. (Tr. p. 100; p. 110).

[5] The trial judge also instructed the jury on the lesser-included offense of third-degree assault and battery. (Tr. pp. 206-207).

ARGUMENT

I.

To the extent Appellant is contending South Carolina's domestic violence laws are violative of his constitutional right to privacy, that particular issue was not properly preserved for appellate review and cannot appropriately be addressed for the first time on appeal because it was neither raised to nor ruled upon by the trial judge. Furthermore, to the extent Appellant is contending those laws are unconstitutionally vague or overbroad, the trial judge correctly rejected that contention because our state's domestic violence laws are neither vague nor overbroad in a constitutional sense.

Relevant Facts

Toward the outset of Appellant's trial for second-degree domestic violence, defense counsel raised a constitutional challenge to South Carolina's domestic violence statutes. (Tr. p. 33). More specifically, defense counsel argued the statutes should be struck down as unconstitutional because the term "cohabit" employed as part of the definition of "household member" for domestic violence purposes had purportedly "never been defined clearly anywhere" and was supposedly too "overbroad and vague."[6] (Tr. pp. 33-34). In rebuttal, the solicitor

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[6] As part of her argument, defense counsel noted the only statutory definition concerning cohabitation she could find was in an entirely different part of the South Carolina Code of Laws. (Tr. p. 33). Based on her representations, it appears defense counsel was referring to a statute related to alimony payments and the effect of remarriage on such payments. S.C. Code Ann. § 20-3-150. In that particular statute, the legislature mandated "*continued* cohabitation" of a supported spouse with another would result in the cessation of alimony payments by the supporting spouse. Id. (emphasis added). And, "[f]or purposes of th[at] section," the legislature defined "continued cohabitation" as meaning "the supported spouse resides with another person in a romantic relationship for a period of ninety or more consecutive days." Id. Notably, the existence of that particular statute hurt defense counsel's argument rather than helped because it demonstrated the legislature: (1) considered cohabitation to be something distinct from *continued* cohabitation; and (2) was fully aware of how to establish a minimum period of time in the context of cohabitation when it intended for such a requisite time period to apply. See Hodges v. Rainey, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000) ("The canon of construction 'expressio unius est exclusio alterius' or 'inclusio unius est exclusio alterius' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.' "); cf. Nelson v. Ozmint, 390 S.C. 432, 436, 702 S.E.2d 369, 371 (2010) (finding the legislature's inclusion of language allowing for early release in one statute but omitting it in another evidenced the

argued the term “cohabit”—which has a recognized dictionary definition and had previously been defined by the South Carolina Supreme Court in a similar context—simply meant living together in an intimate relationship. (Tr. pp. 34-35).

Following that, defense counsel shifted her argument to the specific facts of Appellant’s case and claimed those facts allegedly would not support a conclusion Appellant and Victim had cohabited with one another since Victim purportedly had only spent a night or several nights in a row with him.[7] (Tr. pp. 35-36). The solicitor responded defense counsel’s contention in that regard was one going to the strength of the State’s evidence as opposed to the constitutionality of the domestic violence statutes.[8] (Tr. p. 36).

After considering the arguments of counsel, the trial judge declined to strike down South Carolina’s domestic violence laws as unconstitutional. (Tr. pp. 36-37). In declining to do so, the trial judge noted statutory terms are frequently not explicitly defined when they have a plain and ordinary meaning that can be readily understood. (Tr. pp. 36-37). Finding that to be true of the

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legislature’s intent for a defendant convicted of the offense delineated in the statute not containing the early release language to be ineligible for early release).

[7] Contrary to defense counsel’s claim, Victim later testified she lived continuously with Appellant—whom she indicated had been her boyfriend—from January of 2019 until June or July of 2019. (Tr. p. 95; p. 98; p. 103; p. 115). Victim further testified her relationship with Appellant was an intimate one, she had a key to his apartment, and she kept clothing there, including at the time of the incident. (Tr. p. 95; p. 113; p. 126). In addition to that, Appellant himself confirmed during trial he had been involved in a sexual relationship with Victim and dated her for approximately two years. (Tr. p. 142; p. 144). Moreover, although he insisted Victim never actually lived with him, Appellant admitted she stayed with him for approximately two weeks at one point and then was staying with him for four-to-five-day-in-a-row periods after that. (Tr. p. 153).

[8] Consistent with that contention, the solicitor later argued to the jury: “If you don’t believe that they lived together, then assault and battery third degree is going to be the other thing that [the trial judge] charges you, which means that the household member is[n’t] there.” (Tr. p. 180).

term "cohabit," the trial judge concluded there were no constitutional problems with the statutes at issue in Appellant's case. (Tr. pp. 36-37).

As the trial continued on, defense counsel renewed her contention South Carolina's domestic violence laws were unconstitutionally vague and overbroad at the conclusion of both the State's case and the defense's case.[9] (Tr. pp. 129-130; pp. 170-171). However, the trial judge rejected that contention each time it was raised. (Tr. p. 130; p. 171).

