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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

Assigned Judge: Darrell Scott Fisher, Circuit Court Judge
Disposition Judge: G.D. Morgan, Jr., Circuit Court Judge

Appellate Case Nos. 2023-000182 and 2023-001149

The State of South Carolina, Respondent,

v.

Luis Armando Alvarez, Appellant.

AND

The State of South Carolina, Respondent,

v.

Juan Carlos Alvarez, Appellant.

PETITION FOR REHEARING

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Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, the Appellants petition the Panel to grant a rehearing in this consolidated appeal. *See* Op. No. 2025-UP-204, 2025 WL 1753565 (S.C. Ct. App. filed June 25, 2025). The Panel misapprehended or overlooked the evidence in the record to support a self-defense jury instruction and in its conclusion that any error in the trial court's accomplice liability instruction was harmless. *See Alvarez*, 2025 WL 1753565, at *1-2. It also misapprehended or overlooked the evidence in the record demonstrating that trial counsel preserved the issue regarding the Appellants' right to remain silent. *See id*. at *2. The Panel should grant rehearing to correct these errors and reverse.

I. Self-Defense Jury Instruction

There was more than "any evidence" from which it could be reasonably inferred that the Appellants acted in self-defense. *See State v. Day*, 341 S.C. 410, 416–17, 535 S.E.2d 431, 434 (2000) ("If there is any evidence in the record from which it could reasonably be inferred that the defendant acted in self-defense, the defendant is entitled to instructions on the defense, and the trial judge's refusal to do so is reversible error"). In the early morning of September 22, 2018, the Appellants were at Club Vibe ("the Club"), sitting at the bar, when Orlando Lopez ("Lopez") walked in the back door with two others. (R. p. 203, lines 7-9; p. 206, line 20-p. 207, line 4). Lopez sat near the Appellants. (R. p. 185, line 22-p. 186, line 1; p. 229, lines 13-19). The Clubs owners, Bladimir Acosta ("Acosta") and Paula Patina ("Patina"), along with Javier Solis ("Solis") and Solis's wife, were also at the Club. (R. p. 184, lines 15-16; p. 204, lines 14-17; p. 260, lines 12-14; p. 282, lines 6-8). Acosta played a song from the Appellants' home country, Honduras. (R. p. 186, lines 4-6; p. 319, lines 13-15; p. 345, lines 10-12). Lopez testified that he commented, "What an ugly song," and one of the Appellants replied, "Shut up your mouth" "little Columbian son of a bitch." (R. p. 186, lines 4-5). There was also testimony that one of the Appellants replied

"Columbian, watch, watch what you say" without the offensive phrase. (R. p. 186, lines 4-8; p. 203, lines 13-16; p. 207, line 17-p. 208, line 8). Jhefrey Colorado ("Colorado") testified that he saw Lopez and the Appellants argue inside the bar. (R. p. 231, lines 4-6). Lopez and Solis were drinking alcohol that night. (R. p. 185, lines 6-13; p. 231, lines 12-14) (Lopez had two drinks of the liquor Aguardiente in the "very short period of time" he was at the Club); (R. p. 217, lines 14-24) (Lopez had two or three drinks of whiskey and coke); (R. p. 281, line 22-p. 282, line 2) (Solis drinking Tequila from 10:00 pm to 2:00 am); *see also State v. Douglas*, 411 S.C. 307, 327, 768 S.E.2d 232, 243 (Ct. App. 2014) (evidence of the victim's intoxication is relevant to self-defense).

Solis testified that he was not sitting near the Appellants, but the Appellants "passed [his] side" when they used the bathroom and "bumped" into him. (R. p. 289, line 20 – p. 290, line 8; p. 291, lines 8-9). He also saw "gestures" and the Appellants speaking to Patina. (R. p. 287, line 20-p. 288, line 4). Although he did not know what was being said, it upset him, so he confronted the Appellants. (R. p. 287, line 25-p. 288, line 4; p. 288, line 25; p. 289, lines 1-6); *see Day*, 341 S.C. at 417, 535 S.E.2d at 434-35 (self-defense instruction proper where defendant knew of victim's tendency to violently overreact). Solis testified that he sued the Club and its owners (Acosta and Patina) because the fight "started there." (R. p. 213, lines 11-22, Q: So you are holding [Acosta and Patina] responsible for what happened to you? A: Yes. Because it started there"; *see also* R. p. 321, lines 14-18).

Lopez testified that he announced that he was leaving the Club while the Appellants were still inside. (R. p. 187, line 8-p. 188, line 6; p. 188, lines 15-25). However, he admitted on cross-examination that he did not actually leave the premises. He stayed outside in the parking lot for five (5) minutes before seeing the Appellants come outside. (R. p. 220, lines 16-24). Colorado had

an argument with a female inside the Club and went outside "just after" Lopez. (*See* R. p. 212, lines 17-25, p. 230, lines 10-19).

