STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Debra R. McCaslin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CLEVELAND STONE, JR.,

APPELLANT

APPELLATE CASE NO. 2024-002010

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Whether the solicitor's improper closing argument denied Appellant his Due Process right to a fair trial?

II. Whether the trial court erred in charging the jury on the "contemptuous language" exception to self-defense?

STATEMENT OF THE CASE

On June 3, 2024, Appellant was indicted by the Lexington County grand jury for the offense of murder. R.*(indictment). On August 19, 2024, Appellant proceeded to trial before the Honorable Debra R. McCaslin and a jury. Tr. 1. Tivis Sutherland[1] represented Appellant. Sutania A. Fuller and Robert E. McNair, IV, represented the state. Tr. 1. On August 22, 2024, Appellant was convicted as indicted. Tr. 705. Judge McCaslin sentenced him to forty-eight (48) years' imprisonment. Tr. 723.

This appeal follows.

[1] Appellant was originally represented by H. Wesley Kirkland, Jr. However, for reasons that are not in the record, Kirkland was relieved as defense counsel immediately before trial. Tr. 61.

STANDARDS OF REVIEW

As to Issue I, this Court must find whether the solicitor's comments were improper, and if so, whether "the improper argument so unfairly prejudiced the defendant as to deny him a fair trial." *Fortune v. State*, 428 S.C. 545, 549, 837 S.E.2d 37, 39 (2019).

As to Issue II, a jury charge is to be determined by the evidence presented at trial. *State v. Hill*, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). This Court "determines whether the [circuit courts]'s ruling is supported by any evidence." *State v. Williams*, 400 S.C. 308, 314, 733 S.E.2d 605, 608 (Ct. App. 2012) (alteration in original; citation omitted). A jury charge must be both erroneous and prejudicial to warrant reversal of the judgment. *State v. Taylor*, 356 S.C. 227, 231, 589 S.E.2d 1, 3 (2003) (citing *Ellison v. Parts Distributors, Inc.*, 302 S.C. 299, 395 S.E.2d 740 (Ct. App. 1990)).

ARGUMENTS

I.

The solicitor's closing argument was so improper that it denied Appellant his right to Due Process.

Relevant Facts

On August 25, 2022, acting in self-defense, Appellant shot and killed Michael Funny outside of Appellant's home. Tr. 113. During the incident, Appellant and his sister sustained gunshot wounds. Tr. 114, 117. Appellant asserted that he acted in self-defense and in defense of others.

During Appellant's trial, Donte Jackson testified that he, Appellant, Appellant's sister, Necorian Richardson, and another person were in front of Appellant's house celebrating Appellant's sister's birthday. Tr. 504-05. Immediately after arriving at the home, Appellant went inside to speak to his mother. Tr. 506. While inside, Appellant retrieved his pistol, which he only carried while around his home because it is a "bad area," and his home had been "shot up" before. Tr. 522. Approximately five minutes after the group arrived at the house, the decedent arrived in his car. Tr. 507. The decedent asked Appellant where his father was and claimed to be Appellant's uncle. Tr. 508. During this conversation, Appellant saw the decedent present a firearm. Tr. 513. At that point, Appellant "racked" his gun, at which point the decedent began shooting at him; Appellant then returned fire. Tr. 513. Jackson testified that he was certain the decedent shot first. Tr. 520.

Necorian Richardson, a former friend of Appellant, testified that Appellant and the decedent spoke to each other in front of Appellant's house. Tr. 206. During that conversation, Appellant chambered a round into his handgun. Tr. 206. According to Richardson, Appellant

then shot first at the decedent; the decedent did not present a firearm before this occurred. Tr. 208. The decedent also did not threaten Appellant. Tr. 209. During this confrontation, Richardson was on the phone with his father who was incarcerated. Tr. 207. This phone call was recorded, and a recording of Richardson stating "my homeboy just did some stupid shit" was entered as evidence. Tr. 214. On cross-examination, however, Richardson conceded that he did not know who shot first. Tr. 233. Joshua Bice testified that Richardson had the best vantage point to see the shooting from his position. Tr. 459.

