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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
The Honorable Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

ANTONIO VASHON BARNES, JR.,

APPELLANT.

Appellate Case No. 2023-001390

FINAL BRIEF OF RESPONDENT

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APPELLANT'S ISSUES PRESENTED

I.

Did the trial court err by denying Appellant immunity from prosecution pursuant to the Protection of Persons and Property Act, when Appellant proved by a preponderance of the evidence that he was entitled to immunity pursuant to the Act?

II.

Did the trial court err by failing to correctly instruct the jury on the defense of habitation as requested by Appellant when there was evidence to support the charge, particularly where the instruction given incorrectly told the jury the defense only applied if Appellant or a member of his household was attacked in Appellant's home and the life or safety of Appellant or a member of his household was jeopardized, which is an incorrect statement of law?

III.

Did the trial court abuse its discretion by admitting evidence of Appellant's marijuana possession and prior marijuana distribution as well as evidence of Appellant's possession of unrelated firearms and ammunition since the evidence was not relevant pursuant to Rule 402, SCRE, any probative value of the evidence was substantially outweighed by the danger of unfair prejudice pursuant to Rule 403, SCRE, and the evidence was improper bad character evidence merely used to establish propensity in violation of Rule 404(b), SCRE?

IV.

Did the trial court abuse its discretion by admitting lyrics from a song Appellant rapped and posted on YouTube when the state failed to disclose the evidence to the defense in violation of Rule 5, SCRCrimP, and where the rap lyrics should have been excluded because the evidence was not relevant pursuant to Rule 402, SCRE, any probative value of the evidence was outweighed by the danger of unfair prejudice to Rule 403, SCRE, and the evidence constituted bad character evidence in violation of Rule 404(b), SCRE?

V.

Did the trial court abuse its discretion by refusing to admit Defendant's Exhibit No. 108, Appellant's prior consistent statement, pursuant to Rule 801(d)(1)(B), SCRE, to rebut the state's argument that Appellant had fabricated his account of events, and to counter the state's suggestion Appellant manufactured remorse on the stand, particularly where the exclusion violated Appellant's constitutional right to present a complete defense?

VI.

Did the trial court err by refusing to grant a new trial based on the cumulative effect of the trial errors?

STATEMENT OF THE CASE

On February 7, 2019, at approximately 8:55am, Appellant shot and killed his roommate, Antonio Dash (hereinafter referred to as Mr. Dash), and his friend Eric Griffin (hereinafter referred to as Mr. Griffin). Antonio Barnes (hereinafter "Appellant") was indicted for two counts of murder and possession of a weapon during the commission of a violent crime. (2021-GS-40-1292; 1293; 1294). Appellant was represented by attorneys: Caroline E. Latimer, Brian R. Shealey, Luke A. Shealey, and Larua W. Young. Senior Assistant Solicitor Christopher Dale Scott, along with Assistant Solicitors Nicolas A Fowler and Paul Walton prosecuted the case. Pursuant to the Protection of Persons and Property Act, Appellant first proceeded to an immunity hearing before the Honorable Deandrea Gist Benjamin on March 30-31, 2022. After hearing the evidence and Appellant's theory of self-defense, the trial court took the matter under advisement and permitted the parties to present proposed orders. Immunity was denied and Appellant proceeded to a jury trial on December 5 – 8, and 13, 2022, before the Honorable Judge Clifton B. Newman. At the conclusion of the trial, Appellant was found guilty for the murder of Eric Griffin and for the possession of a weapon during the commission of a violent crime; Appellant was found not guilty for the killing of Mr. Dash. Appellant was then sentenced to 35 years imprisonment for murder and 5 years imprisonment for the possession of a weapon charge, to be served concurrently. (R. p. 1215-1216; 1220).

STATEMENT OF FACTS

Trial

On the morning of February 7, 2019, Mr. Griffin was in the car with his fiancé, Ieasha Washington, and his mother, Wanda Griffin. They dropped off his daughter at the babysitters, but before heading to his mother's workplace to drop her off, he asked his fiancé to stop by the

apartment of his friend, Appellant. This was not an uncommon occurrence, and since Appellant's Willow Run 14G apartment was nearby their babysitter's home, she obliged. Mr. Griffin got out of the car, walked up to the apartment, knocked on the door, and went inside. (R. p. 521-526; 556-561). Mr. Griffin appeared to be in a happy mood when he exited the vehicle and he was not in possession of a firearm. (R. p. 527; 543-544; 562). Approximately five to six minutes passed. Then, at about 8:54am, Ms. Washington and Ms. Griffin heard what they thought might be multiple gunshots; Ms. Griffin heard three shots and Ms. Washington heard between five and seven. (R. p. 532; 563-565). They walked up to the apartment door and knocked three times over the course of a few minutes before Appellant finally answered the door. Appellant opened the door enough to slip outside the apartment and he then closed the door behind him while he spoke with Ms. Washington.[1] Ms. Griffin opened the door herself and went inside where she found victims' bodies. (R. p. 530-536; 563-564). In response, Ms. Washington dialed 911. (R. p. 551).

Ms. Washington spoke briefly with Appellant prior to the women entering the apartment. She testified that he shook her and asked: "What are they doing here? They were fighting. Who let them in?" He then claimed he was asleep. (R. p. 575-576). However, he never informed them that he had committed the shooting. She then followed in after Ms. Griffin. (R. p. 567-569). Ms. Washington noted that Mr. Griffin did not have a pulse when she checked and that Mr. Dash was gasping for air. Ms. Washington testified that Appellant then went down the hallway and soon left the apartment. (R. p. 569). Neither Ms. Griffin nor Ms. Washington saw Appellant with a gun that morning. (R. p. 570; 553).

[1] Appellant emphasized during trial that the door was either designed or installed in such a way that it tended to close itself.

Mr. Kevin Archie was working at the Willow Run apartments as a maintenance and HVAC technician when he heard the gunshots while outside of building 17. (R. p. 586). When called by some ladies to come help, he ran to Appellant's apartment in building 14. He knocked on Appellant's door and testified that Appellant's reaction was to say "What, what, what?" Mr. Archie saw the bodies in the entryway, and as a result of Appellant's reaction, tone, and volume, he turned and ran from the building. He then reported the shooting to the apartment complex office. (R. p. 586-589). Before leaving, Mr. Archie recalled seeing two other individuals, Shakihla Smalls (hereinafter "Ms. Smalls") and Richard Charles, at the apartment but noted that Ms. Smalls seemed to "disappear real fast during the chaos." (R. p. 598).

Shortly after leaving the apartment Appellant spoke to Mr. Archie again. Mr. Archie testified that Appellant attempted to explain what happened to him but gave three separate explanations. First, Appellant told him that he simply did not know what happened. Second, he told Mr. Archie that they were trying to rob him. Third, he said "I'm gonna tell ya what happened. They were in there fighting." Mr. Archie also noted that as part of Appellant's various explanations, he claimed that "they was in there fighting. I just came out blasting." (R. p. 595-596). Appellant told Mr. Archie to tell the police this explanation.[2] During cross examination, Mr. Archie was asked what he told the police Appellant's explanation was, to which he responded: "I told the police what he told me to tell them." (R. p. 593; 602). Javontae Davis also testified, and provided yet another version of Appellant's explanation, noting that he was "saying something about somebody tried to kick his door or something like that." When shown his previous statement

[2] Appellant asserts that he "was always consistent in his account of what occurred." (Brief of Appellant, p. 8) Respondent disputes such in light of the testimony of Mr. Archie, and as was argued in closing, asserts that Appellant's supposed consistency to law enforcement only came after Appellant evolved his story in the hours preceding his statements to police. (R. p. 1130).

to refresh his memory, he added that Appellant told him that "he was asleep or something, and they was on the floor dead." (R. p. 622; 625-626; 632). Again, Appellant did not inform Mr. Davis that he was responsible for the shooting.

Samuel Thomas, Appellant's other roommate, also testified at trial. He testified that he had a morning doctor's appointment and had left the apartment before Mr. Griffin arrived. He arrived back at the apartment after the shooting. He testified that he was the only individual in the apartment with a car and would commonly take Mr. Dash to work[3], and help Appellant with transportation as well. However, Mr. Dash had told him that he did not need a ride to work that morning. Mr. Thomas did not inform Appellant of this. Mr. Thomas testified that he was friends with Appellant, Mr. Dash, and Mr. Griffin, but noted that Mr. Griffin and Mr. Dash had been having a disagreement regarding a firearm that had gone missing. (R. p. 657-661). The disagreement had developed two days prior and had led to the two having a confrontation that Appellant ultimately diffused. (R. p. 668-675). Regarding the shooting on February 7, Mr. Thomas had an opportunity to speak with Appellant by phone about an hour after the shooting. Mr. Thomas testified that Appellant's explanation was that he was asleep and was woken by a boom in the apartment; he thought he was being robbed and he did not realize it was Mr. Dash and Mr. Griffin until after he had shot them. (R. p. 683-684). Mr. Thomas acknowledged that he only received Appellant's explanation of events, he was not there to witness the shooting. (R. p. 691). He further testified that Appellant is not friends with Ms. Smalls. (R. p. 688).

At approximately 10:47am, Appellant returned to the scene and informed officers that he was the shooter. He was interviewed briefly at the scene by Officer Ryan McIntyer, who initially

[3] The apartment only had two bedrooms, which Appellant and Mr. Thomas occupied. Mr. Dash was staying in the walk-in closet for the time being.

thought Appellant was merely a witness. (R. p. 635-636). Appellant gave his explanation about being awoken by a loud boom, believing he was being robbed, and committing the shooting. (R. p. 637-642). Appellant also offered an explanation for why he supposedly believed he was being robbed; Appellant noted that his roommate had recently been robbed and he confessed to dealing drugs and having marijuana in the apartment. Appellant explained that he thought he was being robbed for his weed. (R. p. 643; State's Exhibit 71). Appellant was taken to the station for further questioning, but he was not yet placed under arrest. (R. p. 644).

During the subsequent interview, Appellant gave law enforcement the version of his story about being awoken by the loud boom, coming down the hall thinking he was being robbed, and shooting at the two individuals on the floor before knowing who they were. He also informed law enforcement about the missing firearm that had caused a "beef" between Mr. Griffin and Mr. Dash. When asked where the gun used in the shooting was, Appellant explained that shortly after the shooting took place Ms. Smalls came up to the apartment and snatched his gun out of his hand and walked off. Critically, Appellant's statement to law enforcement suggested that he barely knew Ms. Smalls and he explicitly denied having her phone number; he only had her Facebook profile to show to police. (State's Exhibit 71; R. p. 650-654). In contrast, the data dump from Appellant's phone revealed that there were fifteen (15) calls going "back and forth between he and a Shakihla Smalls," between 10:10am and 10:29am on February 7, 2019. This was barely more than an hour after the shooting took place. (R. p. 876). Nevertheless, even after this data information was provided, Appellant testified on direct examination that he did not know Ms. Smalls' phone number, despite having his phone with him during the interview. (R. p. 932-933; 939; 1024).

Law enforcement's investigations provided additional evidence to the case. Pursuant to a search warrant, the 9-millimeter firearm used in the shooting was found underneath the mattress

in Ms. Smalls' apartment. The clip inside the gun had a seventeen round capacity and was found to contain six rounds of ammunition in addition to the one round in the chamber.[4] (R. p. 743-747). There were no signs of forcible entry into the apartment. (R. p. 699). There was no artificial lighting on in the apartment, however the lighting provided by the windows provided enough light for responding Officer Joseph Dwyer to be able to see the entire apartment. (R. p. 610).

