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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Sumter County
Court of General Sessions

The Honorable Kristi F. Curtis, Circuit Court Judge

THE STATE,

Respondent,

v.

RASHAD MONTRELL HARVIN,

Appellant.

Appellate Case No. 2025-000123

FINAL BRIEF OF RESPONDENT

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Whether Appellant's issue is procedurally barred when Appellant failed to present any argument challenging the reasons the trial judge gave for finding a mutual combat instruction applicable in this case, and further failed to object after the instruction was given? Or, in the alternative, whether this record could support a conclusion that the trial judge abused her discretion in charging mutual combat when evidence presented at trial arguably supported 1) pre-existing ill-will between the parties; and 2) that prior to the deadly shooting both the defendant and victim knew the other was armed?

STATEMENT OF THE CASE

A Sumter County grand jury indicted Appellant Rashad Montrell Harvin for the murder of Michael Wilson and possession of a weapon during the commission of a violent crime. (R. p. 345-346). The case was called for trial before a jury on March 28, 2022. (R. 1). After jury selection and pre-trial matters, the jury was sworn and opening statements were presented the next day, March 29, 2022. Allen Barnes, Esq., represented Appellant on the charge and John Meadors, Esq., represented the State. (R. 2). The Honorable Kristi F. Curtis presided. On March 31, 2022, the jury convicted as charged. (R. 338). Judge Curtis sentenced Appellant to a thirty-year term of imprisonment for the murder conviction, and a concurrent five-year term for the weapon conviction. (R. 334). This appeal follows.

RESPONDENT'S STATEMENT OF THE FACTS

On May 8, 2020, the murder victim, Michael Wilson, was at a gas station in Sumter, South Carolina, buying lottery tickets, ice and beer. (R. 25-29; 70-71). Michael saw a friend at the store, Larry Harrison. The two engaged in friendly banter, discussed Michael's new car rims, and made arrangements for Michael to cut his friend's hair. (R. 70-71; 75). Larry helped Michael put the newly purchased ice and beer in a cooler in Michael's Cadillac. (R. 71). Larry "gave him a fist bump" and said goodbye. (R. 71, lines 24-25). As he drove off, Larry heard a gunshot. (R. 72, lines 2-4). After hearing the gunshots, Larry immediately returned. (R. 82). Michael had been shot and was going to his car to drive for help. Larry stopped him, and seeing blood and the distress Michael was in, helped him to Larry's car and took off to get help for his friend. (R. 83). Michael told him, "The guy shot me in the back." (R. 83, lines 14-15).

Larry had noticed a young man in red and white clothing, "pacing back and forth," then the man "ducked back and went - - startled over by the gas pump off of the Boulevard." (R. 72, lines 5-18). Larry could see that the man in red and white clothing had a gun and was in the process of running away. (R. 85).

James Gainey was also a customer at the store that day. He testified that he was in his truck at the gas pump area and saw a young man just standing in the area. (R. 96). Mr. Gainey explained what happened next:

> So then I looked down to pull my money out of the counter and while I was looking down I heard two, three shots. Looked up and he was still standing there and I looked over and the big fellow, he was kind of doing like a swagger back to his car. I don't know I he'd already been shot or just trying to keep him [from] getting shot or what, but he went back to his car.

(R. 96, lines 13-19). Then, the larger man "shot back a couple of times," and while the other man "shot again." (R. 97, lines 5-24; *see also* 280-281).

Emergency personnel met Larry on the road as he was trying to get Michael help. At one point, the paramedic could not find a pulse, but they got Michael to the hospital. (R. 150-152). Michael died from a gunshot to the back. (R. 154).

Analysis of the casings located at the scene indicated that two guns were fired, a .380 and a 9mm. (R. 17-24; 103; 104). The bullet fragment retrieved from autopsy was consistent with a .380. (R. 105). The forensic pathologist who conducted the autopsy opined that the bullet entered at an angle, and that the angle was consistent with being shot as the victim was bent over. (R. 153).

The investigation developed Appellant as a suspect and he was taken into custody and questioned. (R. 107-108). Appellant declined to write a statement, but the interview was recorded (audio only) and that was played for the jury. (R. 114). In his statement, Appellant denied knowing the victim; denied that victim had made Appellant mad or had said something to him; and Appellant admitted that he fired first, though he claimed he fired into the air. (R. 118-121; 340). Appellant admitted running from the scene, hiding the gun, and changing his clothing, confirming that he had been wearing "red trousers." (R. 122-124, 128). Appellant claimed the victim "ran out of the store" and started shooting. (R. 124). Appellant claimed that he shot back. (R. 124; 126; 135). Officers collected the clothes worn that day – "a white hoodie and … red sweatpants." (R. 141, lines 1-13).

The defense opted to call witnesses, including Appellant. Felicia Nixon, who had been employed at the convenience store and gas station where the shooting occurred, testified for the defense. She testified that she was familiar with both Appellant and the victim because each of them would go into the store. (R. 155-156). She did not see the shooting. (R. 157). She was called to testify about an event "a couple of months" prior to the shooting. (R. 157, lines 11-13).