During closing argument, the state sought to present Appellant's defense as meritless and an attempt to obfuscate the facts. Specifically, the solicitor argued to the jury: "They're asking you not to believe your own ears." Tr. 645. "Don't pay attention to what people can come in here and say to spin the truth. That's hot air." Tr. 646. The solicitor went on,

> The defense attorney in opening said if Mr. Funny had survived, he would be in the defendant's place. No, sir. What Mr. Funny did is what real self-defense is. That's what it really looks like. Not this stuff they're trying to spin up here that totally contradicts what you can hear for yourself. Give [Funny] credit for not shooting sooner.

Tr. 647. "I'm sure they want to discredit Necorian." Tr. 648. The solicitor also implied that there was some unknown and unproven plan by Appellant to murder the decedent:

> You know, the hard thing about this case is understanding the why. The why it happened. And I've wrestled with it because best case scenario for him is a senseless act of violence by somebody who probably had a little too much to drink that night, but that still makes him guilty of murder because voluntary intoxication is not a defense. But worse case scenario for him, it seems like there's more to this story, doesn't it? Did he know Mr. Funny was coming that night? Why did things escalate for him so quickly when the victim just pulled up and asked for his dad by name?

Tr. 653-54. Further, the state made several references to "the truth," drawing frequent objections from defense counsel, some of which were sustained, others of which were overruled.

> SOLICITOR: If you have a doubt in this case, just keep going back to the recording. We've listened to that call a hundred times. Listen to what they say. Listen to what they said that night before they had a motive to lie. The truth is in what they said before they realized the consequences.
>
> MR. SUTHERLAND: Judge, I'm gonna object to the word "truth"...
>
> THE COURT: All right. Move on, Mr. McNair. Don't use the word "truth," please.
>
> SOLICITOR: I implore you to listen to the recording and you decide the truth because if Mr. Funny had his gun out everybody would not be telling that man to stop. Your verdict isn't gonna tell him or anybody else there that night anything they didn't already know. That it was murder. *I just pray that your verdict speaks the truth in this case.*
>
> MR. SUTHERLAND: Judge, I'm sorry. I have to object...That's improper.
>
> THE COURT: I'm gonna let him go ahead. And please do not use the word "truth."

Tr. 655-56 (emphasis added). After the state's closing, defense counsel gave his closing. There, defense counsel argued that the state had attacked its own witnesses, stating: "Now I might pound on these people over here, but they're the Government. They can take it." Tr. 658. He further stated "Keep in mind you don't owe the Government any favors. You are not here to help them." Tr. 670.

Apparently taking great offense to being referred to as "the Government," in reply argument, the government stated:

> You have everything and cases like this, we live these cases for years. Prior to trial I'm getting texts from Ms. Fuller at 3:00 in the morning. We live these cases. I'm sorry we put in a lot of

> evidence. We don't want you to have questions. He can call us the Government all he wants, but we want you to know what this case is about, and I'm sorry if we put too much evidence in for you. I don't want you to have a doubt. I don't want you—to hinder you from seeing the truth in this case. I'm the last—

Tr. 674. At this point, defense counsel objected, which was overruled.[2] The solicitor continued:

> My greatest fear is that after all these people put in all this work I'm the last man standing up here and I don't want to prevent you from seeing what happened in this case. So I am sorry that we put in too much evidence.

Tr. 674. After slightly more than two hours of deliberation, the jury convicted Appellant of murder. Tr. 705.

Discussion

The solicitor's closing argument was so improper that it deprived Appellant of his Due Process right to a fair trial. He is entitled to a new trial.

A closing argument is proper *only* if it is contained to the evidence presented at trial or reasonable inferences that can be drawn from that evidence. *Washington v. State*, 440 S.C. 550, 564, 891 S.E.2d 668, 675 (Ct. App. 2023). A solicitor may argue their own version of the evidence and comment on how much weight the jury should give certain evidence, but not to the extent that the argument overcomes a prosecutor's ultimate duty "to see justice done, not to convict a defendant." *Id.* at 564, 891 S.E.2d at 676 (citing *Vasquez v. State*, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010)). "A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors' passions or prejudices." *Id.* (quoting *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002)). For this reason, it is "generally improper for the prosecutor to accuse defense counsel of fabricating a defense or to

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[2] *See* Tr. 674, ll. 13-15 ("MR. SUTHERLAND: Judge, if I may? I'm sorry. The word 'truth.' THE COURT: Go ahead, Mr. McNair").

otherwise denigrate defense counsel." *State v. Parker*, 391 S.C. 606, 614 n.3, 707 S.E.2d 799, 803 n.3 (2011) (citation omitted)). And "it is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant." *United States v. Young*, 470 U.S. 1, 8 (1985) (quoting ABA Standards for Criminal Justice 3-5.8(b) (2d ed. 1980)).