Mr. Griffin was found lying on his back on the floor. Mr. Dash was found lying on top of Mr. Griffin. (R. p. 537; 569; 590; 591; 592; 611; 653). Mr. Dash received seven (7) gunshot wounds, five (5) of which were "through and through" wounds, along with two (2) blunt force injuries to the head.[5] (R. p. 804-805). Two of the five gunshots wounds struck different sides of Mr. Dash's head. (R. p. 806). Four gunshots were through and through wounds to the left arm, and one was a through and through wound to the right arm. (R. p. 807-808; 811). Mr. Griffin suffered six (6) gunshots wounds: one to the back of the head, one through-and-through gunshot to the inner left arm, one to the right upper arm, two to the right upper back, and one graze to the upper right shoulder. (R. p. 818-819). Doctor Monroe testified that "*depend[ing] on what it hits*", the bullet can begin to lose its spiral and tumble into a subsequent entry of another victim. The tumbling and lack of spiral results in a "irregular" wound as opposed to a "regular" clean entry wound. He testified that none of the wounds provided a clear indication that the bullet had been disrupted prior to entry and there was only one wound on Mr. Griffin that led him to question it as a possible re-entry wound. (R. p. 845-848).

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[4] In total, the firearm was capable of holding a maximum of eighteen (18) rounds of ammunition. (R. p. 771).

[5] Doctor Monroe agreed that the blunt force wounds to Mr. Dash could have come from being hit with the butt of a pistol. (R. p. 842).

Mr. Dash and Mr. Griffin each had gunshot wounds that were of significant forensic focus. The gunshot wound that impacted the back of Mr. Griffin's "upper neck, lower head" was testified to by Dr. Monroe as being a "contact gunshot wound." (R. p. 829; 830). He testified that the wound possessed an abrasion border, partial muzzle imprints, and a contusion; he testified that this type of wound is the result of the gun being placed directly in contact with Mr. Griffin's head when the bullet was discharged. (R. p. 821-823). Mr. Dash's bullet wounds displayed "stippling" which was informative as to the range at which Mr. Dash was shot. According to Dr. Monroe, a gunshot wound displaying stippling could be fired anywhere between 6 inches and 3.5 feet from the victim.

Seven total shell casings were recovered from the crime scene. Two were by the doorway and five were amongst the bodies, but none were in the hallway where Appellant claimed to commit the shooting. (R. p. 710-712). There were no signs of bullet holes in the walls or laminate flooring. (R. p. 708-709). All seven shell casings were matched to the recovered 9-millimeter pistol. (R. p. 757-758). Four of the recovered projectiles were conclusively matched to the 9-millimeter firearm. (R. p. 759-760). Two bullet fragment jackets were consistent with the 9-millimeter cartridge and were matched to the firearm. One fragment was consistent with being ammunition within the "nominal .38 caliber family" (which includes 9-milimeter ammunition) but further detail was not available for a more specific finding. (R. p. 762-763). The remaining fragments were either too small, too damaged, or lacking sufficient markings for analysis. (R. p. 764). None of the ammunition forensic evidence demonstrated that a second firearm was used during the crime. A further search of the apartment led to the discovery of a 3-ounce quantity of a "green leafy plant", as well as .40 caliber ammunition and .380 caliber ammunition. (R. p. 707).

In Appellant's case-in-chief, he presented expert witness Christopher Watkins to discuss the phone data. He testified that the "Apple Health" data from Appellant's phone indicated that

movement by the phone on the morning of February 7, 2019, began at 8:49am and totaled 121 steps by the time Appellant's phone dialed 911. Mr. Watkins agreed that the data was not able to tell the type of movement occurring, only that it was recorded as movement by the inner gyroscopic sensor. (R. p. 857-871). There is no indication that Appellant spoke with the 911 operator. (R. p. 887-888). The phone calls to Ms. Smalls were discussed (R. p. 876), and text message data was also recovered by the expert. One such text thread was discussed by the State during cross examination as pertaining to a stolen gun that Appellant described as being "our gun[]" as opposed to belonging solely to Mr. Dash. (R. p. 873-875; 881-882). The phone also contained photographs of Appellant posing with a number of guns. (R. p. 884-885).

Appellant testified in his own defense and noted that he had been friends with Mr. Dash and Mr. Griffin for a long time, though Mr. Dash appeared to be the closer of the two friends. He provided a detailed accounting of how Sam Thomas borrowed what he then referred to as "Tonio's gun", but that the gun went missing after Sam returned and put the gun on the table in the apartment. He noted the various people who were in the apartment that day, which included: Appellant, Mr. Griffin, Mr. Dash, Samuel Thomas, a lady named Katerra, and a man named Hezekia. (R. p. 892-904). Samuel Thomas believed Mr. Griffin had taken the gun. Appellant called to ask Mr. Griffin about it, but Mr. Griffin denied taking the gun. (R. p. 904-905). Appellant recounted the confrontation on February 6th between Mr. Dash and Mr. Griffin, noting that Appellant interrupted the dispute and took his gun away from Mr. Dash. (R. p. 908-910).

Appellant testified that the next morning he heard a loud boom in the front room. He waited a minute or two to see if he could hear what was happening, but all he could hear was feet moving

around.[6] He believed the boom could have been his door being kicked in and did not think his roommates were home. He next heard what he thought to be the TV falling. He testified that he did not want anyone to reach his room, so he grabbed his gun and walked down the hallway keeping to the wall. When he reached the end of the hallway he turned to start shooting at the area where he was hearing the commotion. He claimed that his body was still moving forward as he began shooting and that he did not see any faces at first. However, after shooting he saw that one of the individuals was Mr. Dash and that the other was Mr. Griffin. (R. p. 913-919).

Contrary to others' testimony, he testified that Mr. Griffin was on top of Mr. Dash. He testified that he was crushed that he had shot his friend Mr. Dash. He next heard knocks at the door. He claimed that he let Ms. Washington and Ms. Griffin inside immediately and does not remember talking to Ms. Washington. (R. p. 922). Appellant next offered contradictory testimony. First, he stated that after the two women came into the apartment, he went back to his room to get his phone and call 911. (R. p. 923). Later, Appellant testified that he was going to get his phone from his room to call the police and used such testimony as an explanation for why it took him so long to respond to Ms. Washington's and Ms. Griffin's knocking. He then testified that they never knocked on the door, he just let them in immediately. (R. p. 923; 976).

He next testified about Ms. Smalls coming into the apartment and snatching his gun out of his hand. He testified that he never asked her to take the gun and did not stop her from doing so.[7]

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[6] Respondent disputes the portions of Appellant's statement of facts indicating that "he did not hear any voices he recognized." (Brief of Appellant, p. 5). Such would imply that he heard *unfamiliar* voices, which is not supported by the record. (R. p. 513; p. 915). Respondent would further dispute Appellant's assertion that Mr. Dash was underneath Mr. Griffin. (Brief of Appellant, p. 5). There is considerable testimony to the contrary. (R. p. 537; 569; 590; 591; 592; 611; 653).

[7] Appellant's statement of facts presents a number of Appellant's assertions, as if they were record *facts*, and implies that Ms. Smalls was not called as a witness by the State due to credibility issues. (Brief of Appellant, p. 6). Respondent would note that the record strongly disputes Appellant's

(R. p. 924-925). Appellant admitted to leaving the apartment, but testified that he immediately identified himself to police. However, in process of identifying himself to the police he *did not* indicate to police that he committed the shooting. (R. p. 928). In the immediate aftermath of the shooting Appellant went to the apartment of his friend Wesley Wright, who was two parking lots over. They later went to get cigarettes from the store. Only after they returned did Appellant turn himself into police as the shooter. (R. p. 929-931).

Part of Appellant's testimony concerns his remorse, emotional state, and nightmares that resulted from his having committed the shooting. On cross examination, Appellant was asked about being a rapper with the alias "Big Hood Lyfe" and some of the lyrics of his songs that directly referenced the shooting and victims in question. Appellant was adamant that the prosecutor had not correctly heard and recited his lyrics. Appellant also admitted the following:

> Q. Yeah. What if there's no danger? What's if it's your friend and roommate who are in the living room and you - - -
> A. Well, at the time you wouldn't be able to know if it was no danger. I was all the way in the back room sleep. So, I wouldn't even know, know if danger was imminent or not. It would be impossible for me to know.
> Q. Okay. Impossible?
> A. Yes, sir.
>
> ...
>
> I didn't take no time to assess the situation. . . I didn't observe nothing. As soon as I got to the hallway, to the end of the hallway and I heard where the noise was coming from, I shot towards that area as I was still moving.

(R. p. 982; 1001-1002).

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version of events, and Appellant fails to note that Ms. Smalls hid Appellant's firearm *under her mattress*. Appellant's assertion that there "is no evidence in the record as to why Smalls took the gun from Appellant" disregards the fifteen (15) phone calls between her and Appellant in the immediate aftermath of the shooting which strongly suggests a cover up or the hiding of evidence from the crime at Appellant's behest. Regardless of "why" Ms. Smalls supposedly "snatched" a murder weapon out of Appellant's hand and hid it under her mattress (a dubious assertion), such a question is subordinate to the proven fact that she did so at all.

Appellant was asked repeatedly about the contact gunshot wound to Mr. Griffin's head. Appellant provided no explanation other than testifying that he did not remember committing that particular shooting. Despite this position, he did not dispute the contact gunshot wound and did not claim that he "black[ed] out" during the shooting. (R. p. 1011-1012; 1038).

Appellant's case-in-chief also included the testimony of Sara Goodman. She testified as to the likelihood ratios of the DNA evidence submitted. In summary, each victim had the other victim's DNA under their fingernails, but she could not rule out that such was the result of the two victims lying on top of one another in their collective blood. Appellant and Ms. Smalls were ruled out as contributors to the DNA results.

Immunity Hearing

Investigator Emmitt Gilliam was called first by the defense.[8] His testimony demonstrated that Appellant and Mr. Samuel Thomas were the leaseholders for the 14G Willow Run apartment and that Mr. Dash was a roommate. He testified that both Mr. Dash and Mr. Griffin were friends of Appellant. (Hearing R. p. 11-19). Mr. Griffin stopped to see Appellant while his wife and mother stayed in their parked car. No testimony is offered demonstrating that Mr. Griffin was seen having difficulty entering the apartment, and they were not alerted to any problems of violence until they heard gunshots. Despite the apparent emergency and their knocking on the door when they went to the apartment to check on Mr. Griffin, it took Appellant a couple of minutes to open the door. His behavior demonstrated that he did not immediately allow the women into the home but instead closed the door behind him. It was only after they opened the door themselves that they found Mr. Griffin and Mr. Dash bleeding on the floor. (Hearing R. p. 20-24). Although Appellant ultimately

[8] Persistent throughout the hearing was Appellant's effort to have the testimony and opinions of witnesses presented via the second-hand accounting of the officers.

admitted that he committed the shooting, he left the premises prior to informing police of his involvement. (Hearing R. p. 26-30). Investigator Gilliam testified that Ms. Smalls received the gun from Appellant, that gun was recovered, and that the seven shell casings found at the scene all matched to the gun. By the leading question of defense counsel to Mr. Gilliam he confirmed that "that not all the projectiles matched this gun." [9] (Hearing R. p. 30-33). Investigator Gilliam testified that Ms. Smalls denied having the gun, but the fact that it was recovered from underneath her mattress demonstrated that she either took the gun or was given the gun by Appellant, and was not honest with law enforcement officers on the topic. (Hearing R. p. 38; p. 40-41; p. 50).