Standard of Review

In reviewing a challenge to the constitutionality of a statute, an appellate court has a "very limited" scope of review. State v. Harrison, 402 S.C. 288, 292, 741 S.E.2d 727, 729 (2013); see State v. Lewis, 434 S.C. 158, 166, 863 S.E.2d 1, 5 (2021) ("This Court's review of whether a statute is constitutional is limited."). All statutes are presumed to be constitutional and, if possible, will be construed in such a way to render them valid. State v. Neuman, 384 S.C. 395, 402, 683 S.E.2d 268, 271 (2009); see Powell v. Hargrove, 136 S.C. 345, 350, 134 S.E. 380, 382 (1926) ("[An appellate court] must sustain the validity of the legislative enactment, if it is possible to do so by any reasonable construction of the Constitution, even though the Court might differ with the Legislature as to the propriety of the legislation."). "Constitutional constructions of statutes are not only judicially preferred, they are mandated; a possible constitutional construction must prevail over an unconstitutional interpretation." Henderson v. Evans, 268 S.C. 127, 132, 232 S.E.2d 331, 333-334 (1997). Importantly, a statute "will not be

[9] In addition to renewing her constitutional challenge, defense counsel also moved for a directed verdict at the conclusion of the State's case. (Tr. pp. 130-131). However, in doing so, she conceded her motion was a "perfunctory" one merely being made "for the record." (Tr. pp. 130-131). In rebuttal, the solicitor argued the State's evidence satisfied all the elements of the indicted offense, and defense counsel indicated she had nothing in response to that. (Tr. pp. 131-132). Upon considering the matter, the trial judge declined to grant a directed verdict in Appellant's case. (Tr. p. 136).

declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt[,]" and the party challenging the validity of the statute has the heavy burden of proving its unconstitutionality. In re Care & Treatment of Lasure, 379 S.C. 144, 147, 666 S.E.2d 228, 229 (2008); see State v. Jones, 344 S.C. 48, 58, 543 S.E.2d 541, 546 (2001) ("Appellants have the burden of proving the statute unconstitutional.").

Analysis

While it has long constituted a criminal offense in South Carolina for a person to unlawfully injure or offer or attempt to injure any other person, the General Assembly first enacted targeted domestic violence laws roughly *four decades ago* to address the significant societal problem of acts of violence involving intimate partners.[10] Act No. 484, 1984 S.C. Acts & Joint Resolutions; see Doe v. State, 421 S.C. 490, 505, 808 S.E.2d 807, 815 (2017) ("[T]he overall legislative purpose is to protect victims from domestic violence that occurs within the home and between members of the home."); see also S.C. Code Ann. § 16-3-600 (setting out South Carolina's statutory assault and battery crimes); State v. Small, 307 S.C. 92, 93, 413 S.E.2d 870, 871 (Ct. App. 1992) ("Simple assault and battery is an unlawful act of violent injury to another person unaccompanied by any circumstance of aggravation."). Pursuant to the current version of our state's domestic violence laws, it is unlawful for a person to "cause physical harm or injury" to a household member or "offer or attempt" to do so "with apparent present ability under circumstances reasonably creating fear of imminent peril." S.C. Code Ann. § 16-25-20(A). And, for domestic violence purposes, a household member is statutorily defined as: (1) "a spouse"; (2) "a former spouse"; (3) "persons who have a child in common"; and (4) "a male

[10] At their inception, those laws were applicable in a criminal context to "persons cohabiting or formerly cohabiting." Doe v. State, 421 S.C. 490, 499 n. 7, 808 S.E.2d 807 n. 7 (2017).

and female who *are cohabiting or formerly have cohabited*."[11] S.C. Code Ann. § 16-25-10(3) (emphasis added).

In the case sub judice, Appellant—while focusing exclusively on the supposedly problematic nature of the "cohabiting" portion of the statutory definition of "household member" for domestic violence purposes—contends South Carolina's statute criminalizing second-degree domestic violence is unconstitutionally overbroad and somehow violative of his due process right to privacy. As support for that contention, Appellant maintains the statute is unconstitutional to the point of being totally "unenforceable" because it applies to couples who are cohabiting or have formerly cohabited but does not set out a specific length of time for which a couple must live together before their relationship can be statutorily classified as cohabitation.[12] For multiple reasons, Appellant's appellate arguments should and must be rejected.

Initially, to the extent Appellant's current appellate challenge to the constitutionality of our state's domestic violence laws is predicated on an assertion that his constitutional right to privacy was violated, that issue was not properly preserved for appellate review because it was

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[11] Notably, although Appellant now appears to be contending South Carolina's "household member" definition is too broad in scope, it is narrower in scope than the scope of many other states' domestic violence laws, which frequently apply to people who are in dating relationships or who simply reside together. People v. Disher, 224 P.3d 254, 257 (Colo. 2010).

[12] Due to its apparent substance, Appellant's challenge to the domestic violence laws appears to be one based on a disagreement with the scope of the laws' applicability as opposed to one truly based on an actual claim of constitutional vagueness or overbreadth, and, thus, it is raising an attack to something falling exclusively within the policy-making function and authority of the legislature. See ArrowPointe Fed. Credit Union v. Bailey, 438 S.C. 573, 580, 884 S.E.2d 506, 509 (2023) (instructing appellate courts "do not sit as a superlegislature to second-guess the General Assembly's decisions"); cf. State v. Leopard, 349 S.C. 467, 473, 563 S.E.2d 342, 345 (Ct. App. 2002) ("If it is desirable public policy to limit the class [to which the domestic violence statutes apply] to those physically residing in the household, that public policy must emanate from the legislature.").