There was evidence that the Appellants did not bring on the difficulty, and in fact, the evidence shows that the Appellants actively tried to avoid any difficulty. *Contra* Panel's decision, *Alvarez*, 2025 WL 1753565, at *1. The Appellants did not want to leave the Club by themselves, and they urged Acosta – the victims' friend – to make everyone leave at the same time and call the police. (R. p. 307, lines 19-24). One of the Appellants showed Acosta his driver's license and said, "I have a driver's license and I will be out tomorrow." (R. p. 307, line 24 – p. 308, line 1). Acosta refused the Appellants' request and told them that they (alone) had to leave the Club, and then he locked the Club's door so the Appellants could not retreat inside. (R. p. 308, lines 18-20; R. p. 206, lines 17-22; p. 267, lines 14-16; p. 268, lines 2-5; p. 303, lines 13-15; p. 309, lines 4-5). At oral argument, the State admitted that there was evidence that the door was locked, however contended that there was no evidence that the Appellants knew the door was locked. The jury was able to reasonably infer that the Appellants knew that the door was locked, as other witnesses knew that the door was locked. (S*ee*, *e.g.*, R. p. 267, lines 15-23, Solis' testimony that the door was locked; R. p. 268, lines 2-5, Q: And were there any women outside in the parking lot? A: [Solis] The – when all this is happening that the door was locked, no, there was no women outside"; R. p. 206, lines 17-22, Lopez's testimony that when he arrived at the Club the front door was locked; R. p. 303, lines 13-15, doors locked at 1:30 am; R. p. 309, lines 2-5, doors locked after Appellants were told to leave the Club; R. p. 374, lines 5-10, Deputy Cassel did not speak to Club owners because the doors were locked; R. p. 379, lines. 22-24, Officer Neely did not go into the Club because "[t]he doors were locked that evening").

Although Solis's wife could not see anything that was happening outside, it is reasonable to infer that she knew the men planned on attacking the Appellants, as she told Solis not to leave the Club. (*See* R. p. 293, lines 14-17; p. 294, lines 11-16; p. 319, lines 1-6). Solis went outside despite his wife telling him not to. (R. p. 319, lines 5-6, stating "I just told him at that point, don't go"). At oral argument, the State admitted that there was evidence that Mrs. Solis cautioned her husband about going outside.

Outside, the Appellants faced four men: Lopez, Colorado, Solis, and Lopez's friend. It is reasonable to infer that the unnamed fourth man was Lopez's friend because the man asked Lopez for a ride home (R. p. 212, lines 17-25), and Colorado told law enforcement that they "were all hanging out in the parking lot." (R. p. 245, lines 20-21). The Appellants had the right to act on appearances. *See State v. Guderyon*, No. 2023-000633, 2025 WL 471314, at *2 (S.C. Feb. 12, 2025); *see also State v. Starnes*, 340 S.C. 312, 322, 531 S.E.2d 907, 913 (2000). Even if there were three men in the parking lot (as asserted by the State), there was more than the "any evidence" standard to support a charge on self-defense. *See Day*, 341 S.C. at 417, 535 S.E.2d at 435 ("Although some of the evidence was disputed, there was certainly enough evidence in this case to make self-defense a jury question"). There was evidence that the Appellants reasonably believed they were in imminent danger when they were forced out of the Club against their wishes and saw the four (or three) men lying in wait.

Even though Lopez and Colorado had past difficulty with the Appellants inside the Club and sued the Club and its owners because the fight "started there," they chose to wait in the parking lot for the Appellants rather than leave the premises. *See Day*, 341 S.C. at 417, 535 S.E.2d at 435 (the jury can consider "past difficulties between the parties in weighing self-defense"). At some point, Colorado armed himself with what was described as a club, a tube or stick, and a metal tube

or pole. (*See* R. p. 237, lines 13-14; p. 342, lines 13-14; p. 267, lines 14-16); *contra State v. Wigington*, 375 S.C. 25, 33, 649 S.E.2d 185, 189 (Ct. App. 2007) (cited by the Panel wherein it was "uncontroverted that [the victim] never hit, struck, or threw anything at appellant or presented any weapon during the verbal argument"). At oral argument, the State asserted that Colorado armed himself only after the Appellants allegedly stabbed the victims. However, this was a jury issue, as the witnesses contradicted themselves and each other about what happened in the parking lot that night (*See*, *e.g.*, R. p. 187, line 8-p. 188, line 6; p. 188, lines 15-25, wherein Lopez testified that he announced that he was leaving the Club, but he did not have time to make it to his car before the Appellants attacked him), *contra* (R. p. 208, line 9-p. 209, line 21, wherein Lopez admitted that he was outside with Colorado, but still asserted that the Appellants did not let him get to his car before attacking him), *contra* (R. p. 232, lines 3-13 wherein Colorado testified that Lopez was inside his car at the time); *contra* (R. p. 220, lines 16-24, wherein Lopez testified that he was outside for five (5) minutes before the Appellants came out), *contra* (R. p. 230, lines 10-15, wherein Colorado testified that he left just after Lopez); *see also Sauers v. Poulin Bros. Homes*, 328 S.C. 601, 605, 493 S.E.2d 503, 505 (Ct. App. 1997) ("As a general rule, the jury is free to accept or reject in whole or in part the testimony of any witness"); *State v. Jackson*, 384 S.C. 29, 37, 681 S.E.2d 17, 21 (Ct. App. 2009) (self-defense instruction proper where there was "testimony that [the victim] himself had the knife at one point during the fight").