In *Fortune v. State*, 428 S.C. 545, 837 S.E.2d 37 (2019), our Supreme Court addressed improper closing argument by a solicitor in the post-conviction relief context. In that case, the solicitor made comments during his closing such as, "My job is to present the truth," "If you look in the...Code of Laws...I have to say what the truth is," "the defense attorneys' jobs are to manipulate the truth. Their job is to shroud the truth. Their job is to confuse jurors," and "If [the solicitor] believes somebody else did the crime," then he must "dismiss" the case. *Id.* at 547, 837 S.E.2d at 38. The Supreme Court found these comments "absolutely inexcusable." *Id.* at 551, 837 S.E.2d at 41. First, the *Fortune* Court held that numerous courts had condemned any attempt by prosecutors to use their position as government actors to influence the jury, or, in other words, to "induce the jury to trust the Government's judgment rather than its own view of the evidence." *Id.* at 553, 837 S.E.2d at 41 (quoting *Young*, 470 U.S. at 18-19). The Court further found that "arguments of this kind can rarely be harmless," and certainly were not in that case. *Id.* at 559, 837 S.E.2d at 45.

In this case, the state's closing constituted prosecutorial misconduct. The solicitor relied heavily on arguments that had no support in the record, were calculated to appeal to the jury's emotions and prejudices and served no purpose but to attack defense counsel and his handling of the defense.

First, the solicitor "pray[ing]" that the "verdict speaks the truth in this case," was improper. For one, the word "truth," when spoken to a jury in this context, has a special and insidious connotation. Telling the jury to seek "the truth" can have the effect of, in the jury's mind, reducing the state's burden of proof. *See State v. Beaty*, 423 S.C. 26, 46, 813 S.E.2d 502, 512 (2018) (instructing trial courts to abandon jury charges that instructed juries to find the truth). Further, this statement, in conjunction with the solicitor's other statements, show that he was using his position as a government attorney to impliedly endorse a version of events that constituted objective truth. By telling the jury that there was an objective "truth" to be found and that he was the one advancing it, the solicitor simultaneously "lessen[ed] the jury's sense of responsibility…," *cf., State v. Thomas*, 287 S.C. 411, 412, 339 S.E.2d 129, 129 (1986), and placed a heavy burden on the jury—one supported by the invocation of religious imagery—to reach the solicitor's preferred "correct" verdict.

Second, the solicitor frequently relied on information that was not in the record nor a reasonable inference therefrom. During the end of the solicitor's closing argument in reply, he made numerous odd "apologies" to the jury "for putting in too much evidence." During these apologies, he told the jury that he and his co-counsel "live these cases," and that he "get[s] texts from [co-counsel] at 3:00 in the morning." The solicitor then told the jury that he was unlike the huge monolith that defense counsel wanted to evoke when he called the state "the government," stating "He can call us the Government all he wants, but I want you to know what this case is about… I don't want to hinder you from seeing the truth." The solicitor's insistence that he is in fact not the government, and he wants the jury to see the truth, read in conjunction with his numerous attacks on defense counsel, was calculated to communicate to the jury that essentially, "we are presenting you the truth, that defense lawyer is not." This is extremely similar—albeit

more indirect—to the argument found "absolutely inexcusable" in *Fortune*, 428 S.C. at 551, 837 S.E.2d at 41. In no event was the argument "carefully tailored" to avoid juror biases. *See State v. Linder*, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981).