neither raised to nor ruled upon by the trial judge. See State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004) (explaining an issue—in order to be properly preserved for appellate review—must have been: (1) raised to and ruled upon by the circuit court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the circuit court with sufficient specificity); see also In re Care and Treatment of Corley, 365 S.C. 252, 258, 616 S.E.2d 441, 444 (Ct. App. 2005) ("Constitutional issues, like most others, must be raised to and ruled upon by the trial court to be preserved for appeal."). Instead, during trial, defense counsel challenged the domestic violence statutes' constitutionality *solely* on vagueness and overbreadth grounds without once mentioning "privacy" or "due process" at any point. See State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial."). And, as would be expected under such circumstances, the trial judge obviously did not rule upon any privacy-based issues related to the domestic violence statutes since none were actually raised to him. See State v. Gee, 262 S.C. 373, 379, 204 S.E.2d 727, 729 (1974) ("Only matter that has been ruled on below can be reviewed[.]"). As a result, Appellant's newly-conceived issue concerning a supposed violation of his constitutional right to privacy was patently not properly preserved for appellate review and cannot appropriately be considered or addressed for the first time on appeal. See State v. Head, 330 S.C. 79, 87, 498 S.E.2d 389, 393 (Ct. App. 1997) (instructing an appellate court "cannot address unpreserved errors"); see also State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) (instructing a defendant cannot raise one argument in support of an issue at trial and then raise a different argument in support of that issue to the appellate court); cf. In re Care & Treatment of McCracken, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001) (declining to address a constitutional challenge to a legislative act that was not sufficiently preserved for appellate review based on the "firm policy to decline to rule on

constitutional issues unless such a ruling is required"); State v. Baker, 390 S.C. 56, 65, 700 S.E.2d 440, 444 (Ct. App. 2010) ("Baker cannot now add a constitutional claim on appeal because he cannot raise one ground to the trial court and a different ground on appeal."); State v. Charron, 351 S.C. 319, 328, 569 S.E.2d 388, 393 (Ct. App. 2002) (finding allegations of due process and equal protection violations were not preserved for appellate review when there was no indication those issues were raised to the trial judge).

Likewise, to the extent Appellant's current constitutional challenge to South Carolina's domestic violence statutes is predicated on an assertion those laws are unconstitutionally vague[13] or overbroad due to the absence of a precise definition of the statutory term "cohabit," his position in that regard was and is fundamentally incorrect. That is true because the statutes at issue were and are neither unconstitutionally vague nor unconstitutionally overbroad when the proper analyses are conducted.

As to the correct analysis when a constitutional vagueness challenge is raised, a penal statute defining a criminal offense must—to withstand such a challenge—simply be sufficiently specific such that: (1) ordinary people have fair notice as to what conduct is prohibited by it; and (2) its language does not encourage arbitrary or discriminatory enforcement without any fixed standards. Kolender v. Lawson, 461 U.S. 352, 357 (1983); see Connally v. General Const. Co., 269 U.S. 385, 393 (1926) ("The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue."). Critically, all that is constitutionally required of a statute is it must provide a "sufficient warning" that would allow people to "conduct themselves so as to avoid that which is forbidden." Rose v. Locke, 423 U.S. 48, 50 (1975); see Curtis v. State, 345 S.C. 557, 572, 549

[13] Although not completely clear, it appears Appellant may have abandoned his vagueness challenge on appeal. (App. Br. pp. 4-12).

S.E.2d 591, 599 (2001) ("[A]ll the Constitution requires is that the language convey sufficiently definite warnings as to the proscribed conduct when measured by common understanding and practices."). So long as a person of common intelligence would not have to guess at what is prohibited by its language, the statute will not be deemed unconstitutionally vague. See State v. Green, 397 S.C. 268, 280, 724 S.E.2d 664, 670 (2012) (recognizing all the terms of penal statute do not have to be expressly defined in order to survive a vagueness challenge to the constitutionality of the statute so long as "a person of common intelligence would not have to guess at what conduct is prohibited by the statute"); see also Colten v. Kentucky, 407 U.S. 104, 110 (1972) ("The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited.").

Similarly, to withstand a constitutional overbreadth challenge, a statute must not prohibit a "substantial" amount of *constitutionally-protected* speech or conduct. United States v. Williams, 553 U.S. 285, 292 (2008); see Coates v. City of Cincinnati, 402 U.S. 611, 616 (1971) (finding an ordinance to be unconstitutionally overbroad where it made "a crime out of what under the Constitution cannot be a crime" and was "aimed directly at activity protected by the Constitution"); see also State v. Short, 483 So. 2d 10, 11 (Fla. Dist. Ct. App. 1985) ("[A]lthough lawyers and courts frequently interchange the terms 'vague' and 'overbroad,' the doctrines of vagueness and overbreadth are separate and distinct."). The overbreadth doctrine is "predicated on the sensitive nature of protected expression: persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression." New York v. Ferber, 458 U.S. 747, 768

(1982) (citation and internal quotations omitted). Therefore, the overbreadth doctrine is *only* applicable when constitutionally-protected speech or conduct is involved. Schall v. Martin, 467 U.S. 253, 268 n. 18 (1984). Pursuant to it, a court will invalidate a statute "only when the terms are so broad that they punish a substantial amount of protected free speech in relation to the statute's otherwise plainly legitimate sweep—until and unless a limiting construction or partial invalidation narrows it so as to remove the threat or deterrence to constitutionally protected expression." In re Amir X.S., 371 S.C. 380, 385, 639 S.E.2d 144, 146-147 (2006). Furthermore, since the invalidation of a statute based on the overbreadth doctrine is "strong medicine," a court will only employ the doctrine hesitantly and as a last resort. Ferber, 458 U.S. at 769 (citation and internal quotations omitted).