Appellant's version of events is summarized for the court. According to Investigator Gilliam, Appellant believed he was being robbed and heard fighting and tussling going on outside his bedroom. He comes out, sees figures on the ground, and starts shooting. (Hearing R. p. 54-55). However, statements made by Ms. Smalls demonstrated that prior to the shooting she came over to buy weed from Mr. Dash *while Mr. Griffin was already present*, and that Appellant peeked out of his room to see who it was. This negated his assertions of being asleep and believing no one else was rightfully in the apartment. (Hearing R. p. 52-53). Investigator Gilliam confirmed that Appellant presented signs of being upset and emotional, but upon questioning by defense counsel Investigator Gilliam testified that he believed the emotion to be feigned. (Hearing R. p. 105-108). Investigator Gilliam testified further to a possible "gun problem" between Mr. Griffin and Mr. Dash. (Hearing R. p. 121).

Investigator Gilliams' cross-examination from the state addressed the possibility that Mr. Dash might have been sleeping on the pallet beside the bed, and that documents belonging to Mr.

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[9] Such was not a fair characterization of the evidence, as it insinuates that some of the projectiles were found to be *conclusively* not matched to the recovered firearm. The full record of this appeal demonstrates that such is not the case.

Dash were found inside Appellant's room. (Hearing R. p. 131-134). He reiterated that Mr. Thomas, Appellant, and Mr. Dash were all living together and friendly with one another, and that Mr. Griffin was a frequent visitor to the home, having just been there two days prior. (Hearing R. p. 138). There was also evidence of other caliber ammunition in Appellant's room and a receipt showing Appellant had purchased a .40 caliber gun that was not the 9-millimeter pistol used in the crime. (Hearing R. p. 139-141). He confirmed that there was no indication or evidence that the apartment door had been kicked in or forcibly opened. Nor were there any broken windows or other signs of forced entry. (Hearing R. p. 143). Investigator Gilliam testified that they learned Appellant was a marijuana dealer and that he had a large amount of marijuana in the apartment. (Hearing R. p. 147). He then confirmed that he is not qualified to testify as to the ballistics and forensic analysis of projectiles matching weapons. (Hearing R. p. 147-148).

Investigator Gilliam testified that the shell casings were found either by the door or by the bodies, but none were found in the hallway where Appellant supposedly began firing his weapon. (Hearing R. p. 148). Critically, Investigator Gilliam testified that he recalled Appellant indicating that both victims were on the ground when he shot them, that he did not make any statement about the individuals lunging toward him, threatening him, or seeing them armed with a weapon. (Hearing R. p. 152-153). His explanation was simply that he was asleep, believed his roommate had left, heard a loud bang, listened further but could not hear any identifying voices, believed he was being robbed, and immediately started shooting at people on the ground. (Hearing R. p. 154-155). Investigator Gilliam also testified that there was a discrepancy as to whether Appellant changed or washed his clothing, as his shirt was uncharacteristically clean in light of the crime scene he created. (Hearing R. p. 160).

Kevin Archie testified at the hearing. He was on duty as a HVAC handyman for the

apartment complex when he hurried to the location of the gunshots. On direct examination, he testified that Appellant told him he was asleep and awoke confused. He heard people fighting, thought he was being robbed, and came out shooting. (Hearing R. p. 173-175). On cross-examination, he testified that he knocked on Appellant's door shortly after the gunshots. This apparently spurred an aggressively toned "What what what?" from Appellant when he opened the door. Appellant's reaction was enough for him to say, "oh never mind, nothing" and leave. (Hearing R. p. 180-182). He did, however, see inside the apartment and see the victims on the floor. On cross examination he testified in detail that Appellant spoke with him later while outside the apartment and provided him with three separate attempts to explain the shooting. First Appellant stated: "Man, I don't know, I was sleeping. I was like, Come on, man." When he confronted Appellant about the inadequacy of his explanation, Appellant responded with a second explanation: "Man, they tried to rob me, man." When Mr. Archie confronted Appellant about the unlikelihood of such an excuse when one of the victims was his own roommate, Appellant offered a third explanation: "All right, I'm going to tell you the truth, man. They was in there fighting and I just came out the back blasting. I'm going to change my shirt and turn myself in." (Hearing R. p. 183-184).

Samuel Thomas testified next. In summary, he testified that victims and Appellant were all his friends and roommates. He usually provided Dash with a ride to work each morning, but such was not needed that day. He also testified that he was absent at the time of the crime, as he was at the doctor's office. He testified that Mr. Dash slept in their storage closet, not Appellant's room. When he first had an opportunity to speak with Appellant, Appellant gave him the explanation about hearing the commotion and thinking he was being robbed. (Hearing R. p. 190-204; 213).

He testified that Ms. Smalls never just "pops in" and does not visit in the morning hours.

He confirmed that it was customary that they lock their apartment door at night. (Hearing R. p. 211-212). He acknowledged that any knowledge of the shooting he had, came from Appellant. He was not present at the time of the shooting and did not independently know what took place. (Hearing R. p. 218-219).

Chris Watkins testified as an expert in digital forensics who compiled the data from Appellant's phone on behalf of the defense. His testimony showed that Appellant's phone was tracking physical movement through the Apple Health App starting at 8:49am on the morning of the shooting. He testified that Appellant's phone dialed 911 at 8:55:24am, and the call lasted 7 seconds. He further testified that the phone contained text messages concerning a missing firearm. (Hearing R. p. 231-256).

Doctor Daren Monroe testified that Mr. Griffin was shot six times, with one gunshot being a "contact wound" to the back of the upper neck. Mr. Dash was shot seven times, two of which were to each side of his head, and that he also had blunt force trauma wounds. (Hearing R. p. 276-282).

His cross-examination revealed that a contact gunshot wound like the one Mr. Griffin sustained is caused when the tip of the gun barrel is placed against the skin of the victim at the time the gun is fired. He further testified that Mr. Dash had stippling around his gunshot wounds which indicated that the gun was fired between 6 inches and 3.5 feet away Mr. Dash's body. He also acknowledged that bullets which strike one victim could enter the body of an adjacent victim. He believed one such wound could potentially be a "reentry wound." (Hearing R. p. 293-303)

Sara Goodman testified at the hearing as to DNA evidence. Her testimony is consistent with that which was provided at trial. (*Supra*, p. 11); (Hearing R. p. 308-317).

Paul Greer testified at the hearing as to ballistic/firearm evidence. His testimony is likewise

consistent with that which is provided at trial. (*Supra*, p. 8); (Hearing R. p. 331-347).

Bob Tressel testified at the immunity hearing. His expertise in certain fields was successfully challenged by the State. His testimony demonstrated that two of the blood stains came from an object that had blood on it, rather than such being caused by a gunshot impact. (Hearing R. p. 382-384). Another wound was a stellate wound that would potentially be caused by an object like a hammer or a pistol physically striking the body. (Hearing R. p. 385). In review of the photographs and discovery he noted that there was an earring torn off the victim's ear, which is indicative of a physical altercation. (Hearing R. p. 387). He confirmed that there were thirteen distinct wounds between the two victims, the presence of only seven shell casings, but the apparent identification of "eight bullets." (Hearing R. p. 390).

STANDARD OF REVIEW

Pretrial hearings to determine whether a defendant is entitled to immunity under the Protection of Persons and Property Act employ a preponderance of the evidence standard and are reviewed on appeal for an abuse of discretion by the circuit court. *State v. Cervantes-Pavon*, 426 S.C. 442, 449, 827 S.E.2d 564, 567 (2019). Similarly, "[a] trial court's denial of a new trial motion will not be disturbed on review absent a showing of an abuse of discretion which results in prejudice to the defendant." *State v. Kelly*, 331 S.C. 132, 145, 502 S.E.2d 99, 106 (1998) "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." *State v. Lopez*, 352 S.C. 373, 378, 574 S.E.2d 210, 212 (Ct.App.2002). "In criminal cases, the appellate court sits to review errors of law only" and it is bound by the trial court's findings of fact, unless they are clearly erroneous. *State v. Collins*, 409 S.C. 524, 529–30, 763 S.E.2d 22, 25 (2014) (citing *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006)).

"In reviewing jury charges for error, this Court considers the trial court's jury charge as a whole and in light of the evidence and issues presented at trial. A jury charge is correct if, when read as a whole, the charge adequately covers the law." *State v. Logan*, 405 S.C. 83, 90–91, 747 S.E.2d 444, 448 (2013) (citing *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 604 (2011)) (internal citations omitted). "A jury charge that is substantially correct and covers the law does not require reversal." *Id.* (citing *State v. Foust*, 325 S.C. 12, 16, 479 S.E.2d 50, 52 (1996)). "An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." *State v. Brandt*, 393 S.C. 526, 550, 713 S.E.2d 591, 603 (2011)

"The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." *Collins*, 409 S.C. at 529–30, 763 S.E.2d at 25 (2014) (citing *State v. Wise*, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004)). The trial judge is given broad discretion in ruling on questions concerning the relevancy and admissibility of evidence, and his decision will be reversed only if there is a clear abuse of discretion. *State v. Alexander*, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991); *State v. Clasby*, 385 S.C. 148, 682 S.E.2d 892 (2009). "A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." *Collins*, 409 S.C. at 534, 763 S.E.2d at 28 (2014) (quoting *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct.App.2003)). An appellate court "review[s] a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and is obligated to give great deference to the trial court's judgment." *Id.*

ARGUMENT

I. Appellant has failed to appropriately argue the standard of review of a circuit court's immunity ruling. Moreover, Judge Benjamin did not abuse his discretion in denying immunity to Appellant following his Protection of Persons and Property Act hearing as the evidence strongly contradicts the defense of habitation and self-defense theories proposed by Appellant. The nature of the conflict, the manner in which Appellant alleges he committed the shooting, and the nature of the gunshot wounds received by both victims demonstrates, at minimum, that the preponderance of the evidence weighs against the defense's arguments and demonstrates considerable questions of credibility.

Appellant fails to appropriately argue an abuse of discretion on the part of the circuit court and instead seeks to merely relitigate his immunity hearing evidence to this Court. Such is improper. In any case, Judge Benjamin heard the evidence presented, weighed it in light of Appellant's arguments for immunity under the theories of Defense of Habitation and Self-Defense, and correctly found that the weight of the evidence was not in Appellant's favor. (Order – R. p. 469-483). Appellant failed to present sufficient evidence to satisfy his preponderance of the evidence burden, and in some cases, he failed to provide any evidence in support of certain elements of his defenses. Moreover, the nature of the evidence demonstrates that there are considerable credibility issues relating to Appellant's supposed explanation for the shooting. The circuit court is not obligated to take Appellant's alleged version of the facts at face value and the evidence here demonstrates the weakness of Appellant's theory of the case.