Second, whether or not the solicitor actually "live[d]" this case or received 3:00 a.m. text messages from his co-counsel about it, that information is nowhere in the record and serves only to appeal to the jury's emotions. It also served to "inject an arbitrary factor into jury deliberations" that the solicitors worked very hard on the case and lead the jury to rely on the solicitor's opinion "instead of exercising [its] independent judgment as to the facts." *Id.* at 554, 837 S.E.2d at 42. The argument that the solicitors had worked very hard on this case is little more than a differently worded induction "to trust the Government's judgment rather than [the jury's] own view of the evidence." *Fortune*, 428 S.C. at 553, 837 S.E.2d at 41 (quoting *Young*, 470 U.S. at 18-19). However hard the solicitor worked on preparing the case for trial has no value to the trial other than to tell the jury that Appellant must be guilty because otherwise the solicitor would not have worked so hard. Such arguments are "particularly improper, even pernicious." *Id.* at 553, 837 S.E.2d at 42 (quoting *United States v. Garza*, 608 F.2d 659, 663 (5th Cir. 1979)). For this very reason, our Supreme Court has repeatedly condemned "the solicitor's personal opinion [being] explicitly interjected into the jury's deliberations as though it were in itself evidence." *Id.* at 554, 837 S.E.2d at 42 (quoting *State v. Woomer*, 277 S.C. 170, 175, 284 S.E.2d 357, 359 (1981)). There was no other reason for the solicitor to make this argument to the jury but to inject his personal opinions about the case into their deliberations.

This case was a self-defense case. The credibility of the defense witnesses was of great importance. The solicitor, seeking a conviction rather than justice, presented a host of improper statements to the jury. In fact, these statements were not limited to closing argument. The

solicitors' frequent peppering of biting and rude statements pervaded the entire trial. Several different times, the solicitors made comments about witness testimony during their "questioning" of them, though the comments were not interrogatory in nature.[3] The solicitors also frequently made similar statements in front of the jury in response to defense counsel's objections.[4] These comments, taken together with the improper closing argument, paint the jury a picture that the state is entitled to conduct itself in a manner unbecoming of officers of the court and are given this leeway because "the truth" is on their side and they "lived" this case.

A prosecutor's duty is to do *justice*, regardless of the outcome. *Washington*, 440 S.C. at 564, 891 S.E.2d at 676. While the solicitor "may strike hard blows," he may not "strike foul ones." *Berger v. United States*, 295 U.S. 78, 88 (1935). Because "arguments of this kind can rarely be harmless," *Fortune*, 428 S.C. at 559, 837 S.E.2d at 45, Appellant was prejudiced by the solicitor's improper arguments. He is entitled to a new trial. This Court should reverse.

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[3] *See, e.g.,* "Well, I will warn the Girl Scouts and Trick or Treaters not to go to your house, okay?" Tr. 554 ll. 12-13; "And now he's dead. No further questions" Tr. 177 ll. 7-8; "Q. For the court reporter. So if we do some simple math, we can go back, it won't be the full three to five minutes, but we should at least have two and some change. You would agree? A. No. Q. Oh, please" Tr. 578 ll. 19-24; "Q. No, please take your time because I am not gonna be accused of confusing you since you were confused during the pre-trial. So, please, your testimony now for the first time in two years that there was- A. It's kind of hard to remember in two years of what happened. Like, I got shot and I'm traumatized by this still. Q. And I a hundred percent, and we've met and I told you that, and what I told you is that your brother's responsible for that. A. My brother is not responsible for- Q. Correct. We'll move on. That's your viewpoint" Tr. 568 ll. 1-12; "Right. But you said you were in your phone earlier not paying attention, but earlier you said it was confrontational, my word confrontational, but it was getting escalated. That's what you just testified to when you started. I'm not trying to confuse you, but you just said something completely different than what you testified about thirty minutes ago or however long we've been going" Tr. 600 ll. 10-16;(solicitor attempts to force Donte Jackson to demonstrate something with a fake gun, then chastises him for acting "scared of guns" after he expressed discomfort) Tr. 551-52.

[4] *See, e.g.,* Tr. 567 ll. 16-20 (MR. SUTHERLAND: I'm sorry, Judge. These are *compound questions* that are confusing the witness… MS. FULLER: I don't know what the objection is. (emphasis added)).

II.

The trial court erred by charging the jury on the "contemptuous language" exception to self-defense.

Relevant Facts

During trial, the state played an audio recording of the phone call the decedent was on at the time of the shooting. A voice identified as Appellant says "what nigga" at the time a round is chambered into the firearm. Tr. 496, 621. The state used this fact to request a charge on contemptuous language. Tr. 621. Defense counsel objected, arguing that there was no evidence for the charge. Tr. 621. When the state said that its request was based on that "he said what and the N word," defense counsel responded, "What I would say and, I hate to have to go into this, but if I were to say that it's different than my guy saying that. As far as contemptuous, I mean, it's kind of like a normal every day—you know, they're like hey, what's up." Tr. 621.