With those principles in mind, South Carolina's domestic statutes were and are not unconstitutionally vague because their language: (1) is wholly sufficient to provide ordinary people with fair notice as to what conduct is prohibited by them; and (2) does not in any way encourage arbitrary or discriminatory enforcement without any fixed standards. Kolender, 461 U.S. at 357. Demonstrating that fact, no reasonable person would or could have any legitimate doubts about the unlawfulness of causing or attempting to cause physical harm or injury to a household member, which is *precisely* the conduct prohibited by our state's domestic violence statutes. S.C. Code Ann. § 16-25-20(A); see State v. Workman, 443 S.C. 369, 374, 905 S.E.2d 119, 121 (2024) ("The predicate act for all four degrees of DV is set forth in subsection 16-25-20(A)[.]"); cf. State v. Kameenui, 753 P.2d 1250, 1252 (Haw. 1988) ("Persons of ordinary intelligence would have a reasonable opportunity to know that causing physical injury by punching someone in the face or shoving them so that they fall against a wall would constitute physical abuse."). Beyond that, the definition of "household member" for purposes of our

domestic violence laws—including the portion of that definition concerning individuals "who are cohabiting or formerly have cohabited"—is sufficiently clear to leave no doubt as to its scope since it employs terms with well-recognized and easily-understood meanings. See Doe, 421 S.C. at 504, 808 S.E.2d at 814 (interpreting the "cohabiting" language of the "household member" definition as being applicable to couples "who live together or have lived together"); E.D.M. v. T.A.M., 307 S.C. 471, 475, 415 S.E.2d 812, 815 (1992) (concluding "evidence of living together in an intimate relationship supports a finding of cohabitation"); Boozer v. Boozer, 242 S.C. 292, 296, 130 S.E.2d 903, 905 (1963) (recognizing a couple can be cohabiting even when more than one domicile is being maintained); Black's Law Dictionary 327 (11th ed. 2019) (defining "cohabitation" as "[t]he fact, state, condition, or practice of living together, esp. as partners in life, usu. with the suggestion of sexual relations"); Collins English Dictionary 400 (13th ed. 2018) (defining "cohabit" as "to live together in a conjugal relationship, esp without being married"); New Oxford American Dictionary 337 (3rd ed. 2010) (defining "cohabit" as "live together and have a sexual relationship without being married"); see also Lewis, 434 S.C. at 167, 863 S.E.2d at 6 ("Simply because a statute uses undefined terms or could have been drafted more precisely does not render it unconstitutionally vague."); State v. Bridgers, 329 S.C. 11, 14, 495 S.E.2d 196, 197-198 (1997) ("The General Assembly is presumed to be aware of the common law, . . . and where a statute uses a term that has a well-recognized meaning in the law, the presumption is that the General Assembly intended to use the term in that sense." (citations omitted)); cf. State v. Salt, 347 P.3d 414, 425 (Utah Ct. App. 2024) (rejecting a constitutional vagueness challenge because the challenged legislation's definition of "cohabitant" as—amongst other things—an individual who resides or has resided in the same residence as the other party was sufficient to provide fair notice to a person of ordinary intelligence). Under such

circumstances, the trial judge prudently and correctly rejected Appellant's meritless vagueness challenge to our state's domestic violence laws.[14] Cf. State v. Michau, 355 S.C. 73, 78, 583 S.E.2d 756, 758-759 (2003) (rejecting a constitutional challenge to a statute because the phrase "endangering the morals or health" was not too vague for a person of ordinary intelligence to understand what conduct was prohibited by it).

Meanwhile, South Carolina's domestic statutes were and are likewise not unconstitutionally overbroad because they do not prohibit *any* constitutionally-protected speech or conduct, let alone a substantial amount of it. Williams, 553 U.S. at 292. Instead, those laws purely proscribe causing or attempting to cause physical harm or injury to a household member, which is *not* speech or conduct entitled to any constitutional protections at all. See United States v. Alvarez, 567 U.S. 709, 717 (2012) (recognizing "true threats" fall within the category of speech that can constitutionally be subjected to content-based restrictions). Under such circumstances, the trial judge prudently and correctly rejected Appellant's fundamentally-misguided overbreadth challenge to our state's domestic violence laws. Cf. Salt, 347 P.3d at 424 ("The Cohabitant Abuse Act does not penalize a person for choosing to reside with another person, as Salt claims, nor does it inhibit any protected form of expression. Instead, the act only prohibits criminal conduct against a cohabitant that involves violence or physical harm or threat of violence or physical harm. Violence and threats of violence against cohabitants are not the sort of form of expression that the First Amendment right of association is meant to protect from

[14] Moreover, the domestic violence laws were clearly applicable to Appellant's case based on the testimony and evidence presented establishing Appellant punched his live-in—or former live-in—girlfriend in the face, and, thus, Appellant did not have proper standing to raise his vagueness challenge. See S.C. Dep't of Soc. Servs. v. Michelle G., 407 S.C. 499, 506, 757 S.E.2d 388, 392 (2014) (explaining a party challenging a statute as vague must demonstrate it "is vague *as applied to his own conduct*, regardless of its potentially vague application to others"); Curtis, 345 S.C. at 572, 549 S.E.2d at 598 ("One to whose conduct the law clearly applies does not have standing to challenge it for vagueness.").

government intrusion; indeed, such conduct is universally criminalized. Rather, the Cohabitant Abuse Act is designed to promote the value of the relationships the act encompasses by discouraging physical violence in such relationships. Because the act does not constrain any speech or conduct protected by the First Amendment, the fact that its broad definition of cohabitant may theoretically bring within its reach such attenuated relationships as, for example, former roommates, may raise questions of policy without necessarily implicating constitutional overbreadth. This is especially true in a case such as this one, where Salt and J.G. had lived together for a substantial time and the violence stemmed from their prior intimate relationship. We therefore conclude that Salt's claim of overbreadth fails." (citations, brackets, and internal quotations omitted)).

