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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions

Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2024-001477

THE STATE,

Respondent,

v.

DAJON MALIK LAVERN GRATE,

Appellant.

INITIAL BRIEF OF RESPONDENT

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II. Did the trial court err by admitting Appellant's booking report and mugshot?

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I. Whether the trial court erred by declining to charge the jury on self-defense after the jury began deliberations where Dajon did not request a self-defense charge until after the jury inquired about self-defense during their deliberations and where he was not entitled to a self-defense charge.

II. Whether the trial court erred by denying Dajon's motion to exclude his redacted booking report and photograph where this evidence was explained in such a manner that it did not imply Dajon had committed prior bad acts.

STATEMENT OF THE CASE

In January 2023, an Horry County grand jury indicted Dajon Grate on two counts of murder and one count of armed robbery. (Indictment Nos. 2023-GS-26-00422, -00423, & -00453). At the same time, the grand jury indicted Dajon's brother, Nasirea Grate,[2] for the same offenses. (Indictment Nos. 2023-GS-26-00424, -00425, & -00452). On August 19-28, 2024, Dajon and Nasirea proceeded to a joint jury trial before the Honorable Benjamin H. Culbertson. (Tr. 1).

At trial, Sabrina Bryant, an employee at the Sunhouse convenience store in Red Bluff, testified that on May 31, 2022, Dajon and Nasirea, along with two other individuals, stopped by the Sunhouse. (Tr. 281-82, 298, 309). Bryant stated that she did not know Dajon and Nasirea's real names; rather, she knew Dajon as "Day-Day" and Nasirea as "Knock-Knock." (Tr. 283-84). Bryant testified that the Sunhouse had a surveillance system and that she provided video surveillance footage to law enforcement on the day of the incident. (Tr. 281-83). After State's Exhibit 40 (the Sunhouse surveillance video) was played for the jury, Bryant stated that Dajon had on pink flipflops and Nasirea had on a "rolled up toboggan-looking thing" and white shorts. (Tr. 293-94). Bryant stated that a man standing next to a white Acura outside had been around the Sunhouse all day and that she had never seen him before. (Tr. 294-96). Nasirea talked to that man while the group was at the Sunhouse. (Tr. 294). Bryant testified that she was aware of murders that happened elsewhere on the day of the incident. (Tr. 298).

After Bryant's testimony, the State informed the trial court that the State's next witness, Sandy Lowe, would testify to "identify officially" Dajon and Nasirea as well as their home address based on their booking reports and photographs. (Tr. 324; State's Ex. 46-50). The State noted that

[2] Nasirea also has an appeal pending with this Court concerning substantially similar issues. *See State v. Nasirea Brewnoplis Jerome Grate*, Appellate Case No. 2024-001460.

it had previously asked both Dajon and Nasirea if they wanted anything on their respective booking reports redacted and that both took issue with the booking reports and photographs being admitted. (Tr. 324-25). The State's reasoning for offering the booking reports and photographs was to show that Nasirea's nickname was "Knock-Knock" and that both Dajon and Nasirea's home address was on Moore Road. (Tr. 325).

Nasirea argued that the information in his booking report was already in evidence, and therefore cumulative, because Bryant had testified to his identity. (Tr. 325). Nasirea asserted that the only reason the State wanted to admit his booking report and photograph was to prejudice him based on the kind of light in which he believed the two pieces of evidence portrayed him. (Tr. 325).

Dajon agreed with Nasirea's argument and noted that his booking report did not list an alias. (Tr. 326). Dajon argued that because his booking report did not list an alias, the State's stated purpose for admitting his booking report and photograph could not be achieved. (Tr. 326).

The State informed the trial court that Lowe, an employee with the Sheriff's Department, could authenticate the booking reports as she was the appropriate records custodian. (Tr. 326). The State noted that Dajon and Nasirea were not in orange SCDC jumpsuits in their photographs. (Tr. 326; State's Ex. 46 & 50). The State asserted that it needed to establish Dajon and Nasirea's home address on Moore Road because law enforcement conducted a search at their Moore Road address. (Tr. 327). The State asserted that Dajon and Nasirea provided Lowe with the information in their booking reports, but Lowe could not recall if she received the aliases from them or from NCIC. (Tr. 327-28). The State agreed to redact Nasirea's nickname from his booking report because Lowe could not recall from where she got the information. (Tr. 328).