The trial court stated, "let me tell you what, the Court looks at it totally different," and decided to give the jury charge. Tr. 621. The trial court would go on to charge the jury as follows:

> First, the defendant must be without fault in bringing on the difficulty. If the defendant's conduct was the type which was reasonably calculated to and did provoke a deadly assault, the defendant would be at fault in bringing on the difficulty and would not be entitled to an acquittal based on self-defense. Self-defense is not available to a person who uses language which is so contemptuous that a reasonable person would expect it to bring on a physical encounter and which did actually contribute to the physical encounter.

Tr. 685, l. 22 – 686, l. 7. During deliberations, the jury asked to be recharged on self-defense, and the trial court read the same charge again. Tr. 696; 698.

Discussion

"What nigga," between two Black males is not language that is so contemptuous that it would reasonably provoke a physical encounter. The trial court erred in concluding otherwise and gave a burden-shifting instruction during its self-defense charge. This was erroneous and prejudicial, and this Court should reverse.

"[T]he plea of self-defense is not available to one who uses language so opprobrious that a reasonable man would expect it to bring on a physical encounter, and which did actually contribute to bringing it on." *State v. Rowell*, 75 S.C. 494, 56 S.E. 23, 29 (1906). Language that is insulting is not sufficient to meet the opprobrious words standard, to act as a bar to self-defense, the language must be so contemptuous that the speaker *knows* a physical encounter will result. *See id.* at 494, 56 S.E. at 27 ("The court should have held: That a person is not deprived of the right of self-defense because he uses insulting language. That one who insults another by opprobrious words may be bound to anticipate that the insulted person will repel the insult to the extent the law allows, *but he is not bound to anticipate that he will go to the extent of attempting to take his life*" (emphasis added)).

The "opprobrious language" rule has not been well fleshed-out by this State's appellate courts and has been long criticized for its "apparently unlimited declaration of the law." *State v. English*, 115 S.C. 535, 106 S.E. 781, 784 (1921) (Cothran, J., dissenting). While the question of whether the language used meets the standard of "opprobrious language" will typically be a jury question, *see State v. Ferguson*, 91 S.C. 235, 242-43, 74 S.E. 502, 505 (1912), the trial court must still determine whether a jury could, as a matter of law, determine that language was opprobrious before deciding to give the instruction. *See State v. Hill*, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993) (a jury charge is to be determined by the evidence presented at trial).

A similar rule is found in the First Amendment context: "fighting words" are words which "by their very utterance inflict injury or tend to incite an immediate breach of the peace." *State v. Perkins*, 306 S.C. 353, 354, 412 S.E.2d 385, 386 (1991) (citations omitted). Language that constitutes "fighting words" would invariably constitute language meeting the "opprobrious language" rule. *Compare id. with Rowell*, 75 S.C. 494, 56 S.E. at 29.

In the "fighting words" context, this Court has addressed similar language to that used here and held that the language did not constitute fighting words. In the case of *In re Jeremiah W.*, 353 S.C. 90, 576 S.E.2d 185 (Ct. App. 2003), *aff'd in relevant part* 361 S.C. 620 (2004), a fourteen-year-old juvenile yelled profanities at a police officer who was attempting to call him over to his patrol car. *Id.* at 92, 576 S.E.2d at 187. When one of the officers decided to approach the juvenile, he "turned around...pulled his pants up. And he went 'What?' in [the officer's] face with his arms bowed out." *Id.* After that display, the officer arrested the juvenile for breach of peace. *Id.* at 92-93, 576 S.E.2d at 187. This Court reversed the juvenile's conviction for breach of peace. *Id.* at 97, 576 S.E.2d at 189. This Court found that profanity alone does not constitute fighting words and neither did "loud or boisterous behavior." *Id.* (quoting *State v. Pittman*, 342 S.C. 545, 551, 537 S.E.2d 563, 566 (Ct. App. 2000)). Therefore, the juvenile was entitled to a *directed verdict* on the breach of peace charge, meaning that there was *no evidence* to support it. *See id.*; *see also,* Rule 19(a), SCRCrimP ("the court shall direct a verdict in the defendant's favor...if there is a failure of competent evidence tending to prove the charge in the indictment").