For all those reasons, Appellant did not and could not meet his heavy burden of establishing South Carolina's domestic violence laws—which are profoundly important for the health and welfare of our state's citizens—were constitutionally repugnant beyond a reasonable doubt as required for them to deemed unconstitutional, and, accordingly, the trial judge correctly declined to strike down those laws in Appellant's case. See State v. Ross, 185 S.C. 472, 477, 194 S.E. 439, 441 (1937) ("A Court should not declare a statute unconstitutional unless its invalidity is manifest beyond a reasonable doubt, and the burden to show its unconstitutionality rests upon the one making the attack."); see also Doe, 421 S.C. at 509, 808 S.E.2d at 816 ("To leave these victims [of domestic violence] unprotected for any length of time would be a great disservice to the citizens of South Carolina."). Appellant's conviction and accompanying thirty-day sentence should be affirmed.

II.

The trial judge did not abuse his discretion or otherwise err by declining to instruct the jury on self-defense because the evidence and testimony presented during trial did not establish Appellant caused physical harm or injury to a household member while acting in self-defense and, instead, supported a conclusion Appellant either unlawfully injured his victim without justification or did not cause any physical harm or injury to her at all such that a jury instruction on self-defense was neither necessary nor warranted under the circumstances involved.

Relevant Facts

Appellant's second-degree domestic violence charge stemmed from Victim's claim Appellant caused a physical injury to her by punching her in the face during an argument. (Tr. p. 6; p. 88; p. 99). And, from the very outset of Appellant's trial, the solicitor made abundantly clear to the jurors the precise criminal act for which they would be asked to convict Appellant of that charge was his act of punching Victim in the face on the date of the incident. (Tr. p. 41).

During the evidentiary phase of the trial, Deputy Salmond detailed the fresh injuries he observed on Victim after he responded to the report of the domestic incident, and he confirmed Victim reported Appellant had struck her in the face. (Tr. pp. 47-89). Likewise, a photograph depicting Victim's injuries in the aftermath of the incident was introduced, and the recording of Victim's 911 call was admitted into evidence and played for the jury. (Tr. p. 52; p. 104; State's Ex. # 1; State's Ex. # 2). On that recording, Victim—consistent with her account to Deputy Salmond—stated her boyfriend hit her in the face. (State's Ex. # 1).

In addition to that, Victim personally testified about what occurred between her and Appellant on the date of the incident. (Tr. pp. 92-126). More specifically, Victim detailed the events that transpired as follows:

- On August 23, 2020, Victim made plans with Appellant, her boyfriend at the time, to go over to Appellant's apartment on Beaufort Street that evening. (Tr. pp. 97-98; p. 102).

- Victim arrived at Appellant's apartment a little after 8:00 p.m., and she brought him some food from a family cookout she had attended earlier that day. (Tr. pp. 97-98).

- Upon arriving, she put the food in the refrigerator and then sat down next to Appellant on the couch. (Tr. pp. 98-99). The two then talked and drank alcohol together. (Tr. pp. 98-99; pp. 114-115).

- At some point, their conversation shifted to Appellant's plans to move back to Kansas. (Tr. p. 99). During that conversation, Victim advised Appellant she did not intend to move to Kansas with him because her son lived in South Carolina. (Tr. p. 99).

- Appellant responded to Victim's stated intent by suddenly punching her in the face. (Tr. p. 99).

- Stunned and now bleeding from the nose, Victim got up from the couch, went to the kitchen, and got a rag to try to stop the bleeding. (Tr. p. 100; p. 126). She then returned to the living room and got her phone so she could call for help. (Tr. p. 100).

- At that point, Appellant approached her, demanded her phone, and stated he "wish[ed] [he] could keep punching [her]." (Tr. p. 100). Victim begged Appellant not to take her phone, but he nevertheless wrested it from her. (Tr. pp. 100-101; p. 110).

- Appellant then returned to the couch, said he was going to sleep there that night, and told Victim to go to the bedroom. (Tr. p. 101). Victim refused, and Appellant responded by demanding she return the key to his apartment. (Tr. p. 101). Victim did so, ended her relationship with Appellant, and left. (Tr. p. 101; p. 110).

- Once Victim was gone, she first attempted to report what had occurred in person at the police department. (Tr. p. 102). However, believing it was closed, she returned to Beaufort Street and obtained assistance from a neighbor in calling 911. (Tr. pp. 102-104). Police then responded to the scene, and she told them what happened. (Tr. p. 105).

Furthermore, Victim identified Appellant in the courtroom as the man who punched her. (Tr. pp. 108-109).

Following the presentation of that testimony and evidence, Appellant elected to testify in his own defense and offered a strikingly different account of what supposedly happened during the incident. (Tr. pp. 142-163). According to his account, Appellant made plans with Victim, whom he had been dating for approximately two years, and she came over to his home around 6:30 p.m. (Tr. pp. 142-143). After she arrived, Appellant ate some food Victim prepared for him and the two, who had both been drinking, then proceeded to have sex on the couch. (Tr. pp. 143-144). After that, they talked with one another, and Appellant advised Victim he was going to move back to Kansas and not return. (Tr. p. 146). When he told her that, Victim slapped him in the face and then began trying to hit him more. (Tr. pp. 146-147; p. 159). Appellant responded by pushing back with "[q]uite a bit" of force to fend Victim off and got her to stop her attack simply by telling her they should "just go to bed." (Tr. pp. 147-148). Appellant then told Victim their relationship was over, she began crying, and she repeatedly begged him not to break up with her. (Tr. pp. 150-151). Around 10:30 p.m., Victim asked him for her phone, but he had no idea where it was located. (Tr. p. 150). She then kicked him "in the balls" for not telling her where her phone was, he asked her to leave at that point, and she promptly "gathered her things" and left.[15] (Tr. pp. 150-151).

