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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Honorable Benjamin H. Culbertson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

NASIREA BREWNOPLIS JEROME GRATE,

APPELLANT

APPELLATE CASE NO. 2024-001460

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

1. **Did the trial court err in admitting appellant's booking report with photograph maintained by the Horry County Police Department that included information indicating appellant had an alias, hold orders, and a Federal Bureau of Investigation identification number under the pretext that the state needed to establish appellant's address?**

2. **Did the trial court err in failing to charge the law in South Carolina regarding self-defense upon being presented with a question from the jury during deliberations when counsel for appellant argued self-defense during closing arguments?**

STATEMENT OF THE CASE

Nasirea Grate and his co-defendant Dajon Grate were indicted in Horry County for two counts of murder and one count of armed robbery in January of 2023. R. p. *. They were tried together before Judge Benjamin Culbertson and a jury from August 19 to 28, 2024. Tr. 1. Appellant was represented by Ralph Wilson, Sr., and the state by Nancy Livesay and Liz Martin. Tr. 2. James Gamor appeared on behalf of Dajon Grate. Tr. 2. The jury acquitted both defendants of all charges as indicted, but found both guilty of one count of the lesser-included offense of voluntary manslaughter. Tr. 1458, l. 3 – 1459, l. 2. The trial court sentenced appellant to thirty years in prison. Tr. 1484, ll. 3-9.

This appeal follows.

STATEMENT OF FACTS

On May 31, 2022, at about 1:30 in the afternoon, appellant and his brother (and co-defendant) Dajon Grate were recorded on surveillance video at the Sunhouse gas station. Tr. 283, l. 1 - 284, l. 25; 293, l. 10 – 294, l. 5. The two brothers arrived at the Sunhouse with two other individuals: Todd Fry drove the group in his silver Cadillac and Jeremiah Dicker (the Grates' cousin) was also with them. Tr. 959, ll. 2-22. Members of the group went inside, made purchases, and left the store. State's Ex. 40. Dicker can be seen in the video footage speaking with a man, identified as Kalik Conn, outside the convenience store. Tr. 956, l. 12- 957:1. 9; 960, ll. 5 - 11; State's Ex. 40. No audio was recorded by the surveillance system and no witness testified about the nature of this conversation.

Just after 2 p.m., Bereniece Mellado called 911 because she heard shooting outside her apartment. Tr. 350, l. 2 – 20; 354, ll. 5 - 19. When she looked out her window, she saw the back of "a guy" in a black shirt with a triangle logo on the back with "dreads" and a black mask. Tr. 351, ll. 8 - 18. Upon exiting the apartment, she found one young man dead on the steps and another dead in the driver seat of a white SUV outside. Tr. 354, ll. 18 – 356, l. 25.

The young man in the car was identified as Conn and Dicker was identified as he lay just off the sidewalk near the steps into an apartment. Tr. 573, l. 23 – 547, l. 8. Conn showed no defensive wounds indicating any attempt at blocking or protecting himself from gunfire. Tr. 1169, ll. 23 – 25.[1] Conn was shot five times, with an immediately fatal wound being to the back of his head, which would have rendered him incapable of firing his weapon. Tr. 1175, l. 15 – 1176, l. 15. The state's expert analyzed two recovered two firearms, twenty shell casings, and

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[1] The pathologist testified that defensive wounds are "injuries that are on the body in areas where you'd expect if a person is trying to protect their main surfaces from injury. So, it's usually on the backs of the arm or the front forearms as you're holding them up, and injuries in this area are considered defensive wounds. Tr. 1166, ll. 12 – 17.

several bullet fragments. Tr. 814, l. 8 – 815, l. 2, 830, ll. 8 - 18. He identified four separate firearms being connected to the twenty shell casings. Tr. 817, ll. 6-20. Conn's Glock 9 mm left nine casings.[2] Tr. 827, l. 22 – 828, l. 25, 836, ll. 5 - 10. Dicker's firearm left four casings and was recovered in a jammed firing posture.[3] Tr. 826, ll. 15 – 24, 836, ll. 1 - 14. A third firearm (never recovered) was identified as a 9mm Luger and fired the casings recovered from the backseat of the SUV. Tr. 825, l. 20 – 826, l. 11, 836, ll. 15 - 24. A fourth firearm (also never recovered) was identified as a .45 caliber, and was connected to the final three casings found outside the vehicle on the driver's side. Tr. 825, ll. 6 - 22, 836, ll. 16 - 18. One of these .45 caliber casings was connected to the fatal head wound suffered by Conn. Tr. 830, l. 8-831, l. 23.