The trial court allowed the State to call Lowe to authenticate what she personally knew and added to the booking reports, including the booking photographs. (Tr. 328). However, the trial

court stated that if Lowe did not know where an alias came from, then it would need to be redacted. (Tr. 328). The State said that it would redact everything on the booking reports aside from the addresses. (Tr. 329).

Nasirea and Dajon objected to the booking photographs because Bryant had already identified them, which made the photographs duplicative and cumulative. (Tr. 330). The trial court allowed the admission of the booking photographs. (Tr. 330).

Sandy Lowe, the sergeant over the classification department at the Horry County Sheriff's Department, testified that she was the records custodian for the Horry County detention center. (Tr. 333). She stated that anyone charged with a crime would have a record with the Sheriff's Department that would include a photograph, name, and address. (Tr. 334). Lowe identified State's Exhibits 46-51 as the booking reports and photographs for Nasirea, Dajon, and Todd Allen Fry, Jr. (Tr. 335). She stated that State's Exhibits 46 and 47 were Nasirea's photograph and booking report, which included the Moore Road address he provided to her. (Tr. 336-37). State's Exhibits 50 and 51 were Dajon's photograph and booking report, which included the same Moore Road address as Nasirea's booking report. (Tr. 337). State's Exhibits 48 and 49 were Todd Allen Fry, Jr.'s photograph and booking report, which contained a Holly Loop address in Conway. (Tr. 338). Lowe confirmed that she did not take the photographs but that someone at the Sheriff's Department took them on the day Dajon and Nasirea were arrested and brought in. (Tr. 339). She confirmed that the photographs were "booking photos," meaning that Dajon and Nasirea were already at the detention center and charged with a crime when the photographs were taken. (Tr. 341).

Berenice Uresti Mellado testified that at the time of the incident, she lived near the Sunhouse with her then boyfriend. (Tr. 347-50). On the day of the incident, she was at her

apartment when she heard gunshots. (Tr. 350). A few moments after the gunfire ended, she went to her window and peeked outside. (Tr. 350). Mellado saw a Black man in a black mask wearing a black shirt with a distinctive triangle logo on the back. (Tr. 351-52). She stated that the man had dreadlocks. (Tr. 351). Mellado observed the man getting into a beige Cadillac. (Tr. 352). She stated that when she first saw the man, he was getting into the back passenger side of a different car. (Tr. 352).

After the man left, her boyfriend went outside while she called 911. (Tr. 354). When she went outside, she observed a man face down right outside the door to her apartment. (Tr. 354). That man did not have on a shirt, and his pants were sagging to show green underwear. (Tr. 354-55). Mellado observed blood and noticed that the man was not moving or talking. (Tr. 355). She saw a small white SUV on her right that did not belong to her or any of her neighbors. (Tr. 355). Mellado walked toward the car and noticed a Black man with his head to the side in the passenger seat. (Tr. 356). She believed this man was dead because of the bullet holes in one of the car windows and because he was not moving. (Tr. 356). Mellado testified that a small blood trail came from the open front passenger door of the white SUV toward her apartment where the face down man was laying. (Tr. 356-57).

Mellado saw a gun on the sidewalk near the passenger side of the car. (Tr. 356). She also observed shell casings close to the passenger side of the car but did not go to the driver's side of the vehicle. (Tr. 358). Mellado stated that she had never seen the white SUV, the beige Cadillac, or any of these men before that day. (Tr. 359-60). Further, she did not observe anyone shoot a gun that day. (Tr. 378).

Alicia Miller, an officer with the Horry County Police Department, testified that she responded to a call about the incident. (Tr. 423-24). While she was driving to the scene, she was

rerouted to a fire station because a man with gunshot wounds presented at the fire station. (Tr. 425). That man turned out to be Dajon. (Tr. 425). Miller stated that Dajon was alert but did not answer any of her questions. (Tr. 426). Dajon's injuries were to his left side. (Tr. 430).

Charles Todd, an employee at Conway Used Cars, testified he sold Todd Fry a silver 2007 Cadillac DTS. (Tr. 453-63).