Notably, as he was providing that account, Appellant—at defense counsel's request—physically demonstrated in the courtroom what he did when he was purportedly pushing Victim back to fend off her attack. (Tr. pp. 146-148). Furthermore, Appellant described what he did during the incident as defending himself. (Tr. pp. 162-163). However and importantly, Appellant repeatedly insisted he *never* at any point hit Victim even a single time in doing so. (Tr. pp. 162-163). Moreover, as to Victim's injuries, Appellant claimed she had none when she

[15] During her testimony, Victim acknowledged she told police she kicked Appellant in his groin at some point. (Tr. p. 122).

left his home as far as he was aware and opined her bleeding might have occurred merely because "she was taking a blood thinner." (Tr. p. 151; p. 162).

After all the testimony and evidence was presented, the trial judge conducted a charge conference with counsel to discuss his intended jury instructions. (Tr. p. 171). During that discussion, defense counsel requested a jury instruction on "amount of force," and the solicitor promptly objected, noting Appellant unequivocally testified he did not hit Victim. (Tr. pp. 171-172). The trial judge then attempted to clarify the nature of the charge defense counsel was requesting and, after some further discussion, determined defense counsel was actually seeking a jury instruction on self-defense. (Tr. p. 174). Again, the solicitor objected to the charge, noting Appellant's physical demonstration of what occurred established all he did was push back on Victim's arms, Appellant explicitly denied hitting Victim, and Appellant never once said he hit Victim in the face in any manner. (Tr. pp. 174-175). In light of that, the solicitor argued there was no evidence presented that supported a self-defense charge in Appellant's case. (Tr. pp. 174-175). In response, defense counsel indicated she had "[n]o rebuttal" and wished to leave the matter to the trial judge's discretion. (Tr. p. 175). Ultimately, the trial judge declined to instruct the jury on self-defense, concluding such an instruction was not warranted based on what had been presented. (Tr. p. 175).

Thereafter, the parties presented their closing arguments to the jury. (Tr. pp. 176-200). During the State's, the solicitor argued to the jury Appellant should be convicted based on the evidence Appellant punched Victim in the nose. (Tr. p. 176; p. 188). Conversely, during the defense's, defense counsel argued Appellant should be acquitted because he did *not* hit Victim. (Tr. p. 197).

Following that, the trial judge instructed the jury on the applicable law. (Tr. pp. 201-210). In doing so, the trial judge emphasized the State bore the burden of proving Appellant's guilt beyond a reasonable doubt, Appellant was presumed innocent unless and until the State satisfied its burden of proof, and a criminal defendant like Appellant was *never* required to prove himself innocent. (Tr. pp. 203-205). However, consistent with his earlier ruling, the trial judge did not instruct the jury on the law of self-defense. (Tr. pp. 201-210).

Standard of Review

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). On appeal, an appellate court reviewing a trial judge's jury charge must view the charge as a whole and in light of the evidence and issues from trial. State v. Simmons, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009). Significantly, the appellate court will only reverse a trial judge's decision regarding jury instructions when that decision constituted a prejudicial abuse of discretion. Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). Meanwhile, if the jury instructions presented were substantially correct and covered the applicable law, the trial judge's decision will not be reversed on appeal. State v. Ezell, 321 S.C. 421, 425, 468 S.E.2d 679, 681 (Ct. App. 1996); see State v. Rye, 375 S.C. 119, 123, 651 S.E.2d 321, 323 (2007) ("A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied.").

Analysis

In South Carolina, citizens have a right to act in self-defense if doing so is warranted and justified by the circumstances. State v. Bryant, 336 S.C. 340, 344, 520 S.E.2d 319, 321 (1999). Historically, at its core, self-defense has long been recognized as being a deliberate act predicated upon: (1) justification; (2) necessity; and (3) proportionality. See State v. Osborne,

202 S.C. 473, __, 25 S.E.2d 561, 563 (1943) (instructing self-defense is "based upon necessity"); State v. Jones, 133 S.C. 167, __, 130 S.E. 747, 750 (1925) (instructing a plea of self-defense is not available to one who uses more force than reasonably necessary to repel an attack), overruled on other grounds by State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996); Golden v. State, 1 S.C. 292, 297 (1870) ("In case of self-defence, which is a primary law of human action, only so much force is justifiable in law as may be necessary to ward off actual, imminent or impending danger."); State v. Wood, 1 S.C.L. (1 Bay) 351, __ (1794) (recognizing self-defense requires sufficient justification *and* a proportionate response); see also Blaney v. State, 657 S.W.2d 531, 534 (Ark. 1983) (explaining self-defense is a "deliberate act"). Importantly, if any one of the requisite components is absent, the defense of self-defense is not applicable. State v. Bixby, 388 S.C. 528, 554, 698 S.E.2d 572, 586 (2010).