The pathologist noted being shot in the elbow was consistent with a defensive wound. Tr. 1166, ll. 12 – 17. Co-defendant Grate was found following the shooting at a different location with a gunshot wound to his left arm near the elbow and his left leg. State's Ex. 62 08:22 – 08:45. Decedent Dicker was also shot in the elbow region. Tr. 1166, l. 22 – 1167, l. 6. Dicker's body was found several yards outside the Conn vehicle with a blood trail leading to the passenger front door. Tr. 356, ll. 20 - 24; State's Ex. 6. Dicker had been shot in the back and died on scene with his injury being consistent with Dicker fleeing Conn's gunfire. Tr. 1174, ll. 13 – 18.

Appellant's co-defendant and brother, Dajon Grate, was seated in the rear of Conn's white SUV (his DNA was present in the blood stains in the rear seat along with his phone). Tr. 628, ll. 4 - 21, 632, ll. 7 - 12, 947, l. 14 – 948, l. 1. Cell phone records also confirmed that

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2 Conn's gun was a 9mm with an extended magazine and was found in his lap. Tr. 733, ll. 11 - 14, 772, l. 7 – 773, l. 17.

3 Dicker's fingerprints were found on the jammed gun recovered just outside the passenger side of the SUV. Tr. 535, ll. 9 – 21; 730, ll. 7 - 24, 783, l. 22 – 784, l. 11, 883, l. 7 – 884, l. 24.

Dicker called Conn's phone and that they exchanged text messages leading up to the shooting.[4] Tr. 961, l. 20 – 962, l. 15; State's Ex. 199A. Investigators also found three bags of "a leafy green substance" inside Conn's white SUV and a digital scale in the center console. Tr. 732, l. 12 - 733, l. 22. One of these bags was in the backseat. Tr. 588, ll. 19 - 22. Cell phone location data was used to place appellant's cell phone in the "vicinity" of the crime scene.[5] State's Ex. 199A.

The state produced no witness as to the cause of the shooting. The state produced no witness as to a drug transaction between the parties. The state produced no witness concerning the initial aggressor. The state's theory of the case centered on the presence of the drugs in Conn's vehicle and the belief that the shooting was a result of an attempted armed robbery as set forth in the indictments. R. * Indictments.

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[4] The text messages shed no light on the dispute, as Dicker texted Conn the location of the eventual shooting and Conn texted "Cmin down street now" with Dicker replying "Ite." Tr. 962, ll. 16 – 24.

[5] This location was also in the "vicinity" of appellant's residence. Tr. 999, l. 6 – 1000, l. 10; 1008, ll. 3 – 6. Due to the technological limitations, the accuracy of the location data of appellant's phone was not as detailed as those of the other participants. Tr. 996, ll. 10 – 13; 1008, l. 18 – 1009, l. 19.

ARGUMENT

1. **The trial court erred in admitting appellant's booking report with photograph maintained by the Horry County Police Department that included information indicating appellant had an alias, hold orders, and a Federal Bureau of Investigation identification number under the pretext that the state needed to establish appellant's address.**

A. Standard of Review.

> "Evidence which is not relevant is not admissible." Rule 402, SCRE. Relevant evidence is defined as "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, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE.

State v. Green, 412 S.C. 65, 79, 770 S.E.2d 424, 431–32 (Ct. App. 2015). "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006) (internal citations omitted).

B. Relevant Facts.

The state moved to introduce State's Exhibit 47, appellant's booking information, that included his mugshot and "redacted" information. The redactions only struck through the actual information from the form, not the type or title of the information involved. Thus, the jury was

provided a photographic "mugshot" along with evidence that appellant had an alias, had a "FBI ID" and "holds" conditions. [6]

The state claimed the prejudicial booking report was needed to establish appellant's address and nickname:

> MS. LIVESAY: The document is a booking document. All I want to get in is the fact that Nasirea Grate's nickname is Knock-Knock and his home address is 504 Moore Road.
>
> MR. WILSON: It's already in the record. She testified that this is Knock-Knock -- the lady who was up there. This is cumulative. And not only that, that booking report, you know, is prejudicial.
>
> THE COURT: So, you're objecting to the booking report?
>
> MR. WILSON: I'm objecting to both. The picture is cumulative. He's already been identified as Nasirea Grate. In fact, she turned to you and asked the Court to make note of the fact that she has -- the witness had identified this person, who is sitting next to me in the blue shirt, as being Knock-Knock, who is Mr. Grate.
>
> The same thing is true with Mr. Dajon.
>
> The witness has already put it in. The only reason for those pictures is prejudicial, because they're booking reports which show them in that kind of light. There is no other reason for it.