Sean Wydra, a homicide detective with the Horry County Police Department, testified that he responded to the incident. (Tr. 490-92). He was initially dispatched to the scene but was redirected to the hospital to see Dajon. (Tr. 492). He collected DNA swabs and a gunshot residue kit from Dajon. (Tr. 492). He presumed that Dajon had been given pain medicine for his wounds when he visited Dajon in the hospital. (Tr. 508). Wydra testified that he participated in a search of Todd Fry's residence. (Tr. 493). He confirmed that a Cadillac was parked in Fry's driveway. (Tr. 493). When Wydra conducted the search, Fry was at home with a cell phone. (Tr. 494). Wydra found some clothing and shoes in a trash bag in the living room. (Tr. 494).

Jack Smith, a homicide detective with the Horry County Police Department, testified that he was the first officer at the crime scene. (Tr. 533). After securing the scene, he observed a deceased Black male in an SUV and a second deceased Black male in a grassy area near some concrete. (Tr. 534). Smith stated that the SUV had a cracked door on the driver's side and that the front passenger's side door was open. (Tr. 535). He observed a firearm on the ground on the passenger's side of the car, which appeared to have a malfunction where a shell did not fully eject. (Tr. 535).

Robert Bauman, a crime scene investigation detective with the Horry County Police Department, testified that he responded to the scene. (Tr. 555-56). His testimony covered numerous photographs that he took at the crime scene. (Tr. 561-771; State's Ex. 87-184). State's

Exhibit 5 is a not-to-scale representation of the white SUV and the evidence found in and around the car. (State's Ex. 5).

Bauman testified that one of the facedown victim's shoes was found in the front passenger's side floorboard in the white Acura SUV. (Tr. 566). He did not observe any bullet holes on the passenger side of the SUV. (Tr. 571). The jammed gun was near the passenger's side of the vehicle and was an automatic weapon. (Tr. 572). Kalik Conn was identified as the victim found in the driver's seat of the SUV. (Tr. 574). Bauman stated that there was no indication that Conn had the capacity to exit his vehicle or that he tried to at any point. (Tr. 665). Zachariah Dicker was identified as the victim found face down near Mellado's apartment. (Tr. 574). Bauman stated that the driver's seat in the SUV was damaged and that he observed several bullet holes in the seat. (Tr. 574). He found 9 mm Luger casings and .45 auto caliber casings. (Tr. 582). Bauman stated that he observed a ring around the bullet holes on the driver's seat, which indicated a gun was shot at close range. (Tr. 584-85). Bauman discussed two pink slide-on shoes found in the backseat of the SUV. (Tr. 585-86). He found an additional 9 mm casing in the backseat of the SUV and another casing in the center of the backseat of the SUV. (Tr. 586-88).

Bauman testified about a swipe mark in the backseat where someone may have tried to wipe up a red, blood-like substance. (Tr. 588). He opined that someone may have been bleeding in the backseat of the SUV. (Tr. 588). Bauman testified that "green leafy vegetable matter" was found in three locations in the SUV, including in the backseat area, between the two front seats, and in a fanny pack. (Tr. 588, 732). He discovered a cellphone in the backseat as well. (Tr. 590). Bauman found 9 mm Luger casings near the driver and a cellphone in the driver's seat floorboard area. (Tr. 594). All the shell casings found by Bauman were either in or directly around the SUV. (Tr. 605). Bauman testified that he recovered at least 20 casings from the crime scene. (Tr. 614).

Bauman also searched Fry's Cadillac. (Tr. 647). He observed blood on a seatbelt in the Cadillac and found traces of blood in the backseat. (Tr. 647-49).

Bauman also participated in a search at the Moore Road address listed on Dajon's and Nasirea's booking reports. (Tr. 655). He discussed packaging for a Glock gun and magazine found at the residence and noted that the serial number on the box matched a 9 mm gun. (Tr. 656-58). Bauman confirmed that no gun was found in the box but noted that at least one 9 mm gun was fired at the crime scene. (Tr. 660). Bauman stated that a .45 caliber bullet was discovered inside a dresser inside the residence. (Tr. 661).

Bauman could not say whether any of the victims or Appellants were attempting to rob each other. (Tr. 770). Further, he could not say who fired first or what sequence the firings happened in. (Tr. 771).

Paul Greer, a forensic scientist in the firearms department at SLED and an expert in firearms identification, testified that he examined the twenty casings and two guns recovered at the crime scene. (Tr. 810-15). He determined that four different guns collectively produced the twenty shells. (Tr. 817). Greer determined that Conn's Glock provided nine of the twenty casings. (Tr. 827, 836). He stated that Dicker's Canik provided four casings. (Tr. 826, 836). A third firearm, a 9 mm Luger, provided four more casings, all found in the backseat of the SUV. (Tr. 825-26, 836). A fourth firearm, a .45 caliber weapon, provided the remaining three casings. (Tr. 825, 836). Greer testified that three of the four guns were 9 mm weapons. (Tr. 820). He stated that the bullet fragments recovered from Conn's body were consistent with a .45 caliber hollow point bullet. (Tr. 830-32).