Similarly, the few appellate cases that have analyzed the "opprobrious language" standard suggest that profanity must be combined with threatening language or, or language that would be clear to anyone to bring about difficultly. For example, in *State v. Strickland*, 389 S.C. 210, 215, 697 S.E.2d 681, 684 (Ct. App. 2010), this Court held that a defendant saying "shut

your fucking mouth" was sufficient evidence of "opprobrious language" to deny a motion for directed verdict based on the establishment of self-defense.[5] Similarly, in *State v. Woodham*, 162 S.C. 492, 160 S.E. 885, 886 (1931), the Supreme Court held that a defendant calling a victim, "a God Damn Dago[6] Son-of-a-bitch," was sufficient to warrant a jury instruction on opprobrious language. And in *State v. Wiggins*, the Supreme Court suggested in *dicta* that a defendant threatening to "kick...Victim's ass" presented at least a jury question over whether he had used opprobrious language. 330 S.C. 538, 547, 500 S.E.2d 489, 494 (1998) (cleaned up).

Here, however, the language allegedly used by Appellant was "what, nigga?" It is important to first note that every person involved in the situation giving rise to this case was Black. As defense counsel recognized at trial, the use of the "n-word" by a non-Black person at a

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[5] *Strickland* is the only modern case from South Carolina's appellate courts to discuss the "opprobrious language" principle as a bar to self-defense in any depth. At the same time, modern law has developed to include the principle that "words alone, however opprobrious, are not sufficient to constitute a legal provocation," *see State v. Byrd*, 323 S.C. 319, 322, 474 S.E.2d 430, 432 (1996), but "words accompanied by hostile acts may, according to the circumstances, establish a plea of self-defense." *State v. Dickey*, 394 S.C. 491, 501, 716 S.E.2d 97, 102 (2011). The fact that "words *accompanied by* hostile acts" are required, at minimum, to establish self-defense, but simultaneously a defendant's words alone is sufficient to forfeit self-defense is a glaring contradiction, and more evidence that the "opprobrious language" standard is a relic of a long-passed time. This criticism of the doctrine is by no means new, it is the exact issue Justice Cothran pointed out in his dissent in *English*. *See English*, 115 S.C. 535, 106 S.E. at 784 (Cothran, J., dissenting) ("I do not subscribe to the law that any opprobrious epithet calculated to provoke a personal encounter, regardless of the intention of the party applying it, will rob him of the right to defend himself against a murderous attack. The circulation of the most outrageous, mendacious, and slanderous reports against another, will not justify such other in murderously assaulting the slanderer in resentment. Such an assault, resulting fatally, would constitute murder. Against it the slanderer would be permitted to defend himself, to the extent of slaying, if necessary, even though it should appear that the slander was the provocation of the attack. It would be illogical in the extreme to hold that one could not defend himself against an attack which, resulting in his own death, would constitute murder in his assailant").

[6] "Dago" is a derogatory term used to describe Italians. *Dago, Merriam-Webster* (11th ed. 2003).

Black person is very different than the use of the "n-word" by one Black person to another.[7] *See* Tr. 621 ("What I would say and, I hate to have to go into this, but if I were to say that it's different than my guy saying that"). As opposed to other prophane phrases, such as "fuck," *see Strickland*, 389 S.C. at 215, 697 S.E.2d at 684, the word has no meaning apart from when it is used to "disparage" a person "on the basis of [that person's] membership in a particular group," here, Black. *See* Ralph DiFranco and Andrew Morgan, *No Harm, Still Foul*, 9:3 J. OF AM. PHIL. ASSN. 471, 473 (2023), https://doi.org/10.1017/apa.2022.18 (last accessed May 14, 2026). Necessarily, therefore, the intent of the speaker of a racial slur matters a great deal in determining whether the word was meant in a racist or derogatory context. *See* Delgado, *supra*, 17 HARV. CIV. RIGHTS-CIV. LIB. L. REV. at 180. The use of the word by Appellant, a Black man, removes the racist and derogatory connotation of the word such that it no longer possesses its harmful meaning.