Tr. 325, ll. 5 – 25.

The trial court admitted the prejudicial document over objection, with some redactions, finding:

> THE COURT: I'm going to allow -- she can authenticate what she took down and what she knows in her personal knowledge: these photographs, the addresses provided by the defendants. But if she doesn't know where this alias thing on the booking reports came from, we're going to have to redact that.

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[6] State's Exhibit 47 is on file with this Court for review. An additional photocopy has been included in the record on appeal.

Tr. 328, ll. 13 – 18.

The state's stated purpose, to establish appellant's address on Moore Road, was questionable, if not pretextual, in light of its admission of appellant's driver's license showing he resided at that address during trial. See State's Exhibit 28.

> Q. Okay. And speaking of 504 Moore Road, you collected State's Exhibit 28; right?
>
> A Yes.
>
> Q And what is the address on those licenses belonging to Nasirea Grate?
>
> A All three of them say 504 Moore Road, Longs, South Carolina.
>
> Q Okay. Is this consistent with what we have on this board?
>
> A That says 504 Moore Road, Longs, South Carolina, yes, ma'am.

Tr. 974, ll. 3 – 13.

The state compounded the prejudicial nature of the booking report by using the booking photos as part of its closing argument.

> Another manipulation is when the State takes these surveillance photos and takes these booking photos and sticks them on the board and leaves the board hanging up here in front of you the whole time. And you-all saw me, I would kind of come up here and drag it and take it back over there. I was doing that on purpose, because I wanted to highlight to you what they were doing. They were showing you these pictures and trying to say, "Okay, I showed you these pictures; therefore, he's guilty. " No, this picture just means that he was arrested and took a mug shot.

Tr. 1406, ll. 2 – 12.

C. Discussion.

Under State v. Traylor, 360 S.C. 74, 600 S.E.2d 523 (2004), the introduction of evidence such as the "mugshot" of a defendant is reversible error unless:

> (1) the state has a demonstrable need to introduce the photograph, (2) the photograph shown to the jury does not suggest the defendant has a criminal record, and (3) the photograph is not introduced in such a way as to draw attention to its origin or implication. State v. Tate, 288 S.C. 104, 341 S.E.2d 380 (1986); State v. Robinson, 274 S.C. 198, 262 S.E.2d 729 (1980); State v. Denson, 269 S.C. 407, 237 S.E.2d 761 (1977).

Traylor, 360 S.C. at 84, 600 S.E.2d at 528.

The rationale behind this prohibition centers around the implication that the accused has prior criminal charges and are a direct attack on the character of the accused. *See* State v. Robinson, 274 S.C. 198, 201, 262 S.E.2d 729, 730 (1980) (noting the prohibition around admission of mug shots "necessarily imply" that the accused has "a prior criminal record and thus place his character in issue."). The rationale behind this rule is the inclination of the jury to improperly apply prior criminal actions to convict based upon character of the accused rather than the evidence presented during trial.

> 'In a criminal case, the State cannot attack the character of the defendant unless the defendant himself first places his character in issue.' State v. King, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999). 'Further, evidence of prior bad acts is inadmissible to show criminal propensity or to demonstrate the accused is a bad person.' Id. 'Evidence of other crimes must be put to a rather severe test before admission.' State v. Timmons, 327 S.C. 48, 52, 488 S.E.2d 323, 325 (1997).

State v. Lawson, 424 S.C. 51, 57, 817 S.E.2d 509, 512 (Ct. App. 2018).

Here, there was no demonstrable need to introduce the prejudicial booking report. The stated pre-text by the solicitor for the relevance of the booking report was to establish appellant's

nickname as "Knock-Knock" and his address. Tr. 325, ll. 5 – 8. The listing of the alias ("Knock-Knock") lacked any foundation and was redacted by the trial court. Tr. 328, ll. 13 – 18. The remaining "need" was accomplished through other evidence, such as appellant's driver's license seized from his home and admitted as State's Exhibit 28.

The photograph, particularly when contrasted with the other "booking reports" admitted, suggested to the jury that appellant had a criminal record. The booking report and accompanying "mugshot" do not hide it was from appellant's arrest on the current charges. The report also included headings with clear "redactions" showing information that was present on the form had been removed. This included disclosure of a FBI identification number, an alias, and incarceration hold. See Ex. 47. This can be easily contrasted with the booking report for Todd Fry which contained no redaction for "Holds" but also contained redactions for alias and FBI ID. See State's 49. Further highlighting the importance of the state's telling redactions, the booking report for co-defendant Dajon Grate indicated "No Known Alias" as opposed to the visible redactions. See State's 51. Finally, the state went out of its way to highlight the booking report, placing it on a board and leaving it visible during trial through closing argument. Tr. 1406, ll. 2 – 12.