Ken Marcus, an officer with the Horry County Police Department, testified that he participated in a search of a McNeil Chapel Road residence while looking for Nasirea. (Tr.

905-09). At the residence, he found a bag on the floor with Nasirea's state issued identification card. (Tr. 911). Marcus also found a mask or "gator neck." (Tr. 911).

Marcus was also qualified as an expert in cellphone extraction and analysis. (Tr. 933). Dajon stipulated that his cellphone was found in the backseat of the white SUV. (Tr. 945, 948). Marcus testified that the cell phone records showed that Conn called Dicker shortly before the shooting. (Tr. 961). He stated that the records were consistent with Nasirea's phone and Dajon's phone both being at the crime scene when the shootings occurred. (Tr. 1039, 1041).

Isodro Martinez testified that he lived at one of the apartments where the shootings occurred. (Tr. 1110). He looked out of his window after hearing gunshots and saw a shirtless Black man in green underwear walking quickly and cussing. (Tr. 1111-13). He later saw that man dead on the ground and face down. (Tr. 1113). After he saw the first man, he saw a second Black man with a black face covering running away. (Tr. 1114-15). When he exited his apartment, he saw a third Black man lying on the steering wheel of a white car. (Tr. 1117-18).

Dr. Angelina Phillips, a forensic pathologist at MUSC and an expert in forensic pathology, testified that she conducted Dicker's and Conn's autopsies. (Tr. 1147-49, 1150, 1155). Regarding Dicker's autopsy, Dr. Phillips testified that Dicker suffered three gunshot wounds and that the fatal wound was a shot to the right side of his back that penetrated both lungs and a large blood vessel near the heart. (Tr. 1151-52). Dr. Phillips testified that an elbow wound, like one that Dicker sustained, could be considered a defensive wound. (Tr. 1166-67).

Regarding Conn's autopsy, Dr. Phillips testified that Conn suffered five gunshot wounds, two of which were fatal. (Tr. 1155, 1163). One of the fatal shots was to the back of Conn's head, which travelled through his brain and fractured his skull. (Tr. 1155). The other entered on the right side of his chest, punctured both lungs and exited on the left side of his back. (Tr. 1157).

One of the three other shots injured Conn's spinal cord and would have paralyzed him from the injury down. (Tr. 1158). Dr. Phillips stated that it was possible Conn's injuries came from one person shooting from behind while another shot straight on. (Tr. 1178-79). She confirmed that Conn had marijuana metabolites in his system and noted that toxicology had nothing to do with either Conn's or Dicker's death. (Tr. 1177).

Tysheena May, a detective with the Horry County Police Department, testified that blood, shoes, and a cellphone found in the back seat of the white SUV belonged to Dajon. (Tr. 1208-09).

After the State rested, neither Dajon nor Nasirea presented a defense. (Tr. 1286, 1337). During the charge conference, Dajon requested that the jury be charged with voluntary manslaughter, and Nasirea joined in Dajon's request. (Tr. 1338-39). The trial court agreed to charge voluntary manslaughter. (Tr. 1339). At no point during the charge conference did either Dajon or Nasirea request a self-defense charge. (Tr. 1338-43). In closing Nasirea argued that no one knew who shot first. (Tr. 1378). Dajon, in closing implied that no one knew who shot first. (Tr. 1418). The trial court did not charge the jury on self-defense, and neither Dajon nor Nasirea objected before, during, or after the jury charge. (Tr. 1421-42).

After approximately an hour of deliberation, the jury sent a note to the trial court that read: "What is the law of (1) self-defense if they leave (2) what is the definition of voluntary manslaughter?" (Court's Ex. 2; Tr. 1445). The trial court stated that it was inclined to charge the jury that it had ruled as a matter of law that self-defense was not an available defense in this case and then essentially recharge voluntary manslaughter. (Tr. 1445). The State requested that the trial court provide the entire voluntary manslaughter charge that the trial court used in its jury charge. (Tr. 1446). The State argued that the trial court needed to make clear that self-defense had

been ruled upon, was not available to Dajon and Nasirea, and that a self-defense charge, if given, would apply to Dajon and Nasirea rather than to either victim. (Tr. 1446-47).