"Section 16-11-450 provides immunity from prosecution if a person is found to be justified in using deadly force under the Act." *State v. Cervantes-Pavon*, 426 S.C. 442, 449, 827 S.E.2d 564, 568 (2019) (citing *State v. Curry*, 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013)). The Act represents the codification of the "Castle Doctrine," wherein "[o]ne attacked, without fault on his part, on his own premises, has the right, in establishing his plea of self-defense, to claim immunity from the law of retreat, which ordinarily is an essential element of that defense." *State v. Glenn*,

429 S.C. 108, 117, 838 S.E.2d 491, 495-96 (2019). In seeking immunity, the defendant bears the burden of proof and must show that by a preponderance of the evidence that his killing was a justified use of deadly force. *Id.* Stated another way, he must demonstrate all of the necessary elements of his chosen defense theory by the greater weight of the evidence. However, the appellate review of that decision is not conducted *de novo*; on appeal he must instead show an abuse of discretion by the circuit court in denying immunity. "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. Laney*, 367 S.C. 639, 643–44, 627 S.E.2d 726, 729 (2006). Appellant not only fails to satisfy this standard, he has failed to undertake the endeavor entirely.

Appellant relies upon the theories of defense of habitation and self-defense, along with § 16-11-440(A) & (C) as his basis for immunity. And, while Appellant argues that the evidence presented is sufficient to satisfy his preponderance of the evidence burden, he has not identified any erroneous applications of law by the circuit court, nor has he identified any finding of fact by the circuit court that is not supported by record evidence. In fact, Appellant has raised and argued this entire issue on appeal without a single reference to the contents of circuit court's order denying immunity. All he has done is reassert some of the evidence presented and insist that his standard has been met. Appellant's argument on appeal therefore merely seeks to have this Court reverse the circuit court's immunity ruling simply because he disagrees with the court's weighing of the evidence. As this issue is dependent upon proving an *abuse of discretion*, Appellant's arguments are insufficient on their face because he fails to pursue and satisfy the proper burden of proof on appeal.[10] In any case, a review of the Order denying immunity demonstrates that it is not controlled

[10] The nature of Appellant's error here also renders it improper to supplement this argument by way of a Reply, as such would raise new arguments that would deny Respondent an opportunity to contest such by brief. It is axiomatic that an issue cannot be raised for the first time in a reply

by an error of law or an unsupported factual finding. (Order – R. p. 469-483).

For these reasons, this Court should find no basis for appellate relief under Issue I and affirm the circuit court's pretrial denial of immunity.

a. Defense of Habitation and § 16-11-440(A)

Notwithstanding Respondent's position that the entire issue is improperly presented for appellate review, the substantive arguments raised are also without merit. Appellant's first argument asserts that immunity is warranted under the theory of Defense of Habitation. Appellant is mistaken.

"For the defense of habitation to apply, a defendant need only establish that a trespass has occurred and that his chosen means of ejectment were reasonable under the circumstances." In contrast to a self-defense theory, the defense of habitation does not require that a defendant reasonably believe that he or his property was in imminent danger of sustaining serious injury or damage. *Id.* Rather, the defense of habitation provides "where one attempts to force himself into another's dwelling, the law permits an owner to use reasonable force to expel the trespasser." *State v. Rye*, 375 S.C. 119, 124, 651 S.E.2d 321, 323 (2007).

The evidence presented at the hearing failed to establish either element of this defense. In the context of defense of habitation, our Supreme Court has dictated what constitutes a "trespass":

> A man who attempts to force himself into another's dwelling, or who, being in the dwelling by invitation or license ***refuses to leave when the owner makes that demand***, is a trespasser, and ***the law permits the owner to use as much force***, even to the taking of his life, ***as may be reasonably necessary*** to prevent the obtrusion or to accomplish the expulsion.

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brief. *McClurg v. Deaton*, 395 S.C. 85, 87, 716 S.E.2d 887, 888 n.2 (2011) (citing *Chet Adams Co. v. James F. Pedersen Co.*, 307 S.C. 33, 413 S.E.2d 827 (1992)).

State v. Bradley, 126 S.C. 528, 533, 120 S.E. 240, 242 (1923) (emphasis added). First, there is no evidence that Mr. Griffin forced himself into the Appellant's dwelling. Mr. Griffin was a frequent visitor, and while there is evidence that he and Mr. Dash were having a dispute,[11] there is no evidence to demonstrate that Mr. Dash denied him entry or that Mr. Griffin forced his way into the apartment. Nor is there any evidence that Mr. Griffin instigated the supposed violence toward Mr. Dash, *as opposed to Mr. Dash instigating violence against Mr. Griffin after permitting him to enter the home.* Here, Appellant insists that this Court adopt the unsupported premise that Mr. Griffin was the aggressor, when it is just as feasible, perhaps even more feasible, that Mr. Dash was the aggressor. Appellant's argument also insists that this Court disregard the forensic evidence of the shooting which does not corroborate Appellant's version of how he came to kill both Mr. Griffin and Mr. Dash.

Secondly, as it pertains to establishing trespass, there is absolutely no evidence tending to establish that any resident of the home made a demand of Mr. Griffin to leave and then gave him the opportunity to do so. The possibility that Mr. Griffin and Mr. Dash were wrestling, fighting, or otherwise in an altercation does not logically equate to a demand to leave the premises. And, as Appellant makes clear in his alleged version of events, he did not speak to or even determine the identity of the individuals in his home before opening fire multiple times. In light of these facts, Appellant cannot demonstrate that the preponderance of the evidence supports the conclusion that Mr. Griffin became a trespasser following an unheeded demand to leave their apartment.

Appellant similarly cannot prove by a preponderance of the evidence that "the use of deadly

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[11] For purposes of the immunity hearing, the evidence of the dispute is based upon what Mr. Griffin's girlfriend heard two weeks later from rumors on the street. (Hearing R. p. 121; p. 125). The result is that her testimony is not corroborative of the inference that Mr. Griffin was harboring ill-will when he went to visit Appellant's apartment on February 7, 2019.

force was reasonably necessary to prevent the obtrusion or to accomplish the expulsion." *Bradley*, 126 S.C. at 533, 120 S.E. at 242. Here, the evidence demonstrates three critical matters: 1) neither victim was armed, 2) no violence, aggression, or even an acknowledgment of his presence had been shown to Appellant prior to his shooting, and 3) all three of these individuals were friends and 4) it is more than reasonably likely that efforts well short of deadly force would have been sufficient to have Mr. Griffin leave the apartment. Appellant's argument for defense of habitation attempts to present its merits for the reasonable use of deadly force when Appellant openly admits that he was not even aware that the person he was supposedly seeking to eject from his home was a close friend who had offered him no violence. Such cannot be deemed "reasonable" under the law.

It is for these same reasons that Appellant's arguments under § 16-11-440(A) fail. Appellant's dwelling was never forcibly entered *and* Appellant never had a legitimate reason to believe such when based *solely* on some unsubstantiated noises. Appellant's theory is simply not supportable under the circumstances of this case.

In summary, Appellant failed to present a viable case for immunity under the theory of defense of habitation and subsection 440(A). The denial of immunity was proper.

b. Self-Defense and § 16-11-440(C)

Appellant's next argument is that he satisfied his preponderance of evidence standard under the theory of Self-Defense. Self-Defense is analogous to defense of habitation, but not identical. *State v. Rye*, 375 S.C. 119, 124, 651 S.E.2d 321, 323 (2007). To prove self-defense Appellant was under the burden of proving 1) that he was without fault in bringing on the difficulty, 2) defendant actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger, 3) if his defense is based upon actual belief of

imminent danger, a reasonable prudent man of ordinary firmness and courage would have entered the same belief, and 4) defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance. *State v. Dickey*, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011); *State v. Curry*, 406 S.C. 364, 372, 752 S.E.2d 263, 267 (2013). Appellant cannot satisfy these elements.

The first element is not met because Appellant brought the difficulty onto himself by shooting into a scrap going on between two other individuals who at no time had demonstrated any violence, aggression, or threat against him. The "difficulty" is entirely of Appellant's own making by shooting without gaining even a modicum of knowledge for his situation: no time was taken to look before opening fire, no effort was taken to speak or determine the nature of his circumstances. Appellant *initiated* the only violence that pertained to him. This is especially so given that Appellant knows he lives with two other individuals in the apartments and the layout of the apartment demonstrates that while in the hallway he could see that his door had not been kicked in. (R. p. 698; 1031-1032). Secondly, the evidence is disputable as to whether Appellant ever believed he was in a life-threatening situation. Such is demonstrated by the nature of the shooting itself: the contact gunshot wound, the close-range stippling evidence, and the numerous shots fired striking victims at different angles. The forensics of the shooting simply do not match Appellant's explanation of his actions. They are instead consistent with a purposeful, knowledgeable, and malicious killing. Third, a reasonably prudent man of ordinary firmness and courage would not entertain the belief that his life was in imminent danger when there has been a total absence of threats, aggression, or violence toward him. This is, again, especially so when he lives with other people and has obtained zero insight into what is going on in his apartment. Stated simply, a crash and unobserved sounds of tussling would not spur a man of ordinary courage to simply start

shooting blindly at the sounds he is hearing. Fourth, while Appellant did not have any obligation to flee or retreat (which is usually the context in which the fourth element is considered) the language of the fourth element addresses "other probable means of avoiding the danger. . .than to act as he did in this particular instance." Such is not exclusively a question of the duty to "retreat". As previously stated, no danger had actually presented itself to Appellant and he had other means of handling the situation and learning that there was in fact no danger to his life at all. By failing to take any action to understand his circumstances, he has failed to satisfy the fourth element for self-defense.

It is for these same reasons that Appellant's arguments under § 16-11-440(C) fail. Appellant's admissions demonstrated that he used his apartment for on-going unlawful activity and that such contributed to his supposed fear. The record demonstrated that Appellant was never attacked. Nor was he "meeting force with force" as no aggression or violence had been shown toward him. The record does not support the finding that Appellant reasonably believed deadly force was necessary. (See Order – R. p. 469-483). Appellant's theory is simply not supportable under the circumstances of this case.

Appellant's self-defense theory for immunity was not satisfied by the evidence presented at the hearing. The circuit court's denial of immunity was proper and it should be affirmed.

c. Lack of Credibility to Appellant's Theory of the Case

It should be noted that Appellant's entire theory of the case – that he awoke to a loud boom, mistakenly believed he was being robbed, and blindly fired at the two men fighting each other on the floor – is starkly contrasted by the nature of the injuries that both Mr. Dash and Mr. Griffin received. The immunity hearing record demonstrates that Mr. Griffin sustained a contact gunshot wound to the back of the head, i.e. a wound that could only be inflicted by putting the end of the

gun barrel against Mr. Griffin's skin and pulling the trigger. That is tantamount to an execution style shooting and renders the credibility of Appellant's version of events severely strained, if not impossible. A similar argument arises in relation to Mr. Dash's wounds. His gunshot wounds displayed stippling, which would require the gun to be discharged no more than 3.5 feet away. Since Appellant claims that he fired at the men while they were on the ground, the distance from the gun to the floor would use up most of the allotted 3.5ft distance. Logically speaking, it would mean that Appellant was nearly standing right in front of the two men when he shot Mr. Dash. Such forensic facts run contrary to the explanation he provides for the shooting.[12]

Appellant has failed in both process and substance to demonstrate an abuse of discretion in this matter. Appellant's first issue is without merit and the circuit court's denial of immunity should be affirmed.