D. Prejudice.

The admission of the booking report, and the state's subsequent use of the negative character implications, are prejudicial in a case in which the ultimate determination of appellant's guilt turns in no small degree on whether Conn fired the first shot. As discussed below, self-defense was a viable alternative to the state's theory that Conn was being robbed of his drugs and responded with his weapon. As there was no direct evidence the interaction of the

parties was a drug transaction or an attempted armed robbery, the jury was left to use the circumstantial evidence of the presence of the drugs in Conn's vehicle to support the state's theory. Importantly, the jury rejected the armed robbery theory and acquitted appellant of that charge. Tr. 1458, ll. 12 – 14.

An equally plausible theory was that Conn was the initial aggressor and fired his weapon first. The state's expert identified potential defensive wounds on the other two identified occupants of Conn's vehicle: Dicker and Dajon Grate. Conn fired numerous rounds before his fatal wound, striking both Dicker and Grate. Conn shot Dicker in the back as Dicker fled the vehicle. While Conn was fired upon from the backseat and both sides of his vehicle, the initial cause of the gunfire was open to debate. The state relied upon the presence of drugs in Conn's vehicle as the spark. Since there is no evidence in the record regarding the interactions inside the Conn vehicle before the shooting started, drugs as a spark is a theory and not a fact. Absent compelling evidence of guilt supported by the facts, the introduction of evidence like the booking report is reversible error requiring a new trial. *See* State v. Traylor, 360 S.C. 74, 600 S.E.2d 523 (2004) (noting the introduction of evidence such as the "mugshot" of a defendant is reversible error).

2. **The trial court err in failing to charge the law in South Carolina regarding self-defense upon being presented with a question from the jury during deliberations when counsel for appellant argued self-defense during closing arguments.**

A. Standard of Review.

"It is well-settled the law to be charged is determined from the evidence presented at trial, and if any evidence exists to support a charge, it should be given." State v. Burriss, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999). "If there is any evidence the defendant was acting in self-defense . . . the trial court must charge it and let the jury sort out whether it believes the State's version of events." State v. Stoots, 445 S.C. 127, 132, 912 S.E.2d 248, 251 (2025).

Supplemental instructions in response to a question from the jury must be a correct statement of law and be clear that an earlier incomplete or "incorrect charge is not applicable and the 'superimposed' correct charge must control [the jury's] decision." State v. Bowers, 436 S.C. 640, 652, 875 S.E.2d 608, 614 (2022).

B. Relevant facts.

During closing argument, counsel for appellant argued that the jury should evaluate the state's failure to disprove self-defense in considering whether the state had satisfied its burden of proof. This argument is in accord with the longstanding rule in South Carolina that the state bears the burden to disprove self-defense. *See* State v. Taylor, 356 S.C. 227, 235, 589 S.E.2d 1, 5 (2003) (holding "this Court has placed great emphasis on the importance of a defendant's right to assert self-defense when there is 'any evidence' to support it, and has taken pains to make sure the burden to disprove self-defense remains on the State.").

In support of self-defense, appellant's counsel argued the evidence support the jury finding that Conn pulled his weapon and started firing first.

> What I will tell you -- and the evidence supports this -- think about it for a second. Who gets shot in the back running away from the car? Right? Who gets shot in the back running away from the car? According to the solicitor, he's in the front seat. Right? Mr. Dickers is in the front seat of the car. That's her version of the facts.
>
> And if he's in the front seat of the car and if that gun -- remember the one that jammed that's on the ground? If that's his gun, he ain't in no ability to shoot. But what happens to him? He gets shot in the back. By who? By who? Mr. Conn. Because he's the one with the gun, the ten shots that he fired away. Two of them found their way into the body of Mr. Dickers.
>
> And you know how he got shot in the back? Remember the pathologist says that he had a defensive wound? What that means is he was trying to defend himself from Conn, because he's sitting in the front seat with Conn, according to her story. And he gets shot in the elbow because when Conn raises this gun to shoot him -- and I don't know what the argument was about -- she doesn't either. I don't know what the argument was about. *But if Conn pulled a gun and fired first, then they had every right to defend themselves. All of us do.*

Tr. 1380, l. 18 – 1381, l. 16 (emphasis added).