In the case at bar, Appellant contends the trial judge reversibly erred by refusing to instruct the jury on self-defense. As support for that contention, Appellant maintains self-defense is comprised of the following four elements: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant either must have been in actual imminent danger of *losing his life or sustaining serious bodily injury* or must have actually believed he was in such danger; (3) if the defense is based on the belief of imminent danger, the belief must have been the same as one that would have been entertained by a reasonably prudent person of ordinary firmness and courage in the same situation; if the defendant was in actual imminent danger, the circumstances must have been such that would warrant a person of ordinary prudence, firmness, and courage to *strike the fatal blow* in order to prevent *serious bodily injury or loss of life*; and (4) the defendant had no other probable means of avoiding the danger *of losing his own life or sustaining bodily injury* than to act as he did. After identifying those elements of self-defense,

Appellant then appears to allege—in a largely conclusory and non-specific fashion[16]—evidence of some kind supporting each of those elements was, in fact, presented during his trial contrary to the conclusion reached by the trial judge.

"Ordinarily, the trial court has the duty to give requested instructions which correctly state the law applicable to the issues and which are supported by the evidence." State v. Peer, 320 S.C. 546, 553, 466 S.E.2d 375, 380 (Ct. App. 1996). Meanwhile, a trial judge should not present a jury instruction "which tenders an issue which is not presented or supported by the evidence." State v. Weaver, 265 S.C. 130, 137, 217 S.E.2d 31, 34 (1975); see State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) (explaining a trial judge is required to instruct the jury on sound principles of law that are applicable to the case based on the evidence presented); State v. Otts, 424 S.C. 150, 158, 817 S.E.2d 540, 545 (Ct. App. 2018) (explaining there must be some evidence adduced at trial on a particular issue in order for a jury instruction on that issue to be warranted). Significantly, that is true because the presentation of jury instructions on inapplicable matters has the potential to confuse or mislead the jury. See State v. Washington, 338 S.C. 392, 400, 526 S.E.2d 709, 713 (2000) ("Jury instructions by the court of irrelevant and inapplicable principles may be confusing to the jury and can be reversible error."); State v. Lee, 298 S.C. 362, 364, 380 S.E.2d 834, 836 (1989) ("Providing instructions to the jury which do not fit the facts of the case may tend to confuse the jury.").

Therefore, when determining whether the issue of self-defense should be submitted to the jury during a criminal trial, the trial judge must look to the evidence actually introduced during

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[16] Because Appellant's appellate argument related to the self-defense issue has been raised in a conclusory fashion and contains no allegations as to *what* specific evidence or testimony was presented during his trial that would have supported a jury instruction on self-defense, that argument should be rejected as abandoned on appeal. See Jones, 344 S.C. at 58, 543 S.E.2d at 546 (finding an argument to be abandoned where it raised in a conclusory manner).

trial because "[t]he law to be charged to the jury is determined by the evidence presented at trial." State v. Goodson, 312 S.C. 278, 280, 440 S.E.2d 370, 372 (1994). If any evidence of self-defense is presented, the trial judge should instruct the jury on self-defense when asked to do so. State v. Hill, 315 S.C. 260, 261, 433 S.E.2d 848, 849 (1993); see Stone v. State, 294 S.C. 286, 287, 363 S.E.2d 903, 904 (1988) ("Upon request, a defendant is entitled to a jury instruction on self-defense *if he has produced evidence tending to show the four elements of that defense*." (emphasis added)). Conversely, if no evidence is presented to support the issue of self-defense, the trial judge should *not* present a self-defense instruction to the jury. State v. Slater, 373 S.C. 66, 69, 644 S.E.2d 50, 52 (2007); see State v. Wigington, 375 S.C. 25, 31, 649 S.E.2d 185, 188 (Ct. App. 2007) ("A jury charge on self-defense is not required unless it is supported by the evidence."); see also State v. Williams, 427 S.C. 246, 249, 830 S.E.2d 904, 905-906 (2019) ("If there is no evidence to support the existence of any one element, the trial court must not charge self-defense to the jury.").

Notably, through its somewhat-recent decision in State v. Fonseca-Cintron, 238 A.3d 594 (Vt. 2019), the Vermont Supreme Court addressed a claim the trial judge erred by refusing to instruct the jury on self-defense in a domestic violence case. In that case, divergent accounts of the incident that gave rise to Fonseca-Cintron's charges were presented during trial. Id. at 597. According to the victim's account, Fonseca-Cintron pushed the victim after she ended their relationship and then, after a brief interval, he proceeded to drag her by her hair, hit her, choke her, punch her in the face, and strike her with a sheathed machete while threatening to kill her. Id. Contrastingly, according to Fonseca-Cintron's account, he told the victim to leave his house, which angered her and led to her making a mess, insulting him, and hitting him. Id. Fonseca-Cintron claimed he then simply *pushed Victim away* and told her to stop, she went into another

room and retrieved a bag of his jewelry, he attempted to get the bag back, and she responded by striking him in the face with a broom. Id. Meanwhile, he flatly denied ever punching the victim. Id. Similarly, he denied choking her, pulling her hair, or hitting her with a machete, which were the acts for which he was charged with domestic violence. Id. at 597-598. After those conflicting accounts were presented, Fonseca-Cintron sought a jury instruction on self-defense, and the trial judge refused to give one, concluding one was not warranted based on the evidence presented. Id. at 598. Fonseca-Cintron was ultimately convicted of multiple counts of domestic violence and appealed. Id. On appeal, the Vermont Supreme Court affirmed upon concluding the trial judge correctly declined to instruct the jury on self-defense. Id. at 596. In so concluding, the Vermont Supreme Court determined self-defense—which involved the use of reasonable force against an aggressor based on a reasonable and honest belief such force was necessary to prevent immediate bodily harm—was not warranted based on the evidence presented because, according to Fonseca-Cintron, "he did not use force at all, apart from pushing [the victim] in response to her attack[,]" and he wholly denied strangling her, hitting her, or pulling her hair. Id. at 599. Beyond that, the Vermont Supreme Court further found a self-defense charge was not warranted because nothing established Fonseca-Cintron subjectively believed his actions were necessary to protect himself from harm. Id. at 600.