Nasirea objected to the trial court's proposed charge that self-defense was not available to Dajon and Nasirea. (Tr. 1447). He argued that Dr. Phillips testified that Dicker sustained defensive wounds.[3] (Tr. 1447). Nasirea also argued that if Dicker had a right to self-defense, then Dajon and Nasirea would also have that same right. (Tr. 1447). He asserted that the trial court should charge the jury that the State had to disprove all the elements of self-defense beyond a reasonable doubt. (Tr. 1447). Nasirea argued that it would be a comment on the facts for the trial court to charge the jury that self-defense was not available as a matter of law. (Tr. 1448). He asserted that he went to "great length" explaining how he was defending himself during his closing argument. (Tr. 1448).

The trial court responded that there was no evidence that Nasirea or Dajon were defending themselves. (Tr. 1448). Further, both Nasirea's and Dajon's argument was that they did not commit these crimes, they were not present, and they did not participate. (Tr. 1448). The trial court stated that it was unsure if Dicker sustaining a gunshot to his elbow entitled Dajon and Nasirea to self-defense charges when no evidence presented at trial indicates they were acting in defense of someone else. (Tr. 1449).

Nasirea asserted that the State's theory was that he, Dajon, and Dicker were acting in concert, so it does not make sense to say that Dicker could have claimed self-defense if he lived but Dajon and Nasirea cannot now claim it when the jury "clearly has an issue" about whether all three were defending themselves. (Tr. 1449).

[3] Dr. Phillips testified that some of Dicker's wounds *could be considered* defensive, not that those wounds *were* defensive. (Tr. 1166).

Dajon objected to the trial court's proposed language that self-defense was not available as a matter of law. (Tr. 1450). He asserted that the trial court had not previously ruled on whether self-defense was available. (Tr. 1450). He also suggested that the trial court instead charge that the jury had all of the evidence and the legal standards before reiterating the voluntary manslaughter charge. (Tr. 1450). Dajon argued:

> But to say that self-defense is not available as a matter of law, it was not an issue that was discussed. And I think that does intrude into the jury's purview of the evidence. *They saw something that none of us saw.* I guess they're entitled to that if that's obviously the evidence . . . .

(Tr. 1450) (emphasis added). The State argued that our supreme court in *State v. Jalann Lee Williams*[4] had made it "very, very clear" that self-defense is not available in situations like this one because "there is such a nexus between guns and drugs." (Tr. 1451). The trial court determined not to charge self-defense to the jury, instead charging the jury that it had charged the jury on the law already and the law that had been charged is the only law the jury could consider. (Tr. 1451-52, 1454).

The jury found Dajon and Nasirea guilty of the lesser included crime of voluntary manslaughter regarding the death of Conn. (Tr. 1458). The jury found Dajon and Nasirea not guilty of the murder of Dicker and not guilty of armed robbery. (Tr. 1458-59). The trial court sentenced both Dajon and Nasirea to thirty years' imprisonment for the voluntary manslaughter of Conn. (Tr. 1484).

This appeal followed.

[4] 427 S.C. 246, 830 S.E.2d 904 (2019).

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed in the absence of a prejudicial abuse of discretion." *State v. Bryant*, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007). "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." *Id*.

"In some cases, the jury must be charged that criminal liability for homicide may be excused under the doctrine of self-defense." *State v. Williams*, 427 S.C. 246, 249, 830 S.E.2d 904, 905 (2019). "The law requires this self-defense charge, however, only when there is evidence in the record that supports the right of the defendant to use deadly force." *Id*. "To enable trial courts to determine when the evidence does support that right, and thus when the law of self-defense must be charged to the jury, [our Supreme Court] has listed four elements that must be present." *Id*. "If there is no evidence to support the existence of any one element, the trial court must not charge self-defense to the jury." *Id*. at 249, 830 S.E.2d at 905-06. "Whether there is any evidence to support each element is a question of law" subject to de novo review. *Id*. at 249, 830 S.E.2d at 906.

ARGUMENT

I. The trial court did not err by declining to charge the jury on self-defense after the jury began its deliberations because Dajon did not request a self-defense charge before the jury began deliberations and because Dajon was not entitled to a self-defense charge.