During jury deliberations, the jury asked the trial court two questions: "What is the law of (1) self-defense if they leave, and (2) What is the definition of voluntary manslaughter?" Tr. 1445, ll. 12 – 14. In response, the trial judge initially intended to tell the jury the bench had "ruled as a matter of law that self-defense is not an available defense to the defendants in this case." Tr. 1447, ll. 4 – 6. Appellant's counsel objected, noting "I think a better charge would be to charge the jury that the State has to prove -- disprove all the elements of self-defense in proving their -- to meet their burden of proof; that they have to prove it. They have to disprove all the elements of self-defense in order to sustain their burden. I think that's a better charge in

this case . . ." Tr. 1147, ll. 17 – 23. Appellant's counsel also noted that he had argued self-defense at great lengths during his closing. Tr. 1448, ll. 8 - 9.

The trial court questioned the ability of appellant to request self-defense, and claimed a logical inconsistency between the argument that appellant was not involved and a claim of self-defense.

> The defendants the whole time have asserted, "We didn't do it. We don't think the State has even proved, you know, these elements of murder. We didn't do it. We weren't there. We didn't participate. But, if we were, then we acted in self-defense."
>
> I don't know that that's proper, and I don't -- and I have not -- I have never had a case -- typically, every time I have charged a jury on self-defense, there has been some evidence that the defendant was present at the scene, participated in the killing but said they were not guilty of murder because they were acting in self-defense.

Tr. 1448, l. 20 – 1449, l. 5.[7]

The solicitor argued that the issue had "already been ruled upon by the Supreme Court. Justice Few has been very, very clear that self-defense is not available in situations such as this because there is such a nexus between guns and drugs." Tr. 1451, ll. 2 – 6.

> In some future case involving facts different from these, perhaps the defendant will convince the trial court he has produced evidence he was not at fault in bringing on the violent occasion. *In this case, however, there is no evidence on which a jury may find Williams' unlawful possession of a loaded pistol during an illegal drug transaction was "merely incidental" to arming himself in self-defense.* Rather—as a matter of law—Williams' act of taking the pistol to the drug deal was a violation of law that produced the violent occasion.

State v. Williams, 427 S.C. 246, 255, 830 S.E.2d 904, 909 (2019) (emphasis added).

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[7] Neither defendant testified during trial. The claim that the defendants asserted "we didn't do it" is not supported by the record. Appellant's counsel was free to challenge the sufficiency of the evidence placing appellant at the scene and involved in the shooting as well as arguing that same evidence supported self-defense as a viable explanation for the shooting.

Counsel for appellant noted that the state's logical reading of the evidence cut both ways, allowing the jury to consider self-defense based upon the lack of direct evidence of why the shooting started and who fired the first shot:

> But the whole case here is circumstantial. And just like the solicitor was arguing that she thought these circumstances pointed to the guilt of these defendants, we were saying that these circumstances actually point to Mr. Conn being the initiator of this. And the jury, apparently -- somebody on that jury, apparently, believes that and understands that. That's why that question is coming up.

Tr. 1452, ll. 12 – 19.

The trial court ruled that while appellant's counsel had gotten his argument on the record, he was not going to charge self-defense. Tr. 1452, l. 24 – 1453, l. 6. However, in effect, by instructing the jury that only the law contained in the original charge could be considered, the trial court effectively told the jury to ignore the arguments and evidence of self-defense.

> As to your first question, all I can tell you is that I have charged you with the law in this case, and *the law that I charged you is the only law that you can consider.* Okay? *You can't consider anything that I haven't charged you.*

Tr. 1454, ll. 14 – 18 (emphasis added).

C. Discussion.

As an initial matter, the jury charge is to be based upon the crime charged and the evidence submitted during trial, not simply the alternative theories trial counsel may argue that could support conviction or acquittal. *See* State v. Stoots, 445 S.C. 127, 138, 912 S.E.2d 248, 254 (2025) ("As with self-defense, the trial court must tailor its jury instruction on the law of accident depending on the crime charged and the specific facts and circumstances of the case."). While the evidence brought forward by the defense would clearly be a factor, a defendant is not

bound to "pick a theory" and not point out various defects in the state's case that could lead to a finding of not guilty. *See* State v. Moore, 245 S.C. 416, 421, 140 S.E.2d 779, 781 (1965) (holding the "fact that the defendant interposed the defense of alibi did not deprive him of the benefit of the reasonable inferences to be drawn from the testimony relative to the degree of the offense committed, for the burden of establishing the offense charged rested upon the State."). As such, the trial court's concern that appellant's counsel pointed out alternative grounds for rejecting the state's proof, including pointing out that no evidence directly placed appellant at the scene firing a weapon, somehow negated arguing in favor of self-defense is in error. While there was circumstantial evidence that placed appellant in the vicinity of the shooting (including similarities in the clothing he was seen wearing at the Sunhouse on video and the witness who saw a fleeing suspect from the back with similar clothing, along with the cellular location data), it was not logically inconsistent for appellant's counsel to point out the weakness of the state's case placing appellant at the Conn vehicle as a shooter while also arguing the evidence supported the shooting was in self-defense in response to Conn's actions.