II. The trial court did not err in its jury instruction regarding defense of habitation.

Issue as it was presented at trial

After hearing arguments of both parties and reviewing the relied upon case law, the trial court concluded that the facts and circumstances of the case warranted an instruction on the law of defense of habitation. Following his instructions of the law of self-defense, the trial court then gave

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[12] Though not specific to the question of immunity, Appellant also substantially damaged his credibility when he lied to police about not having Ms. Small's phone number. This is the same woman that he is claiming snatched the murder weapon from his hand without request or provocation, and she proceeded to hide that weapon under her mattress in her apartment. Such facts already strain the bounds of credibility, but Appellant oversold the lie. He claimed to not really know Shakeila and to not have her number for officers when being interviewed. (State's Exhibit 71). However, the data dump from his phone demonstrates that the two individuals shared 15 phone calls between them in a matter of just 19 minutes, just an hour and a half after the shooting and mere minutes before Appellant came to the police with his story of the shooting. Respondent argues that this was a glaring and verifiable demonstration that Appellant was not being honest with police officers, was covering up his efforts to dispose of the murder weapon, and that the credibility for his entire explanation is consequently destroyed.

the following instruction:

> If the defendant or a member of defendant's household is attacked in the defendant's own home, the defendant may use the force which appears to be needed to protect himself or his household from death or serious bodily injury. If a trespasser refused to leave the home when asked to leave, the defendant may use the necessary force to eject the trespasser. If in the effort to eject the trespasser the life or safety of the defendant or member of the defendant's household is jeopardized, the defendant may take the life of the trespasser. The kind and degree of force which are justified depend on the conduct of the trespasser. If a person entered the dwelling at the invitation of a member of the household, the person becomes a trespasser if the person refused to leave when asked.
> If while legitimately exercising in good faith the right to eject a trespasser the defendant is assaulted by the trespasser and fears death or serious bodily harm, the defendant would be entitled – the defendant would be without fault in bringing on the difficulty. Whether the defendant was acting in good faith in attempted to eject the victim or victims and was assaulted in the process is a question for you to determine.

(R. p. 1204-1205). At the conclusion of the jury instructions defense counsel raised the following objection to the defense of habitation charge:

> I know this is kind of more of a last-minute one, but it did omit – was a very critical part of that was that unlike defense of self-defense, the defense of habitation does not require that a defendant reasonably believe that he or his property was in imminent danger of sustaining serious injury or damage. Rather, defense of habitation provides when one attempts to force himself into a dwelling, the law permits an owner to use reasonable force to expel the trespasser. I did hear the language about invitees becoming transformed into trespasser and what it means, but I did not hear that critical distinction about not requiring an attack or imminent threat. So, I just - - to be complete, I think it would be that, Your Honor.

(R. p. 1212-1213). The trial court responded that it was satisfied that the instruction was proper and denied to further instruct the jury.

Discussion

The trial court correctly and fully instructed the jury as to the law of defense of habitation. Appellant's argument, in large part, is not preserved for appellate review because trial counsel's

objection was not to any alleged error of the language used by the trial court, but for what he believed to be an incomplete instruction or an omission. The instruction was given fully and it accurately instructed the jury on the law. Appellant's other arguments to the contrary are legal errors that read portions of the charge language in isolation, rather than collectively, and otherwise insist on his preferred verbiage. Lastly, the language demanded by Appellant would be an incorrect statement of the law and/or a charge upon the facts.

First and foremost, the bulk of Appellant's argument under Issue II are procedurally defaulted. Appellant's first argument insists that "the instruction given incorrectly told the jury that Appellant had to show he or a member of his household was attacked in Appellant's home and that the 'life and safety' of Appellant or member of his household was 'jeopardized.'" He goes on to argue that "[t]he charge incorrectly implied that habitation requires a defendant to establish that his person or property was in some danger of inquiry or harm. It also incorrectly informed the jury that in order for the defense to apply, the defendant or a member of his household had to be attacked or assaulted." (Brief of Appellant, p. 21; p. 22). These arguments were not raised to the trial court. Instead, defense counsel argued that he believed the instruction omitted language that reasonable belief of imminent danger is unnecessary. As such, Appellant's objection is strictly limited to whether the court erred in not giving the additional specific language requested. "The objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the *exact error*." *State v. Johnson*, 363 S.C. 53, 58–59, 609 S.E.2d 520, 523 (2005) (citing *State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001)). "If a party fails to properly object, the party is procedurally barred from raising the issue on appeal." *Id.* Trial counsel did not contest the language used, nor did he argue that the instruction as given inferred or improperly instructed the jury. He argued that a portion of the charge he wanted was omitted. The

court disagreed, finding that his charge sufficiently covered the law. The above-mentioned arguments are therefore procedurally defaulted.

"In reviewing jury charges for error, this Court considers the trial court's jury charge as a whole and in light of the evidence and issues presented at trial." *State v. Logan*, 405 S.C. 83, 90, 747 S.E.2d 444, 448 (2013). "A jury charge is correct if, when read as a whole, the charge adequately covers the law. *Id.* A jury charge does not require reversal if it is substantially correct and covers the law in question. *Id.* "The substance of the law must be charged to the jury, not any particular verbiage." *State v. Burkhart*, 350 S.C. 252, 261, 565 S.E.2d 298, 303 (2002).

Appellant's view of the charge violates each of these maxims. First, it is an accurate statement of law that "[i]f the defendant or a member of defendant's household is attacked in the defendant's own home, the defendant may use the force which appears to be needed to protect himself or his household from death or serious bodily injury." However, Appellant appears to read this portion of the charge in isolation of the other jury instruction language, and presumes that the use of force (the degree of which is not specified) is only available if the defendant or a member of the household is attacked within his home. Such is a clear misreading of the text, and is clearly not the instruction of the court, given the other language. The key *additional portions* of the charge are as follows:

> If a trespasser refused to leave the home when asked to leave, the defendant may use the necessary force to eject the trespasser. If in the effort to eject the trespasser the life or safety of the defendant or member of the defendant's household is jeopardized, the defendant may take the life of the trespasser. The kind and degree of force which are justified depend on the conduct of the trespasser.

This language demonstrates that force for ejection is dependent upon the presence of a trespasser, that an invitee can become a trespasser if he refuses to leave when asked, and that the *degree* of force to be used is dependent upon the circumstances of the situation – i.e. the conduct of the

trespasser. Collectively, the language used covers the verbiage that defense counsel referenced and the charge is complete. What Appellant is demanding is a charge that would insinuate that if a trespasser is present Appellant need not harbor reasonable beliefs of danger or experience an attack or imminent threat *before using deadly force*. The law does not stand for such; the law demands reasonableness based upon circumstance and that is what was charged to the jury.

Appellant's argument is also in error because the requested charge language ventures into the forbidden arena of charges upon the facts. Here, the critical issue in the case is the complete lack of violence demonstrated toward Appellant and the unreasonableness of his blind use of deadly force regardless of the circumstances and actions of his victims. Appellant's demand for phrases like "defense of habitation does not require that a defendant reasonably believe that he or his property was in imminent danger of sustaining serious injury or damage" and "not requiring an attack or imminent threat" are charges upon the facts that are 1) improper, and 2) fully covered by the appropriate language that the degree of force used is dependent upon what is necessary based upon the conduct of the trespasser in question. See *State v. Brown*, 443 S.C. 196, 199, 904 S.E.2d 448, 450 (2024) (noting that jury charges as to "particular facts" is an "improper court-sponsored emphasis of a fact in evidence" and cannot be permitted.).

Appellant relies upon the holding of *State v. Rye* to suggest that defense of habitation instruction error arose from the implication that the defense "required the defendant to establish that his person or property was in some danger of injury or harm." (Brief of Appellant, p. 23). In *Rye*, the trial court differentiated self-defense from defense of habitation solely on the basis that defense of habitation does not require a duty to retreat. The Court found that such a limited instruction implied that habitation required a defendant to establish some danger of injury or harm. The distinction being, again, that some force can be used whether danger exists or not, and the

escalating degree of force that may be viewed as reasonable is dependent upon the circumstances. Appellant here again insists that the trial court's instruction to the jury here was more egregious because it "requires" the defendant to show the presence of an attack. A *fair* and *complete* reading of the charge does not present or insinuate such a requirement. Critically, the Court in *Rye* noted that the charge given was not inherently incorrect, it was simply incomplete as it did not instruct on scenarios where "the occupant is the slayer and stands upon habitation apart from self-defense." Here, the trial court's instruction covers such circumstances addressed in *Rye*, *in addition* to the lack of duty to retreat. (R. p. 1203).

For the above stated reasons, Appellant's arguments do not demonstrate error on the part of the trial court in instructing defense of habitation. This Court should therefore affirm Appellant's convictions.

III. The trial court did not abuse its discretion in admitting the evidence of his sale and use of marijuana and his possession of unrelated firearms and ammunition.

Issue as it was presented at trial

Appellant sought to suppress any mention of marijuana and other firearms and ammunition from the trial via pretrial motion. The motion was heard, but the court did not issue a ruling and instead waited to hear arguments in the context of the trial.

When the issue came to the forefront of trial, Appellant attempted to argue that the evidence was not relevant because the solicitor had failed to present any evidence that there was a drug deal going on and that this was not a matter of a drug deal gone bad. He followed with the presumption that the solicitor would argue Appellant's propensity for selling drugs is demonstrative that he acted in bad character in committing the shooting. In response, the solicitor argued the marijuana is part of the reason Appellant claimed he believed he was being robbed: that people are in and out of the apartment all of the time and that someone had come to rob him of his weed. The solicitor

argued that the evidence does not address whether Appellant was of bad character, but because Appellant admitted that the drug dealing leads to a lot of traffic in and out of his home, and that such fueled his mistaken shooting.[13] (R. p. 638-641)

The issue of firearms and ammunition arose later, when Officer Potash was dealing with the items collected from the apartment during the investigation. He began to discuss ammunition found in the back of the apartment, and Appellant reiterated his pretrial motion under 402, 403, and 404(b). (R. p. 713). In-camera testimony was offered wherein Officer Potash listed finding a quantity of green plant with baggies and a rifle scope from the first bedroom, and a container of green plant material from the second bedroom as well. In the back walk-in closet, they also located green plant material, small clear bags, and ammunition of the .40 caliber and .380 auto caliber variety, and a shoebox containing documents bearing Mr. Dash's name. In the kitchen they found a copy of a firearms purchase receipt for a Smith & Wesson SD40 VE pistol, a digital scale, and .22 rifle ammunition. (R. p. 713-715). Appellant argued a lack of relevance since such constitutes evidence of unrelated firearm ownership. Appellant then argued that even if it were deemed relevant, the prejudicial effect would substantially outweigh the probative value, and that the evidence serves no other purpose than to portray Appellant "as a gun-toting thug who has guns, likes guns, shoots people." The State reiterated that Appellant has already stated to police that he is a drug dealer and that such spurred his concern of robbery. Regarding the firearms, the State noted that there has already been insinuation through cross-examination of victim having been known to carry a gun, that there has been considerable testimony regarding a gun going missing,

[13] Appellant's assertion is key. In his brief, Appellant asserts that "there was no evidence, direct or circumstantial, that Appellant was attempting to sell marijuana on the morning of the shooting." (Brief of Appellant, p. 31). Such an assertion overlooks the fact that he and others in the apartment apparently did so regularly, which impacted the frequency that they experienced visitors in connection with marijuana sales.

and that later testimony would potentially include references to "a mysterious other gun."[14] The State argued that it was already clear that there was more than one gun in this apartment at certain times and the "cat is out of the bag" as it relates to possession of multiple firearms by the apartment's residents. (R. p. 715-719). In response, the court noted that given the nature of the crime scene, the nature of the shooting, what was in the mind of defendant at the time of the shooting, and the State's various burdens of proof, he found that relevant and more probative than prejudicial. (R. p. 720).