There was also evidence that the Appellants were bleeding, and they tried to escape the attack in their work van, however the van door would not open. (R. p. 238, lines 8-10; p. 393, lines 20-24). At oral argument, the State admitted that there was a trail of blood going to the Appellants' work van. This trail of blood is further evidence of self-defense: it shows that the Appellants were injured and bleeding as they tried to escape the ambush by four men. *See Wiley v. State*, 183 S.W.3d

317, 332 (Tenn. 2006) ("A self-defense claim would have been corroborated by evidence of the bloody towel with the petitioner's blood found at the scene"). There was more than "any evidence" from which it could be reasonably inferred that the Appellants acted in self-defense.

II. Accomplice Liability Jury Instruction

This is not a case in which the overwhelming evidence suggested that the Appellants stabbed the victims without provocation. *Contra Alvarez*, 2025 WL 1753565, at *2. Faced with a four-on-two ambush from men who were under the influence of alcohol and with whom the Appellants had previous difficulty, the Appellants had a reasonable fear of serious bodily injury and defended themselves. (*See* R. p. 321, lines 14-18; R. p. 206, lines 17-22; 267, lines 14-16; p. 268, lines 2-5; p. 293, lines 11-13; p. 303, lines 13-15; p. 309, lines 4-5; p. 319, lines 106; p. 327, lines 15-19; p. 430, line 9). The failure to charge self-defense was not harmless, nor was the improper accomplice liability jury instruction. *See Jackson*, 384 S.C. at 35, 681 S.E.2d at 20 ("When any evidence in the record entitles the accused to a jury charge on self-defense, a trial judge's refusal to give the charge is reversible error").

III. Right to Remain Silent

This issue is preserved for appellate review. The trial court had a bench conference with trial counsel. (R. p. 582, lines 8-13). Immediately after the bench conference, the trial court announced on the record of what it was going to do:

> THE COURT: All right. At the bench conference, we had a discussion that the right to - - or failure of the defendants to testify should not be held against them, and so let me make a couple of comments.
>
> … what we're going to do - - *what I'm going to do*, I'm going to bring [the jury] back in. And I'm going to explain to them that [] part of the charge was not included, and I am going to charge them and have them go back to the jury room to deliberate if that makes any difference.
>
> Anything from the State on that?

MR. RICHARDSON: That's the way we think it should be done.

THE COURT: All right. And same from the defense? Anything from the defense?

MS. GORSKI:No, thank you, Your Honor.

MR. WATSON: That's fine.

THE COURT: Let me go get – let me go get that charge. I'll be right back.

(R. p. 582, lines 9-12, 16-25; p. 583, lines 1-5). The trial court had made its decision in the bench conference of "what I'm going to do," and that ruling was clearly final. "[R]equiring attorneys to continue to object when a ruling is clearly final would not serve the purpose of our rules of preservation; rather, it would merely foster a game of 'gotcha,' where form is elevated over substance." *State v. Jones*, 435 S.C. 138, 145, 866 S.E.2d 558, 561 (2021) (citing Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 183 (3rd ed. 2016); *Atl. Coast Builders v. Lewis*, 398 S.C. 323, 333, 730 S.E.2d 282, 287 (2012) (Toal, C.J., dissenting); *Singh v. Singh*, 434 S.C. 223, 226 n.7, 863 S.E.2d 330, 334 n.7 (2021)). Unlike *State v. Hopkins* cited by the Panel, the Appellants did not abandon their objection. "Preservation rules are intended to ensure that appellate courts review considered decisions of our trial courts and that issues are not being raised for the first time on appeal." *Jones*, 435 S.C. at 145, 866 S.E.2d at 561 (citing *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)). This issue was not raised for the first time on appeal.

IV. Conclusion

For these reasons, the Panel should grant rehearing on these matters and reverse.

Respectfully submitted,

July 7, 2025

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IN THE STATE OF SOUTH CAROLINA
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APPEAL FROM GREENVILLE COUNTY
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Assigned Judge: Mark C. Edmonds, Magistrate Court Judge (Juan Carlos Alvarez)
Disposition Judge: G.D. Morgan, Jr., Circuit Court Judge

Luis Armando Alvarez: Appellate Case No. 2023-000182
Indictment Nos. 2019GS2300305; 2019GS2300306
Case Nos. 2018A2330208932; 2018A2330208933; 2018A2330208934; 2018A2330208935

Juan Carlos Alvarez: Appellate Case No. 2023-001149
Indictment Nos. 2018GS2309562, 2018GS2309563
Case Nos. 2018A2330208846, 2018A2330208847, 2018A2330208848, 2018A233028849

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CERTIFICATE OF SERVICE

I hereby certify that on the below date, I have caused the Appellants' Petition for Rehearing to be submitted via email for filing and have served a true and correct copy of the same upon all counsel, via email:

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