Here, the jury requested clarification on the law of self-defense when the assailant leaves the scene. Tr. 1445, ll. 1 – 14. The original charge did not mention self-defense.[8] If the trial court's inclination that self-defense "does not apply" as a matter of law is correct, there can be no error in the court's instruction in response to this question. However, if self-dense, and reliance on the state's burden to disprove self-defense applies to the facts presented before the jury, the trial court improperly instructed the jury in direct response to its question that the "law that I

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8 There is no clear indication as to why self-defense was not charged and certainly no objection was lodged following the charge regarding the omission of self-defense. Following the jury's question on the law, the trial court indicated a belief he ruled it did not apply as a "matter of law", but that assertion was contested. Tr. 1447, ll. 3 – 6; 1450, ll. 3 – 8.

charged you is the only law that you can consider" the jury "can't consider anything that I haven't charged you." Tr. 1454, ll. 14 – 18.

As our Supreme Court held in State v. Bowers, 436 S.C. 640, 875 S.E.2d 608 (2022):

> When an incorrect charge is given, the court must withdraw it; '[m]erely superimposing a correct statement of law over an erroneous charge only fosters confusion and prejudice.'" State v. Robinson, 306 S.C. 399, 401, 412 S.E.2d 411, 413 (1991) (citations omitted). Robinson was not intended to impose a hard and fast rule. Rather, the purpose of Robinson is to ensure the jury understands that the incorrect charge is not applicable and the "superimposed" correct charge must control its decision. The point of Robinson—which we reaffirm today—is the trial court must inform the jury the first charge was incorrect, or the charge "fosters confusion and prejudice." 306 S.C. at 401, 412 S.E.2d at 413. It is too much to ask of a lay jury to determine on its own which of a trial court's conflicting statements of law are correct, and which are incorrect.6 In this case, the trial court responded to the jury's question by "superimposing" an incorrect statement of law over the already improper mutual combat instruction. We are concerned this did not cure, and likely exacerbated, the confusion the jury was already experiencing.

Bowers, 436 S.C. at 652–53, 875 S.E.2d at 614.

As noted below, self-defense was a viable theory of the events leading to the death of Conn. It was supported by the evidence introduced during trial. As such, the Court would have been obligated to charge self-defense had it been requested as part of the original jury charge. When the jury's question raised the matter, the trial court, under Bowers, was obligated to correct the incomplete charge already provided. Instead, the trial court essentially told the jury the law of self-defense could not be used during their deliberations. Tr. 1454, ll. 14 – 18. This was an error of law.

D. Self-defense.

For the jury instruction be an error, the facts presented during trial must have supported self-defense. As noted, the standard is "any evidence" in the record. *See* State v. Stoots, 445 S.C.

127, 132, 912 S.E.2d 248, 251 (2025) ("We have held many times that if there is any evidence from which the jury could reasonably conclude the defendant acted in self-defense, it is reversible error for the trial court to refuse to instruct the jury on the point."); State v. Slater, 373 S.C. 66, 70, 644 S.E.2d 50, 52 (2007) ("If there is any evidence in the record from which it could reasonably be inferred that the defendant acted in self-defense, the defendant is entitled to instructions on the defense, and the trial judge's refusal to do so is reversible error.").

> To establish self-defense in South Carolina, four elements must be present: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, defendant must show that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that he was actually in imminent danger and that the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or the loss of his life; and (4) the defendant had no other probable means of avoiding the danger.

State v. Slater, 373 S.C. 66, 69–70, 644 S.E.2d 50, 52 (2007).