Lastly, the issue arose again during Chris Watkins' testimony about the contents of the data dump from Appellant's phone. This included texts demonstrating concern over a gun that was missing or taken. The testimony then proceeds to the issue of photographs of Appellant holding various firearms. Appellant argues that such is not relevant evidence. Appellant then raised the issue of such being bad character evidence[15], but does not assert such after the court asks how he knows what the State intends to do. The solicitor responded first by noting that the text message thread refers to the missing weapon as "our" gun, which demonstrated a claim of ownership over the weapon. The missing weapon in question might well be pictured in photographs. Ultimately, the solicitor indicated that it would not attempt to admit the photograph and would instead only question Mr. Watkins as to his recognition of the photos and his recognition of Appellant posing with various guns in those photos. Following the arguments, the court overruled the objection. (R. p. 877-885).

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[14] This is a well-founded argument in light of the content of the immunity hearing and the defense's focus upon the potential involvement of an unknown revolver. (R. p. 781-782; p. 798). Appellant now attempts to reverse course from his defense tactics and suggest that "the evidence of firearms and ammunition had absolutely no connection to the case" despite his efforts to make such inferences *appear* feasible at trial. (Brief of Appellant, p. 33).

[15] Despite claiming the evidence to be "bad character" evidence, counsel for the defense even acknowledged that such is not unlawful. (R. p. 879)

Discussion

The trial court did not abuse its discretion in admitting the marijuana and other firearm evidence because the nature of Appellant's arguments for how this shooting came about are both directly tied to marijuana and other firearms. Appellant's theory of the case, his explanation to officers, and the overall facts of this case rendered the evidence relevant, highly probative in comparison to only minor prejudice, and not indicative of bad character to prove conformity therewith. There is no abuse of discretion in the court's applications of Rules 402, 403, and 404(b) and the evidence was properly admitted.

a. Relevancy

"Trial courts are given broad discretion in ruling on questions of relevancy of evidence, and his decision will be reversed only if there is a clear abuse of discretion." *State v. Alexander*, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991). Evidence is considered relevant if it has any tendency to establish, or otherwise make more or less probable, some disputed issue upon which the evidence relates. *Id.*

Among many other litigated disputes, Appellant placed two distinct issues in dispute in his case that relate to the marijuana and other firearm evidence. The first is that Appellant presented a set of circumstances to law enforcement when explaining his actions as being based in self-defense. His explanation was that given the loud boom and the lack of identifying noises, he believed he was being robbed. *Moreover, he readily confessed to dealing marijuana and believed that the robbery was intended to rob him of his weed.* (State's Exhibit 71). By making that confession and linking his marijuana to his assertion of self-defense, and to the basis for which he attempts to portray his conduct as reasonable, he has made the marijuana highly relevant to contesting the key issue of self-defense. As demonstrated by the State, the evidence cuts both ways.

While Appellant asserted that his marijuana dealing made him fear the prospect of someone robbing him of his weed, the State wished to demonstrate that Appellant's confession to dealing marijuana and the consistent flow of people in and out of their apartment for that purpose rendered his version of the shooting to be an entirely unreasonable action, even if true.

The second issue placed into dispute at trial was that the two victims were disputing the theft of a gun from the apartment, a gun that later is described as being "ours" by Appellant in his text messages. Additionally, the solicitor had already witnessed the defense attempt to draw doubt toward the evidence by referencing the limited number of shell casings recovered in comparison to the number of bullet wounds sustained by the victims and the lack of complete "matches" of all fired projectiles to the 9-millimeter weapon. While Respondent would argue that the through-and-through nature of Mr. Dash's arm wounds and his *close* proximity to Mr. Griffin provide a reasonable argument for Mr. Griffin sustaining reentry wounds from the same bullets, the alternative insinuation is that more than one gun was used – and the defense sought to convey to the jury that such might potentially be a revolver. (R. p. 781). Appellant has already admitted to committing the shooting, this evidence becomes relevant to demonstrate to the jury that if they believed more than one gun was used, Appellant was an owner of or potentially in possession of other guns which might have been the missing gun in dispute, or if Appellant's red herring is entertained, could potentially have been used. For these reasons, the additional gun receipt, ammunition, and photographs all became relevant evidence.

b. Rule 403 Balancing

Appellant next argued that if the evidence was deemed relevant, it should be deemed inadmissible as being substantially more prejudicial than probative. Appellant is again mistaken.

Trial courts are afforded great deference in deciding the admissibility of evidence under

Rule 403. *State v. Collins*, 409 S.C. 524, 534, 763 S.E.2d 22, 28 (2014). 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. . ." *State v. Hopkins*, 431 S.C. 560, 571, 848 S.E.2d 368, 373 (Ct. App. 2020) (citing Rule 403, SCRE). "All evidence is meant to be prejudicial; it is only unfair prejudice which must be avoided." *Id.* (quoting *State v. Gilchrist*, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998)). "Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one." *Id.* (quoting *State v. Wilson*, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001).

Appellant seemingly fails to raise a balancing objection to the first reference to marijuana, as it relates to Appellant's explanation for his actions to police. Regardless, as previously argued, the subject matter is highly probative of one of the key disputes of this case: were Appellant's actions reasonable? Given Appellant's admission that people are often in and out of his apartment for the purpose of buying marijuana, introduction of the subject matter was immensely probative to the topic of reasonable fear of imminent danger in comparison to minimal prejudice. Once the jury is aware that Appellant was dealing drugs, the fact that marijuana was found in the apartment during the investigation becomes inconsequential.

Appellant attempts to liken this case to other cases like *State v. Coleman*, *State v. Smith*, or *State v. Bolden* is unconvincing. Here there is a direct connection between Appellant's marijuana, his professed reasoning for believing and acting upon the possibility of a robbery, and the State's right to challenge that reasoning as unreasonable given the admission of what the traffic in and out of their apartment can often entail.

Regarding the firearms, it should first be noted that contrary to Appellant's arguments the photographs of Appellant holding other firearms was not admitted into evidence. Second, by

counsel's own admission the topic involves conduct that is neither illegal nor immoral; Appellant was legally permitted to own and carry firearms. (R. p. 1048). Thus, the record demonstrates that even defense counsel acknowledged that the evidence is not inherently prejudicial. Third, the evidence is highly probative because it: 1) provides tangible evidence related to the previously admitted testimony that other guns were owned by the residents of this apartment; 2) the discontinuity as to who might have owned the missing weapon – which would be highly probative toward explaining Appellant's execution style shooting of Mr. Griffin; 3) evidence that would counter the red herring arguments of the defense regarding the potential consistency of "Item 22 fired bullet jacket fragment" as being potentially fired by a revolver (so as to not leave a shell casing at the scene and suggest to the jury that another gun was involved in the crime). (R. p. 781-782). This argument about "another weapon" also takes the form of suggesting that the 9-millimeter weapon did not have the correct remaining amount of ammunition to match the number of bullet wounds sustained by the victims.[16] (R. p. 791). The evidence in question was probative because it permitted the State to prove the existence of other weapons relative to their involvement in the case, that Appellant claimed some ownership over the missing gun, and that a "second firearm theory" would not necessarily prove Appellant's innocence of the shooting.

The trial court did not abuse its discretion in admitting the evidence under Rule 403. The evidence in question is of considerable probative value in comparison to its minimal prejudice.

c. Rule 404(b) analysis

Appellant's arguments fall woefully short of successfully invoking and arguing a violation of Rule 404(b) by the trial court. First, the arguments for admission presented by the State make

[16] It seemed a persistent effort by Appellant to both challenge the admission of certain evidence but also rely upon the nature of that same evidence to make certain legal arguments.

clear that neither the marijuana nor the firearms are being admitted to demonstrate Appellant's bad character and his conformity therewith. They are being admitted because they relate directly to the explanations offered by Appellant and his defense counsel at trial on the subject of reasonable fear, use of force, sources of tension between the victims, and the potential (albeit unlikely) use of other weapons in the crime. Additionally, the exclusion of evidence relating to marijuana and other firearms would prevent the state from presenting the res gestae of its case. Those two evidentiary matters provide considerable background to the case that would be extremely difficult to make sense of without.[17] Regardless, while specific exceptions under Rule 404(b) were seldom discussed – due to the lack of clear applicability here – the purposes of the evidence discussed above would constitute evidence of motive, intent, absence of mistake or accident, and the res gestae of the case. Rule 404(b), SCRE; *State v. King*, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999) (noting that "the *res gestae* theory recognizes evidence of other bad acts may be an integral part of the crime with which the defendant is charged, or may be needed to aid the fact finder in understanding the context in which the crime occurred"). Lastly, the nature of the evidence disputed simply lacks prejudice to Appellant under the circumstances of the case. He has admitted to being the shooter, the question before the jury was whether the shooting was consistent with his theory of self-defense. The fact that he deals marijuana and has been lawfully in possession of firearms is insignificant.

There is no abuse of discretion by the trial court in admitting the disputed evidence. Appellant's conviction should be affirmed.

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[17] Of note, most of the referenced items that are disputed in the appeal were not found in Appellant's bedroom and are presumably the property of either Sam Thomas or Mr. Dash. A 404(b) bad character evidence argument does not flow from personal property that does not belong to the Appellant.

IV. The trial court did not abuse its discretion in permitting cross examination of Appellant's rap lyrics.

Issue as it was presented at trial

This matter was addressed first during the immunity hearing, and subsequently in a pretrial motion in limine hearing. The arguments by Appellant and the solicitor are both presented to the court. (R. p. 495-96). However, key to Appellant's later supposed dispute over Rule 5 disclosure, the solicitor explicitly noted that there are multiple rap songs in question and that one such song "specifically references him killing his two – the victims in this case. Other ones, he, he kind of – you've seen it from the bench, Your Honor. Some, some people seek a certain amount of clout from saying they've killed people." (R. p. 496). Here, the solicitor has made Appellant aware that he is in possession of more than just the one rap video that was discussed during the immunity hearing, he has made Appellant aware of its contents, and the trial court chose to reserve judgment on the issue until it arose in the context of the trial.

On direct examination, Appellant went into detail about his remorse, emotions, and nightmares that had resulted from this shooting. The solicitor began his cross-examination by confirming that Appellant's "rap name" was Big Hood Lyfe, and whether Appellant wrote a rap song about this shooting. Objection was raised and the matter was addressed outside the presence of the jury. (R. p. 940-944)

Appellant raised objection on the basis of Rule 5 discovery obligations, SCRE 402, 403, and 404(b), and First Amendment rights to free speech. The solicitor asserted that the song in question, along with 21 other songs, were found published on YouTube by Appellant between December of 2018 and August of 2022. The State argued that the lyrics he is creating and posting are explicit articulations of his thinking and mindset, and that such goes to proving malice. The solicitor acknowledged that the lyrics are prejudicial, but that the relevancy and probative value

outweigh such. In support of his argument, the solicitor provided some excerpts of the lyrics, which included:

> T.O.[18] Was like my brother. When the time comes, everybody freeze but I'm cold with that cut.
>
> I heard you trying to jack. I heard you trying to rob me. I'm scared to take a loss. I'm a business thread your cross.
>
> My heart is as black as a kettle. No, I'm not a grave digger. Grave filler, that's my name.