Generally, a trial court is required to charge only the current and correct law of South Carolina. *Sheppard v. State*, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004). The evidence presented at trial determines the law to be charged to the jury. *State v. Brown*, 362 S.C. 258, 261-62, 607 S.E.2d 93, 95 (Ct. App. 2004). "The law requires this self-defense charge, however, only when there is evidence in the record to support the right of the defendant to use deadly force." *State v. Jalann Lee Williams*, 427 S.C. 246, 249, 830 S.E.2d 904, 905 (2019). "If there is no evidence to support the existence of any one element [of self-defense], the trial court must not charge self-defense to the jury." *Id*. at 249, 830 S.E.2d at 905-06. When any evidence in the record entitles the accused to a jury charge on self-defense, a trial court's refusal to give the charge is reversible error. *State v. Muller*, 282 S.C. 10, 10, 316 S.E.2d 409, 409 (1984).

A self-defense charge is only required when the evidence supports it. *State v. Slater*, 373 S.C. 66, 69, 644 S.E.2d 50, 52 (2007). The State then bears the burden of disproving self-defense beyond a reasonable doubt when evidence in the record entitles a defendant to a self-defense charge. *State v. Burkhart*, 350 S.C. 252, 261, 565 S.E.2d 298, 303 (2002).

> To establish self-defense in South Carolina, four elements must be present: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, defendant must show that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that he was actually in imminent danger and that the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or the loss of his life;

> and (4) the defendant had no other probable means of avoiding the danger.

Slater, 373 S.C. at 69–70, 644 S.E.2d at 52. "Any act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars his right to assert self-defense as a justification or excuse for a homicide." *State v. Bryant*, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999). An accused who provokes or initiates an assault cannot claim self-defense unless he both withdraws from the conflict and communicates his withdrawal by word or act to his adversary. *Id*.

A. Dajon's failure to request a self-defense charge before or during the charge conference, failure to object to the trial court's jury charge as given without a self-defense charge, and failure to request an additional jury charge on self-defense at the conclusion of the trial court's jury charge before the jury began deliberations constitutes a waiver of his right to challenge the trial court's decision not to charge self-defense.

Rule 20(a) of the South Carolina Rules of Criminal Procedure provides:

> All requests for legal instructions to the jury shall be submitted at the close of evidence, or at such earlier time as the trial judge shall reasonably direct.

Further, Rule 20(b) of the South Carolina Rules of Criminal Procedure provides that notwithstanding requests to charge, a party must object to the giving or failure to give an instruction *before the jury retires* and that failure to do so constitutes a waiver of objection. Thus, trial courts have no obligation to give instructions which are requested in an untimely fashion. *See State v. Matthew Williams*, 319 S.C. 54, 56, 459 S.E.2d 519, 520 (Ct. App. 1995) ("The trial court had no obligation in this case to give the instruction that Williams requested because the time for Williams to properly request a particular instruction had passed.").

Here, Dajon did not request a self-defense charge during the charge conference. (Tr. 1338-43). He did not object before, during, or after the trial court's jury charge concerning the trial court not charging the jury on self-defense, despite being given ample opportunity to do so by

the trial court. (Tr. 1421-43). Dajon's *first* mention of a self-defense charge on the record occurs over an hour into the jury's deliberations when the jury inquired about self-defense. (Tr. 1445-54). Therefore, he waived any ability to challenge the trial court's jury charge as given without a self-defense charge because his challenge was not timely raised. *See State v. Simmons*, 423 S.C. 552, 561, 816 S.E.2d 566, 571 (2018) (stating that for an issue to be preserved for appellate review, "[t]he issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) *raised in a timely manner*, and (4) raised to the trial court with sufficient specificity." (emphasis added) (quoting *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007))); *see also* Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 185 (3d ed. 2016). Dajon had ample opportunity to request a self-defense jury charge before the jury began its deliberations, and his failure to do so constitutes waiver of his right to request a self-defense charge.

B. Even if Dajon had not waived his ability to request a self-defense charge, *State v. Jalann Lee Williams*[5] precludes a self-defense charge because Dajon's act of intentionally bringing a loaded gun to an illegal drug transaction was reasonably calculated to produce violence such that he was not without fault in bringing on the difficulty, making him ineligible for a self-defense charge.