Here, there is evidence from which the jury could reasonably infer Conn fired the first shot. Conn had no defensive wounds while both co-defendant Dajon Grate and decedent Dicker had wounds that were consistent with defensive motions. Dicker was also shot in the back fleeing from Conn's gunfire. Tr. 1174, ll. 13 – 18. All the participants surrounding the Conn vehicle were either in imminent danger of death or reasonably believed such danger existed. For those in the vehicle and in close proximity (the person standing at the driver's window), a jury could conclude there was no means readily available of avoiding the danger. Dicker's attempt at

escape certainly ended badly. The jury could reasonably infer any attempt by participant outside the car would have resulted in a similar fate.[9]

The only basis to deny a charge on self-defense centered around appellant being without fault in bringing on the difficulty. As noted, there is no direct evidence as to the start of this shooting. Either Conn started it, or the opposing group did. There may have been a specific spark to cause the shooting. The state believed that spark was the presence of Conn's drugs in the car. However, there was no direct evidence that this was in fact a drug transaction. While there was circumstantial evidence Conn both possessed and sold drugs, there was no evidence of an intent on appellant's part to participate in a drug buy.[10]

It is the absence of any direct evidence that appellant was actively involved in a drug transaction that mandates a charge on self-defense. Recently, our Supreme Court has ruled that a person who is in "unlawful possession of a loaded pistol during an illegal drug transaction was 'merely incidental' to arming himself in self-defense." State v. Williams, 427 S.C. 246, 255, 830 S.E.2d 904, 909 (2019). The state argued that Williams automatically precludes self-defense whenever drugs are present during a shooting. As noted, there was no direct evidence in this case that a drug transaction was planned or that appellant was a knowing participant in such a transaction. While there are certainly circumstantial evidence components that support that theory, the Williams decision expressly limited its holding to "the undisputed fact that when Williams agreed to participate in the drug deal, he made a conscious choice to take his loaded pistol with him." Williams, 427 S.C. at 248, 830 S.E.2d at 905. Williams freely admitted to both

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9 According to the state's theory, appellant was standing at the driver's window during the shooting. This position would have placed a .45 caliber handgun on his person and would have fired the shot that struck Conn in the head disabling Conn's further firing of his gun.

10 The only apparent connection between appellant and Conn was the interaction Conn had with Dicker. Even those limited contacts do not mention a drug transaction.

active participation in a planned drug buy and bringing a loaded, illegally possessed firearm to that transaction.

In contrast, in the present case there is no admission on the part of appellant to knowing in advance of a planned drug transaction. As noted by the Supreme Court in Williams, there would be "*some future case involving facts different from these*, perhaps the defendant will convince the trial court he has produced evidence he was not at fault in bringing on the violent occasion. Williams, 427 S.C. at 255, 830 S.E.2d at 909. This limitation in Williams, a requirement of undisputed fact that the defendant brought an illegal firearm to a known drug transaction, was affirmed in State v. Plumer, 439 S.C. 346, 887 S.E.2d 134 (2023). In Plumer the accused "unlawfully possessed the firearm he employed during this illegal drug transaction" and that the "only reasonable inference to be derived from the record is that Plumer intentionally took a loaded firearm to what he knew would be an illegal drug transaction." Plumer, 439 S.C. at 350, 887 S.E.2d at 136.

On their face, Williams and Plumer are clearly limited to a very narrow fact pattern: an accused who is in illegal possession of a firearm who knowing brings the firearm to a known drug transaction would not be entitled to a charge on self-defense due to fault in bringing on the difficulty if gunfire erupts related to the drug transaction. As neither of those narrow sets of facts are undisputed in the record from this trial, Williams and Plumer do not control.[11] As there is just as much evidence in the record that appellant was unaware of any drugs in the Conn vehicle as that he was aware, self-defense should have been charged. The trial court's response to the jury's question improperly precluded the jury from evaluating self-defense as an element that the state failed to disprove beyond a reasonable doubt.

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11 Appellant was not charged with illegal possession of a weapon and the state indicated there were no convictions that touched on credibility if he had testified. Tr. 1332, ll. 22 – 25.

To the extent Williams and Plumer can be read expansively, limiting self-defense as a matter of law in all cases involving potential drug transactions, they should, respectfully be overruled. Our Supreme Court in Williams seemed to signal this limitation, noting there would be "*some future case involving facts different from these*" when a defendant would convince the court he has produced evidence he was not at fault in bringing on the violent occasion while armed and participating in a drug transaction. Williams, 427 S.C. at 255, 830 S.E.2d at 909. That occasion was obviously not provided by Plumer, which did not include the limiting language from Williams.

That fair minded jurists and jurors might find a defendant without fault despite the presence of drugs was noted by the dissent in Williams. 427 S.C. at 255, 830 S.E.2d at 909 (James, J., dissenting). Justice James wrote "our self-defense law already adequately sets forth the parameters of how judges and juries are to consider the question of whether a drug-dealing or drug-purchasing defendant was or was not 'without fault in bringing on the difficulty.'" Id.