(R. p. 944-947).

In response, Appellant first asserted that the rap lyrics should have been disclosed pursuant to discovery obligations under Rule 5 and cited to *State v. Lawton*. Appellant goes on to argue that such would include reports, documents, written materials, or any information that they intend to use at trial that is material to the defense or is something they intend to introduce in their case-in-chief. Appellant next argued that the art behind rap lyrics is not tantamount to biographical information, and that the subject matter of killing and robbing is prevalent across the music genre. (R. p. 947-951). Appellant then cited to *State v. Cheeseboro* as a basis for excluding the lyrics. (R. p. 951-953).

The solicitor responded by noting that the lyrics' connection to this crime is clear, given that Appellant references one of the victim's by his nickname, T.O. and that the lyrics appear to reference this case. He further noted that these rap videos were not the result of searching some law enforcement database or other limited access system; he found them simply by typing in "Big Hood Lyfe" into a google search. (R. p. 953-954). He argues that the lyrics are appropriate impeachment evidence in light of his testimony regarding his supposed remorse. (R. p. 958).

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[18] T.O. is the nickname that Appellant uses for Mr. Dash.

The matter was reconvened after lunch, and the trial court noted the arguments that Appellant had made in memorandum to the immunity hearing. It further noted that the *Cheeseboro* ruling was essentially that the rap lyrics were too vague and minimally probative to qualify as admissible in the state's case-in-chief. (R. p. 960-961). The trial court issued a ruling that the lyrics for which the defense had been provided notice were admissible for purposes of impeachment, in light of the distinguishing facts from *Cheeseboro*. This caused further dispute about which lyrics were being argued for admission and which had been noticed, and prompted a full recitation of the lyrics he had pulled from the video of Appellant's song "Let Me Explain":

> Nobody know what happened. But everybody got something to say. But if the shoe was on the other foot, would you feel the same way? An N word talking about robbing me. An N word run into my house and try to harm me. You know I fuck with both of y'all. But T.O. is like a brother to me. Everybody say what they going to do but they freeze. I'm cold with that cutter. Watch him fall. It don't matter if it's T.O. I'm going to stand on business forever and always. That gangster shit be making me shoot these N words. I swear to God --- Well, I might not mention this, but he says: I swear to God I'll beat the trial. I'm a soldier. I don't mean no truces. It's me against the rest of y'all. I'm a barber with a cutter. Watch me burn like alcohol.

(R. p. 962-964). Though the record is limited, it was also demonstrated that the solicitor and defense counsel had, to some extent, discussed the existence of Appellant's various rap videos and that such were found by a simple google search. (R. p. 964). After hearing this, the trial court interrupted the dispute and noted that it was sticking with its ruling. (R. p. 965).

When cross-examination resumed, the solicitor questioned Appellant about the lyrics and whether they pertained to his having killed the two victims. Appellant denied such and noted that what the solicitor had written down was incorrect. (R. p. 966). The Solicitor then proceeded to ask Appellant about the accuracy of each stanza, and Appellant testified that the solicitor's recitation of certain lines was incorrect or that other lines were omitted:

- "An N word talking about robbing me. An N word run into my house and try to harm me" was corrected to state: "My life was on the line. People plotting and talking to rob me. Can't let nobody run into my house and try to harm me."
- Appellant added a couple of lines that he stated were omitted by the solicitor: "Once my dawg says it's up, they ain't no picking sides." He then explained that the line means that "[i]f they have a problem with you, it's not going to pick a side."
- Appellant explained that the "I'm cold with that cutter. Watch him fall" lyric is a reference to when it gets cold the leaves fall. The solicitor asked if the line was a double entendre, but Appellant did not understand what that meant.
- Appellant denied having lyrics that say: "It don't matter if it's T.O" or "That gangsta shit be making me shoot these N words." He corrected counsel by stating that his lyrics say: "Long live T.O.;" "They don't know what's going on;" and "That gangsta shit you make believe. . . You shoot a nigga, he going to call the twelves. That shit not real to me."

(R. p. 966-974). After these various exchanges, Appellant then says that his little brother actually wrote the lyrics, he merely sang it and posted it to YouTube.[19] (R. p. 974).

Discussion

At trial the State sought to cross-examine Appellant on rap lyrics discovered from a YouTube video that Appellant had personally produced and published. Appellant argued that the evidence was not properly disclosed under Rule 5, and that it would be irrelevant, unduly prejudicial, and inadmissible as bad character evidence. The trial court heard the arguments of the parties and correctly permitted the cross examination on the accuracy and meaning of the lyrics.

[19] The prospect of playing the actual video was discussed, but ultimately such was not admitted and published to the jury.

a. Rule 5

First the record demonstrates that defense counsel was put on notice of the lyrics and that access to them was as simple as running a google search. This is borne out by the record from the motion in limine hearing where the solicitor disclosed its knowledge and access to Appellant's multiple rap videos and made the defense aware of the general subject matter believed to be relevant.[20] The record then demonstrates that both defense counsel and the solicitor had some discussions regarding these videos. While defense counsel argued that this was insufficient, under the circumstances of this case, it is sufficient for establishing disclosure under the rule and for satisfying the purpose of Rule 5 discovery.

Rule 5 "is intended to enable a defendant to obtain prior to trial any of his own statements relevant to the crime charged against him so that he will be able to prepare properly to face the evidence that may be introduced against him at trial." *Earley v. State*, 418 S.C. 255, 266, 792 S.E.2d 226, 232 (2016) (quoting *United States v. Gleason*, 616 F.2d 2, 24 (1979) (discussing the underlying purpose of the similar federal rule). Appellant was already on notice that his rap videos may present an evidentiary problem for his case, as the subject of such was argued extensively during his immunity hearing. In light of that fact, he was likewise aware of and on notice that his other videos may present similar evidentiary problems. He failed to heed such concerns, or he chose to testify despite the risk of being cross-examined on these videos.

Also, unlike statements to police officers, or statements recorded by law enforcement surveillance footage, or any other number of means in which recordings are obtained where knowledge of and/or access to the statements is not conveyed to the defendant, these recordings were recorded and published by Appellant himself to the public domain. Moreover, as they are *his*

[20] Appellant's own brief acknowledges this reality. (Brief of Appellant, p. 36).

YouTube posts, he would also have the ability to access and remove these videos had he wished to do so. The record demonstrates that Appellant was not blindsided by this evidence; he was made aware of its existence and its nature, and he (or his counsel) clearly had access to the videos in question.[21] This is not tantamount to a *Brady* argument where it is the defendant's constitutional right to possess all material exculpatory evidence or evidence of impeachment value. The lyrics in question do not trigger *Brady*, and they exist solely as a discovery dispute between the parties that was disclosed and discussed by counsel from both parties before trial.

Lastly, as the cross-examination reveals, Appellant was well prepared to discuss the text and meaning of his own lyrics, and he provided innocuous explanations for the meanings of his songs and at times demonstrated that the solicitor was mishearing or misquoting his lyrics. In light of this fact, and in light of the fact that the video was never admitted as evidence, it can be said that no undue prejudice arose from the admitted lyrics.

b. Rule 402, 403, and 404(b)

Appellant's other grounds for exclusion simply fail to present compelling arguments. These lyrics contained an explicit reference to T.O. as the victim, the fact that two victims were involved,[22] and clear references to his belief that a robbery was taking place. The lyrics were therefore specific, relevant, highly probative, and admissible as evidence of impeachment concerning Appellant's remorse, mindset, lack of mistake, motive, and intent regarding the shooting. Such fully satisfies the relevancy, probative value, and legitimate evidentiary purposes

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[21] Rule 5 states that the prosecution "shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements by the defendant. . ." Rule 5(a)(1)(A), SCCrimP. Applying such directives to publicly accessible videos for which Appellant has ultimate authority to publish or remove from YouTube demonstrates that he was given adequate disclosure for this issue.

[22] Reasonably apparent from the line: "You know I fuck with *both* of y'all. But T.O. is like a brother to me."

required by the respective evidentiary rules. As was apparent with Appellant's arguments concerning the marijuana and other firearms issue (*supra*), there is a notable friction to the application of Rule 404(b) in this case. The reason for such is that Appellant is the admitted shooter. Where 404(b) evidence disputes are commonly a question of bad character evidence that the defense believes would improperly sway a jury to believe that the defendant is correctly identified as the culprit (i.e. his conformity there with), here Appellant's arguments devolve into disputing any evidence that Appellant believes challenges his motives or reasoning in committing what he argues was a self-defense shooting. The circumstances of this case, and the lack of dispute as to the identity of the shooter, present a paradigm where practically all evidence that Appellant believes risks portraying "bad character" goes to the question of his motive, intent, or absence of mistake or accident.

Additionally, the trial court provided a proper application of *Cheeseboro's* guidance to the facts of this case. First, the trial court in *Cheeseboro* admitted the rap lyrics in the State's case-in-chief as a statement against interest, demonstrating that they were being offered for the truth of the matter asserted. Moreover, in *Cheeseboro* the question of whether the defendant was the culprit to the murders was in dispute. Here, Appellant had confessed to the shooting and the lyrics were not being offered for purposes of truth of the matter asserted, but for impeachment of the supposed remorse and emotions Appellant had testified to on direct examination. The Court in *Cheeseboro* also noted that the references were too vague in context to support admission. Having referenced T.O. specifically, noted the existence of two victims, and referenced the issue of a robbery, Appellant's lyrics were clearly related to this crime. That specificity, and the fact that the evidence was being offered to explore Appellant's supposed remorse distinguish this case from a like-for-like application of the Supreme Court's analysis in *Cheeseboro*. The trial court did not abuse its

discretion in finding the evidence admissible despite objection pursuant to SCRE Rules 402, 403, and 404(b).

V. The trial court did not abuse its discretion in refusing to admit Defendant's Exhibit 108 as a prior consistent statement under Rule 801(d)(1)(B), where the evidence in question was both improper under the rule.

Issue as it was presented at trial

During redirect examination, Appellant sought to introduce video footage during his time at the police station wherein he was videotaped making phone calls to friends and family. Appellant argued under 801(d)(1)(B) that the evidence should be admissible as a prior consistent statement, noting that cross-examination "had brought his remorse into play" and that the State had "attacked his consistency about what he told people." (R. p. 1050-1051). Appellant equated such cross-examination as constituting an "express[ed] or impl[ied] [ ] charge against the declarant of recent fabrications or improper influence." The solicitor noted that the defense had addressed Appellant's supposed remorse on direct examination and that he had cross examined him on the topic, but he argued that he raised no additional issues on the matter and that Appellant was rehashing covered ground. The trial court sustained the objection.

Discussion

Appellant argued an inapplicable evidentiary rule for the admission of his desired exhibit. The trial court was fully within its discretion to deny the admission of Defendant's Exhibit 108, as it in no way constituted a prior consistent statement under Rule 801(d)(1)(B).