Appellant's two-word statement here is not analogous to the one used by the defendant in *Woodham*, who used a racial slur in a derogatory fashion, aimed at a member of the racial class whom the slur is aimed at, and combined with other profanity. 162 S.C. 492, 160 S.E. at 886. Likewise, unlike the defendant in *Strickland*, Appellant did not use profanity. 389 S.C. at 215, 697 S.E.2d at 684 ("shut your fucking mouth"). And unlike the defendant in *Wiggins*, Appellant did not make any threat. 330 S.C. at 547, 500 S.E.2d at 494 ("Appellant threatened to kick 'both [Victim's and Sister's] asses.'" (alteration in original)).

Rather, Appellant's language was far more analogous to the language in *Jeremiah W*, 353 S.C. at 92, 576 S.E.2d at 187. There, this Court held that the combination of profane language

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[7] *See* Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 133, 180 (1982) (recognizing that a reasonable person would not typically understand "hey, nigger" spoken between black persons to be a racial insult in context).

and the word "What?" even when uttered in aggressive posturing was not sufficient to constitute fighting words. *Id.* at 92, 576 S.E.2d at 187.[8] If "what" cannot constitute fighting words—and by extension opprobrious language—then the mere addition of the word "nigga" said by a Black man to another Black man does not either.[9]

Further, the trial court's decision to charge opprobrious language was prejudicial. In other contexts, it is well-established that a wrongful charge in the first element of self-defense can have a burden-shifting effect and is thus *ipso facto* harmful. *See, e.g., State v. Taylor*, 356 S.C. 227, 233, 589 S.E.2d 1, 4 (2003) (mutual combat). The instruction here had the same effect. Rather than the state having the complete burden to disprove self-defense, the trial court's instruction essentially shifted the burden onto Appellant to prove that his language was not opprobrious, and thus, he was without fault in bringing about the difficulty. Such burden-shifting has a similar effect of failing to charge self-defense at all. *See id.* at 235, 589 S.E.2d at 5 (citing *State v. Burkhart*, 350 S.C. 252, 565 S.E.2d 298 (2002)).

There was evidence that the decedent pulled up to Appellant's house, threatened him with a firearm, and shot at him, all before Appellant fired back in self-defense. The case came down

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[8] *Cf. also, Carolina Youth Action Project v. Wilson*, 60 F.4th 770, 785 (4th Cir. 2023) ("After several students started clapping and mocking her, S.P. stated "fuck all of you." S.P. was charged with violating the disorderly conduct law. The solicitor presenting the charge to family court said S.P. violated the disorderly conduct law because she 'was loud and used profanity when the administrator and school resource officer were trying to talk with her.' Although we agree S.P. misbehaved, we do not agree her misbehavior unambiguously fell within the bounds of a criminal disorder law." (internal citations omitted)).

[9] To be sure, the state presented some evidence that Appellant was brandishing a firearm at the time he made this statement. However, that fact is irrelevant to this discussion. The "opprobrious language" charge is focused on *language*. Necessarily, therefore, the language itself must be considered in a vacuum. What the trial court did here, however, was give the jury the opportunity to convict Appellant even if they did not believe he brandished his firearm while speaking to the decedent and even if they did believe that the decedent both brandished his firearm and shot at Appellant first.

to a credibility assessment between the witnesses who testified to those facts and the witnesses who testified consistent with the state's theory. Injecting the "contemptuous language" charge, however, added a new hurdle for Appellant. Now, in order to acquit, the jury must not only be convinced that the defense witnesses "win" the proverbial credibility battle but also that Appellant's use of the phrase "what nigga" was not reasonably calculated to bring about the difficulty. This extra calculus could well have been the deciding factor in the jury's decision to convict; it is impossible to know. An error of this sort, that has the effect of nullifying the self-defense instruction—the only instruction that really mattered—can rarely be harmless. *See Taylor*, 356 S.C. at 233, 589 S.E.2d at 4. When, as here, an appellant presented evidence of self-defense which the jury could have believed, an error impacting the self-defense instruction in this way cannot be harmless.

Accordingly, this Court should reverse Appellant's conviction and sentence, and remand for a new trial.

CONCLUSION

For the foregoing reasons, Appellant's conviction and sentence should be reversed, and this case should be remanded for a new trial.

W. Chandler Norville
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of May, 2026.