The nature and inherent danger of any given drug transaction and whether the presence of a gun was "calculated to produce a violent occasion" is inherently a fact driven question. Traditionally, that role is to be played and sorted by the jury. The Court in Plumer pushed the holding in Williams too far in stating it mattered not "who drew his weapon first or who fired first." Plumer, 439 S.C. at 350, 887 S.E.2d at 136.

South Carolina law has traditionally limited self-defense when the actions of an accused are in "violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars the right to assert self-defense." State v. Slater, 373 S.C. 66, 70, 644 S.E.2d 50, 52 (2007). That connection, between an intentional violation of the law and the resulting need to use deadly force, often involves murky and disputed facts. As such, the trial

judge is instructed to charge self-defense when there is any evidence in the record to support the charge. To the extent Williams and Plumer may be read to add a caveat that that longstanding practice regarding "except in cases involving the sale of drugs," they have gone too far and should be limited to the clear facts before the Court in both cases: an accused admitting participation in a drug transaction while also armed with an illegally possessed firearm.

Multiple states have legalized the sale of cannabis as a regulated industry. Multiple states have legalized small amounts of cannabis (marijuana) for adult recreational use. [12] Recently, a bill has been introduced in South Carolina to expand access to cannabis for medical use. See S. 53, South Carolina General Assembly 126th Session, 2025-2026, Compassionate Care Act. Certainly, societal attitudes towards certain drug use and sale have evolved and are continuing to evolve.

In addition, South Carolinians enjoy substantial protections surrounding lawful carrying of a firearm. See S.C. Code Ann. § 23-31-245 (2024) (declaring a person openly carrying a weapon in accordance with this article does not give a law enforcement officer reasonable suspicion or probable cause to search, detain, or arrest the person.). It is not hard to stretch the imagination to find facts where a seemingly innocuous attempt by an otherwise law abiding South Carolinian to purchase personal use cannabis may result in an unfortunate and unexpected struggle resulting in the discharge of a lawfully owned and possessed firearm. To the extent that Williams and Plumer can be read to cover such a scenario, that holding was not required to answer the question presented either in William or Plumer and should be resolved, not by a *per se* and robotic application of all drug transactions preclude self-defense, but by the Court's traditional approach to the issue when some component of illegality plays a role in the exercise

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12 See National Conference of State Legislatures, Cannabis Overview Report, updated June 20, 2024. https://www.ncsl.org/civil-and-criminal-justice/cannabis-overview.

of self-defense. *See* State v. Burriss, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999) (holding "a person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting."). Importantly, in Burriss, the defendant was already unlawfully carrying the weapon when he drew it lawfully in self-defense. In such scenario, our courts before Williams and Plumer looked to the causal connection between the illegal act (possessing a firearm) and the resulting need to exercise self-defense. If one was merely incidental to the other, the illegal act was not a bar to self-defense. *See* State v. Slater, 373 S.C. 66, 644 S.E.2d 50 (2007) (holding if the unlawful action was incidental to the defendant's lawful act of arming himself in self-defense, the unlawful action will not prevent the use of self-defense).

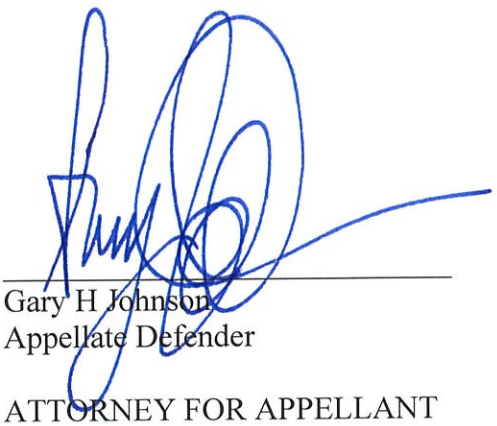
A *per se* rule that all unlawful drug purchases prohibit an armed individual from exercising self-dense when the possession of the weapon or purchase of the narcotics are merely incidental to the need to use such force is, respectfully, an overly broad and unneeded expansion of the holdings in Williams and Plumer.

E. Prejudice.

As noted in appellant's first argument, the lack of direct evidence concerning the nature of the shooting dictates a finding of prejudice. The supplemental charge issued by the trial court improperly negated appellant's counsel's argument that the state failed to disprove self-defense. Rather than properly charge the law, the trial court instructed the jury to ignore everything not contained in its original instruction. As that instruction was silent on self-defense, it was an error of law requiring reversal and a new trial.

CONCLUSION

Based upon the foregoing arguments, appellant respectfully requests that his conviction be reversed and this matter remanded for a new trial.



Gary H Johnson
Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of April, 2025.