Appellant's argument for admitting the exhibit as a prior consistent statement fails because the circumstances of the case and the prior testimony do not satisfy the "*recently*" fabricated statement or improper motive, nor can Appellant demonstrate the necessary timing elements of the rule. Appellant was not accused of a *recent* fabrication of his version of the shooting, he is accused

of fabricating his story for the improper motive of avoiding prosecution of his crime from the very beginning. Under the State's argument, the alleged prior consistent statement was made after he had already fabricated his story and told it to the police, this rendered it repetition, not a prior consistent statement absent the taint of the same motive to lie.

Our Supreme Court in *State v. Saltz* set forth the roadmap for what constitutes a proper use of prior consistent statements. Prior consistent statements require a showing of four elements:

> (1) the declarant must testify and be subject to cross-examination,
> (2) the opposing party must have explicitly or implicitly accused the declarant of recently fabricating the statement or of acting under an improper influence or motive,
> (3) the statement must be consistent with the declarant's testimony, and
> (4) the statement must have been made prior to the alleged fabrication, or prior to the existence of the alleged improper influence or motive.

State v. Saltz, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). Appellant Michael Saltz was charged with the murder of twelve-year-old victim, Joseph Barefoot. Certain testimony arose that suggested a friend of Appellant's, Charlie Mengedoght, may have been involved. During the defense's case-in-chief, Tina Ashford testified that Charlie had confessed to participating in the crime, which was consistent with her affidavit. The prosecution's cross-examination highlighted the fact that her affidavit was signed just thirteen days before her trial and impeached her on the motive of making that affidavit only after becoming the defendant's girlfriend. In response, Tina testified that she had told her father of the confession long before the affidavit or her romantic relationship. The defense sought to call Tina's father, Buddy Hancock, but the trial court would not permit him to testify to the jury concerning Tina's prior consistent statement made to him. *Id.* at 243-47. The South Carolina Supreme Court identified this scenario as "precisely what Rule 801(d)(1)(B) was designed to address" because the prior consistent statement followed an

accusation of *recent* fabrication (signing an affidavit thirteen days before trial) and improper motive for that fabrication (her new romantic relationship with the defendant). *Id.* at 247. Since Tina's prior consistent statement was made prior to the suggested fabrication and/or motive, it was admissible.[23]

In its discussion of rule 801(d)(1)(B) the Court also cited to *Tome v. United States*, 513 U.S. 150, 157, 115 S.Ct. 696, 130 L.Ed.2d 574 (1995) for the premise that "[p]rior consistent statements may not be admitted to counter all forms of impeachment or to bolster the witness merely because she has been discredited... The rule speaks of a party rebutting an alleged motive, not bolstering the veracity of the story told." This sentiment has found its way into other South Carolina cases, such as *State v. Fulton*, 333 S.C. 359, 374, 509 S.E.2d 819, 826 (Ct. App. 1998). Therein, this Court identified several fundamental barriers to the use of prior consistent statements:

> Rule 801(d)(1)(B), SCRE does not address the use of prior consistent statements solely for rehabilitation. However, we fail to see how a prior statement made *after* a motive to fabricate arose can be relevant to rebut a charge of improper motive, since the same motive to fabricate would have existed at the time the prior statement was made.
>
> . . .
>
> The prior consistent statement cannot be said to carry any greater indicia of trustworthiness merely by repetition.
>
> . . .
>
> Accordingly, we hold when a prior consistent statement is offered for the purpose of rebutting an express or implied charge that the witness's testimony is the result of a recent fabrication or improper influence or motive, the statement must predate any alleged improper influence or motive. Because Fulton's post-motive statement is inadmissible under Rule 801(d)(1)(B), SCRE as substantive evidence, it is also inadmissible for "rehabilitative" purposes.

[23] The Supreme Court was also tasked with determining whether other reasons, such as a potential violation of the sequestration of the witnesses, would have permitted the trial court to exclude the evidence, given that its reasoning for doing so was not set forth clearly on the record. However, such does not detract from the clear demonstration of how this Rule is used.

Id. at 826-27.

Appellant's suggested evidence is in no way connected to our courts' clear articulation of the limited utility of 801(d)(1)(B). His exhibit contains nothing more than the same reassertion of his story given to police two hours after the crime was committed and the same feigned remorse. Moreover, this recording was taken *after* the alleged inconsistent stories were told to Mr. Archie. It cannot satisfy the second third, or fourth elements for admission of a prior consistent statement.

To the extent Appellant argues that he wanted to present the jury the video as a prior consistent *demonstration of emotion* – there is no basis in law to utilize the rule in such a way. For that reason, the trial court's refusal to admit the evidence was correct and the specifics need not be addressed. However, even if this unfounded utilization of the rule were to be examined, the elements for timing, fabrication, and motive would still not align. First, in comparison to *Saltz*, the solicitor did not insinuate or accuse Appellant of a "recent" fabrication. The State's theory (at least in part) is that Appellant's supposed remorse and emotion had been feigned from the very beginning. Second, the motive for feigning emotion existed from the moment the crime was committed, there was no new intervening motive, as there was in *Saltz*. Third, and in keeping with the State's general theory, the desired statement must have been made prior to the alleged fabrication or improper motive. Here, the motive has always been the same: feign remorse to sell the bunk theory of self-defense. Rule 801(d)(1)(B) was wholly inapplicable and the trial court was entirely within its discretion to deny the admission of Defense Exhibit 108.[24]

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[24] Appellant references the fact that after recross-examination by the State, Appellant renewed its request to admit the video evidence because the solicitor "directly attacked [Appellant's] remorse again." (Brief of Appellant, p. 45). The trial court rightfully denied Appellant the opportunity to admit the evidence as such was not admissible for that purpose (*supra*), and Appellant is not entitled to further examination or the introduction of evidence after the witness has been so

VI. The trial court did not err in denying Appellant's motion for a new trial as there are no errors for which the cumulative error doctrine can be applied. Moreover, in light of the evidence and testimony presented, even if error did exist to the matters raised by Appellant, they are harmless in light of the evidence presented at trial.

As set forth above, there are no errors or abuses of discretion on the part of the trial court and consequently there can be no application of the cumulative error doctrine. In review of the record, it is clear that Appellant received his constitutionally guaranteed full and fair trial. In the alternative, the evidence presented at trial demonstrates that any particular combination of errors from the above disputed issues is rendered harmless because Appellant's testimony is demonstrably lacking in credibility, and the forensic evidence cannot support Appellant's explanation of the shooting.

"The cumulative error doctrine provides relief to a party when a combination of errors, insignificant by themselves, has the effect of preventing the party from receiving a fair trial, and the cumulative effect of the errors affects the outcome of the trial." *State v. Beekman*, 405 S.C.

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examined and excused. Appellant also attempts to rely on his right to present a "full and fair" defense.

> However, "[i]n the exercise of this right [to present a defense], the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers*, 410 U.S. at 302, 93 S.Ct. 1038. "The right to present a defense is not unlimited, but must 'bow to accommodate other legitimate interests in the criminal trial process.'" *Hamilton*, 344 S.C. at 359, 543 S.E.2d at 594 (quoting *Rock v. Arkansas*, 483 U.S. 44, 55, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987) (quoting *Chambers*, 410 U.S. at 295, 93 S.Ct. 1038)). "'The accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.'"

State v. Lyles, 379 S.C. 328, 342, 665 S.E.2d 201, 209 (Ct. App. 2008). Appellant's fails to present any basis for why these maxims should not likewise apply to his improper arguments.

225, 237, 746 S.E.2d 483, 490 (Ct. App. 2013), aff'd, 415 S.C. 632, 785 S.E.2d 202 (2016). "Respondent must demonstrate more than error in order to qualify for reversal on this ground. Instead, the errors must adversely affect his right to a fair trial. . . 'As we have stressed on more than one occasion, the Constitution entitles a criminal defendant to a fair trial, not a perfect one.'" *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999) (quoting *Delaware v. Van Arsdall*, 475 U.S. at 681, 106 S.Ct. at 1436, 89 L.Ed.2d at 684)) (internal citations omitted).

Appellant has failed to present sound and convincing arguments that any of his alleged issues on appeal constitute error or abuse of discretion on the part of the trial court, let alone multiple such errors that would trigger the ability to consider cumulative error.

While the presence of error is lacking in this case, the evidence presented renders Appellant's claim for self-defense untenable. First, the general theory of the State's case was a sound one: Appellant's description of the events leading up to the shooting cannot satisfy the elements that must be met for self-defense. If his story is to be believed, his friends were involved in a fight that did not include deadly weapons, he introduced a deadly weapon to a nondeadly circumstance. Moreover, there is no showing of threat, aggression, or violence toward Appellant that would satisfy any actual or reasonably believed fear of severe injury or death. Appellant's argument is that he is permitted to act upon appearances, but Appellant specifically admits that he did not take any measures to assess appearances and he did not take any other measures to ascertain whether his initial fear was appropriate. These facts represent the staunch inadequacies of Appellant's own theory of the case, notwithstanding the evidence the state presented. The record demonstrates that Appellant received a fair trial.

When the evidence provided by the State is considered in combination with the weaknesses of Appellant's defense, it takes what is already an inadequate explanation for his actions and

renders it an impossible explanation. "Whether an error is harmless depends on the particular circumstances of the case. No definite rule of law governs this finding; rather the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it could not reasonably have affected the result of the trial." *State v. Reeves*, 301 S.C. 191, 193–94, 391 S.E.2d 241, 243 (1990).

First, Appellant claims that Ms. Smalls simply walked into his apartment, snatched the murder weapon away from him, and proceeded to hide it under her mattress. No one who has genuinely acted in self-defense would permit such actions to take place, and this is especially true when the shooter is still at the scene of the crime while surrounded by witnesses. Appellant either requested Ms. Smalls to hide the weapon or accepted her offer to do so, and both circumstances are demonstrations of guilt. In combination with these facts, it is also established that Appellant left the scene of the crime for nearly two hours before returning to inform the police of a self-defense shooting. The purpose being that he needed time to construct the details of his lie and determine what actions he would need to take before confessing to the shooting.

While such is a strong inference stemming from indisputable evidence, the little feasibility and credibility that might have existed for Appellant's explanation is removed when the phone data demonstrated Appellant clearly lied to police officers about his familiarity with Ms. Smalls and his not having her phone number. Additionally, the nature of the wounds sustained by the victims cannot be squared with Appellant's story. Mr. Griffin suffered an execution style "contact gunshot wound" to the back of the head. There is no other way for that injury to take place, Appellant offered no explanation for it, and it is irrefutable evidence of malice. The impact of that forensic evidence is bolstered by the fact that the other gunshot wounds were inflicted from different angles and Mr. Dash was shot at close range that would require Appellant to be essentially

standing over the bodies of both victims when he chose to start shooting. When that evidence is added to the testimony about his demeanor, behavior, and inconsistencies in explanation, his self-defense theory cannot endure, and he was rightfully convicted.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgments, convictions, and sentences of the trial court should be affirmed.

Respectfully submitted,

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April 29, 2025

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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
The Honorable Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

ANTONIO VASHON BARNES, JR.,

APPELLANT.

Appellate Case No. 2023-001390

PROOF OF SERVICE

I, **Donna D'Alessio**, an employee of the Respondent and legal assistant to W. Joseph Maye, of counsel for the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Final Brief of Respondent has been forwarded to Appellant's counsel, Lara M. Caudy, Esq., via email today, April 29, 2025 to lcaudy@sccid.sc.gov, and to her assistant at smcinnis@sccid.sc.gov.

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

This 29th day of April, 2025.

s/ Donna D'Alessio
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