In *Jalann Lee Williams*, our supreme court discussed the first element of self-defense—that the defendant must be without fault in bringing on the difficulty—where Williams intentionally brought a loaded, unlawfully possessed gun to an illegal drug deal. 427 S.C. at 250-51, 830 S.E.2d at 906. Our supreme court determined that such an act was a violation of law that was reasonably calculated to produce violence, which thereby barred Williams' right to assert self-defense. *Id*. Our supreme court noted three different illegal activities in which Williams participated, two of which are relevant here. *Id*. at 251, 830 S.E.2d at 907-08. The first illegal

[5] 427 S.C. 246, 830 S.E.2d 904 (2019).

activity—unlawful possession of a gun—is not a factor in this case as the State did not allege Dajon unlawfully possessed a gun. Second, the possession, purchase, or sale of marijuana is a violation of state law. *See* S.C. Code Ann. § 44-53-370(a) and (c). Third, it is a violation of federal law to bring a gun to an illegal drug transaction. *See* 18 U.S.C. § 924(c)(1)(A).

Here, the State presented testimony at trial that marijuana was found in Conn's white Acura SUV. (Tr. 588, 732). The circumstantial evidence presented at trial suggested that this incident started as a drug deal. Bryant stated that a man standing next to a white Acura, Conn, had been around the Sunhouse all day and that she had never seen him before. (Tr. 294-96). Nasirea talked to that man while the group was at the Sunhouse. (Tr. 294). Marcus testified that the cell phone records showed that Conn called Dicker shortly before the shooting. (Tr. 961). He stated that the records were consistent with Nasirea's phone and Dajon's phone both being at the crime scene when the shootings occurred. (Tr. 1039, 1041). Further, four guns were shot at the scene, only two of which were recovered by law enforcement. (Tr. 817-18).

Therefore, the evidence in the record supports the State's theory that Dajon intentionally brought a loaded gun to an illegal marijuana transaction with Conn, which our supreme court has determined is a violation of law reasonably calculated to produce violence such that it bars a defendant's right to assert self-defense.

C. Even if Dajon had not waived his ability to request a self-defense charge and if *State v. Jalann Lee Williams* is not applicable, the record contains no evidence that Dajon acted in self-defense.

At trial, it was uncontested that no one knew who shot first. In closing Nasirea argued that no one knew who shot first. (Tr. 1378). Dajon, in closing, implied that no one knew who shot first. (Tr. 1418). Without any evidence as to who shot first, no evidence exists to show that Dajon or Nasirea were without fault in bringing on the difficulty. *See Jalann Lee Williams*, 427 S.C. at 249, 830 S.E.2d at 905 ("The law requires this self-defense charge, however, only when there is

evidence in the record to support the right of the defendant to use deadly force."); *id*. at 249, 830 S.E.2d at 905-06 ("If there is no evidence to support the existence of any one element [of self-defense], the trial court must not charge self-defense to the jury.").

Any argument that the evidence in the record supports an inference that Conn or Dicker shot first amounts to nothing more than conjecture and speculation. Dajon seemed to agree when he asserted that the jury "saw something that none of us saw." (Tr. 1450). To the extent that Dajon argued that Conn fired first because Conn fired more shots than Dicker, Dajon, and Nasirea individually fired, this is a logical fallacy rather than evidence. Merely firing more shots than others when the confrontation could have consisted of more than one person against Conn in no way suggests that Conn began shooting before someone shot at him. No testimony or other evidence was presented that supports a theory that Conn *must* have shot first or else he would not have been physically able to shoot nine times before he was paralyzed and/or killed. While the shot to the back of Conn's head undoubtedly left him unable to fire his weapon again, the number of shots he fired before succumbing to his substantial injuries does not imply that he began this incident. It merely implies that he knew how to pull a trigger, likely in quick fashion. No one knows who started shooting first; therefore, even in the light most favorable to Dajon, there is no evidence that Dajon and Nasirea were without fault in bringing on this difficulty.

To the extent Dajon argued that Dicker's elbow injury could be considered a defensive wound, thus meaning he was defending himself from Conn, this theory also relies on an unsupported logical jump. Because we do not know who started shooting first, it is just as likely that someone other than Conn shot first and Conn was defending himself, which could have resulted in potentially defensive wounds to Dicker. The point being: no one knows who started

shooting first, so there is no evidence that Dajon and Nasirea were without fault in bringing on this difficulty.