Like in Fonseca-Cintron, two conflicting accounts of the incident were presented during Appellant's trial. In one, Appellant injured Victim—a household member for domestic violence purposes—by suddenly attacking her without provocation and punching her in the nose. Meanwhile, in the other, Appellant never struck Victim, never punched Victim in the nose, and did nothing more than push her back when she began an unprovoked attack upon him. In fact, Appellant explicitly denied hitting Victim even a single time. And, critically, Appellant *never*

suggested his act of pushing Victim—which he demonstrated from the witness stand in a manner that was able to be observed in the courtroom by those present, including the trial judge[17]—resulted in Victim being struck in the face and injured. Instead, Appellant claimed she was uninjured when she left his home on the date of the incident and opined her nose may have been bleeding simply because "she was taking a blood thinner."

Considering those accounts, the trial judge in Appellant's case did not abuse his discretion by declining to instruct the jury on self-defense because—just as was true in Fonseca-Cintron—no testimony or evidence was presented that warranted such a charge. Significantly, demonstrating that fact, Appellant was not and could not have been acting in self-defense if Victim's account was accepted by the jury because her testimony established Appellant unlawfully injured her by attacking her first and without provocation, which was not something that could be an act of self-defense for obvious reasons. See Goodson, 312 S.C. at 280, 440 S.E.2d at 372 (instructing self-defense requires—amongst other things—for the defendant to be without fault in bringing on the difficulty). Meanwhile, if Appellant's account was accepted by the jury, he likewise did not cause physical harm or injury to Victim—which, critically, was the basis for his domestic violence charge—with any of his acts because he flatly denied ever hitting her and, instead, simply claimed he did nothing more than push her back in response to her attack in a manner that he did not suggest even theoretically *might* have caused the injuries she sustained. See Fonseca-Cintron, 238 A.2d at 599 ("The evidence does not meet this standard [for self-defense]. According to the defendant's account at trial, he did not use force at all, apart from pushing complainant in response to her attack."); see also Ford v. State, 112 S.W.3d 788,

[17] During the charge conference, the solicitor—without challenge from defense counsel or anyone else who had witnessed Appellant's physical demonstration—noted Appellant had merely pushed back against defense counsel's arm when he showed what had supposedly occurred between him and Victim. (Tr. p. 174).

794 (Tex. App. 2003) ("Self-defense is inconsistent with a denial of the conduct."). Under such circumstances, none of the evidence and testimony presented supported a conclusion Appellant was acting in self-defense because either: (1) he unlawfully caused physical harm or injury to Victim without provocation and in a manner totally inconsistent with self-defense; or (2) he did not cause physical harm or injury to Victim at all and, thus, was not guilty of the charged crime—or any other offense—without need to resort to the justification defense of self-defense. Fonseca-Cintron, 238 A.2d at 599; cf. Boccia v. State, 782 S.E.2d 792, 799 (Ga. Ct. App. 2016) (finding a self-defense instruction was not warranted when Boccia never admitted to harming the victim and repeatedly denied hitting him); Oatis v. State, 726 So. 2d 1230, 1233 (Miss. Ct. App. 1998) ("Without Oatis saying that he hit the officer in necessary self-defense, there is no basis to instruct the jury as to that possibility. Quite simply, self-defense was not Oatis's explanation for what happened.").

Accordingly, because none of the evidence and testimony presented during trial supported a conclusion Appellant was acting in self-defense, a self-defense instruction was neither necessary nor warranted in Appellant's case. See Slater, 373 S.C. at 69, 644 S.E.2d at 52 ("A self-defense charge is not required unless it is supported by the evidence."); see also State v. Gaines, 380 S.C. 23, 31, 667 S.E.2d 728, 732 (2008) ("The law to be charged to the jury is determined by *the evidence presented at trial*." (emphasis added)); Lee, 298 S.C. at 364, 380 S.E.2d at 836 ("Providing instructions to the jury which do not fit the facts of the case may tend to confuse the jury."). As a result, the trial judge—who had the benefit of both hearing the testimony *and* observing the physical demonstration that accompanied it—did not abuse his discretion by declining to instruct the jury on a legal theory that was not supported by the evidence and testimony presented during trial. See Bryant, 336 S.C. at 345-346, 520 S.E.2d at

322 ("[Bryant]'s statements fail to establish the elements of self-defense entitling [Bryant] to a self-defense charge. . . . Accordingly, [Bryant] was not entitled to a self-defense charge and the trial judge correctly refused the charge."); cf. Lee, 298 S.C. at 365, 380 S.E.2d at 836 ("The evidence produced by the State below tended to show Lee exercised actual possession and control over the cocaine. Thus, 'mere presence' was not an instruction supported by the evidence presented by the State at trial. The evidence presented by Lee consisted of his testimony that he was some distance from the group when the officers pulled up and that the officers told him they were 'going to frame [him] for what [they] found when [he] wasn't even no where around.' Lee's evidence does not support a 'mere presence' instruction. Lee's testimony was that the officers knew he was not involved and were framing him, not that he just happened by when someone dropped the bag of cocaine or that he was standing by while others used or possessed cocaine."). Appellant's conviction and accompanying thirty-day sentence should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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