Finally, to the extent Dajon asserts that because he was shot, he was acting in self-defense, this argument, without that critical missing evidence of who actually began this difficulty, has no merit. Conn and Dicker were both also shot, and they both died. Therefore, by Dajon's logic, they both were engaged in self-defense. However, all the actors in this difficulty could not have been acting in self-defense. Again, because no one knows who started shooting first, no evidence in the record exists to show that Dajon and Nasirea were without fault in bringing on this difficulty.

Thus, because no evidence in the record exists to support the first element of self-defense, Dajon was not entitled to a self-defense charge, and the trial court did not err by declining to charge the jury on self-defense.

II. The trial court did not err by denying Dajon's motion to exclude his redacted booking report and photograph because this evidence was explained in such a manner that it did not imply Dajon had committed prior bad acts.

Generally, the introduction of a booking photograph—and similarly, a redacted booking report—can be reversible error unless: "(1) the [S]tate has a demonstrable need to introduce the photograph, (2) the photograph shown to the jury does not suggest the defendant has a criminal record, and (3) the photograph is not introduced in such a way as to draw attention to its origin or implication." *State v. Traylor*, 360 S.C. 74, 84, 600 S.E.2d 523, 528 (2004).

Our supreme court noted that the rationale for holding that booking photographs are generally prejudicial, and therefore inadmissible absent a showing of the three criteria listed above, is because such photographs imply that a defendant has committed prior bad acts. *Id*. at 84 n.12, 600 S.E.2d at 528 n.12. At the same time, our supreme court held that where a booking photograph was explained by testimony at trial in such a manner that it did not imply that the defendant had committed prior bad acts, then no prejudice results from the admission of the booking photographs.

Id. Therefore, where booking documents are explained in a way that does not imply a defendant committed prior bad acts, those documents are admissible.

Here, the witness that identified Dajon and Nasirea from personal knowledge was Sabrina Bryant, an employee at the Sunhouse convenience store. (Tr. 281). However, she did not know their legal names, instead identifying them only by nicknames. (Tr. 284). When the State sought to introduce the booking photographs and redacted booking reports immediately after Bryant's testimony, Sandy Lowe, the records custodian for the Horry County detention center, testified that anyone arrested and charged with a crime would have a similar booking report that would include their name, photograph, and address. (Tr. 333-34). These three pieces of information—name, photograph, and address—were all that the State sought to admit with the booking photographs and redacted booking reports.[6] Lowe testified that Dajon and Nasirea provided their address to her when they were processed after being arrested for the charges in this case. (Tr. 337, 341). Lowe confirmed that the booking photographs were taken after Dajon and Nasirea arrived at the detention center after being arrested for the crimes charged. (Tr. 341).

The booking reports were redacted except for Dajon and Nasirea's names, addresses, and physical identifying information (i.e., weight, height, age, etc.). (State's Ex. 47 & 51). While the reports had lines for "FBI ID" and "Holds," any information associated with these lines was redacted and Lowe did not provide testimony as to what these lines meant. (State's Ex. 47 & 51). The mere presence of these lines without any explanation does not suggest that Dajon or Nasirea committed prior bad acts because without explanation because these lines could mean anything or nothing at all.

[6] Lowe confirmed before her testimony that she did not recall from where the alias on Nasirea's report originated, and the State redacted it. (Tr. 327-28).

While this particular case may not have been the "rarest of cases" in which our supreme court envisioned booking photographs and redacted booking reports to be used under the three criteria listed in *Traylor*, Dajon and Nasirea were nonetheless not prejudiced by the admission of this evidence because Lowe's testimony during trial made clear that this evidence concerned the charges in this case rather than some prior bad act. The booking photographs were taken after Dajon and Nasirea arrived at the detention center after being arrested for the crimes charged. (Tr. 341). The booking reports were created after Dajon and Nasirea arrived using information they provided to Lowe. (Tr. 336-37). Further, this evidence served to positively identify both Dajon and Nasirea by their legal names where the first witness who personally knew them could not. This evidence also confirmed both Dajon and Nasirea's home address, which was relevant because law enforcement executed a search at that address.

Because the entire concern with introducing booking photographs is the implication of prior bad acts, Dajon and Nasirea cannot be prejudiced by the introduction of booking photographs and redacted booking reports where such evidence is paired with testimony that explained the evidence did not imply any prior bad acts.

[*conclusion and signature block on following page*]

CONCLUSION

Based on the foregoing, the State requests that this Court affirm Dajon's conviction for voluntary manslaughter, as well as his associated sentence.

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