Ms. Nixon testified that the victim, Michael, "was just loud, like always … talking the way he talks and stuff like that and he end up putting the gun out on somebody in the store." (R. 157, lines 15-21). She testified Michael "pretty much" began the incident. (R. 157, lines 23-24). On cross-examination, Ms. Nixon agreed that the incident "ended peacefully" and Michael was not "banned from the store." (R. 160, lines 13-16). She also agreed that she had earlier told police that Appellant was at that store that day and had a covering on his face, was in "red pants, white shirt," and that it was unusual for him to be "wearing something over his face[.]" (R. 162, line 21 – p. 163, line 8). She also confirmed, after hearing the video recording with her voice, that she had said at the scene: "He didn't have to shoot that man" though she disavowed the opinion was based on personal knowledge. (R. 164, line 18 – p. 165, line 22; p. 166). She also confirmed that the prior incident she described involving Michael "had nothing to do with" Appellant. (R. 165, lines 23-25).

The defense also called Natori Myers. Ms. Myers worked at a local Family Dollar and related an incident between Appellant and Michael a day before the shooting. (R. 167-168). She testified that Appellant knocked items off the counter near the checkout, though he picked them up, and was "upset and frustrated." (R. 169, lines 2-12). She did not know what had happened, but knew that Michael was at the back of the line at the counter. (R. 170). She made sure, however, that both had exited the parking area – seeing Appellant out first – when they left the store to ensure that nothing else happened. (R. 172). She confirmed neither had a gun, and that she heard no threats exchanged. (R. 173-175).

Appellant also testified and claimed that the event at the Family Dollar store happened differently. Appellant testified that he was at the end of a long line waiting when Michael began to curse at him, walked toward him, and reached for a gun. (R. 182). Appellant asserted that he

"was scared and fearful" and threw the food he held at Michael after which Michael left. (R. 183). He testified he was only at the gas station the day of the shooting to sell drugs. (R. 186). Appellant admitted having a gun, but asserted it was because he had "been threatened in Family Dollar stores," was afraid given that he walked a lot and did not want to get hurt. (R. 190, line 23 – 191, line 3). He clarified, though, that he did not carry a gun until after the Family Dollar store incident. (R. 191). Appellant testified that Michael began cursing at him, getting his attention, then reached for his gun, which caused Appellant to "accidentally" shoot in the air in a panic. (R. 192, line 23 – p. 193 , line 3). Appellant then ran toward the gas pump area for cover, and the two exchanged gun fire. (R. 193-194). He admitted then running away and burying the gun. (R. 196-197).

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Wilson*, 345 S.C. 1, 5–6, 545 S.E.2d 827, 829 (2001) (citing *State v. Cutter*, 261 S.C. 140, 199 S.E.2d 61, 65 (1973)).

Jury Instructions on the Law

"The law to be charged must be determined from the evidence presented at trial." *State v. Cole*, 338 S.C. 97, 101, 525 S.E.2d 511, 512 (2000). To show error in the trial court's jury instructions, an appellant must show the trial court abused its discretion. *State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 166 (2007). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Id.*

ARGUMENT

The jury instruction issue is not preserved for appeal when defense counsel failed to make any argument challenging the trial court's determination to charge the law of mutual combat and made no objection when the trial court asked for "additions or exceptions" before sending the jurors to deliberate. Consequently, the one issue raised is not available for merits review. Even if it was preserved, the record shows that the trial court did not abuse its discretion by instructing the jury on the law of mutual combat because Appellant testified to "bad blood" between him and the victim, specifically a recent altercation and threats, and both knew the other to be armed.

As a first matter, the record does not support that Appellant preserved the issue for this Court to review. Even so, should this Court disagree and find the issue available for merits review, the record shows no abuse of discretion in the giving of the charge, or, if error, there is no true possibility that the instruction could have impacted the jury's verdict given the evidence in the case. Appellant is not entitled to any relief.

Relevant Facts:

Without a request from either party, the trial judge announced that she would add the instruction on mutual combat to the jury charge. (R. 256). Defense counsel lodged a general concern to the instruction asserting, "I just don't think there's any evidence to support that." (R. 256, lines 13-14). The State asked if the court deemed it a proper charge for the case, and the judge responded she had included the instruction, "before we heard any other testimony, but …" and without the judge completing the thought, the State moved to a particular portion of the language, which the judge modified after discussion. (R. 256-257). The State returned to the mutual combat charge generally and the trial court explained:

> … if you follow the Defendant's testimony, that he just shot up in the air and the guy turned around and fired at him and they're firing at one another, I think - - I think it probably does fit under the Defendant's testimony.

(R. 257, lines 6-10).

That State expressed uncertainty but deferred to the trial court. (R. 257). Appellant did not make his own objection. Appellant did not adopt or join the State in its uncertainty about the specific testimony relied upon by the trial court. Notably, the court directly asked whether there were "[a]ny other additions or exclusions[]," and Appellant made no argument at all. Rather, it was the State that returned to the proposed instruction and questioned whether the evidence supported "a mutual intent and willingness to fight." (R. 257, lines 21-24). The judge again explained her view of the evidence: "Well, they're engaged in a gun battle across the parking lot." (R. 257, line 25 – p. 258, line 1). When the State again asked about "willingness," the court explained further, "the Defendant's testimony is he fired up in the air, and that the victim then turned around and fired at him." (R. 258, lines 7-9). Defense counsel, again, did not join in the argument or make his own argument; rather, defense counsel transitioned to the verdict form and asserted that he had no issue with the court's form. (R. 258). The court asked again if there was anything further to discuss, and both the State and the defense indicated there was not. (R. 258).

Closing arguments were presented thereafter with the jury charge following without any additional argument on the record. The jury instructions included the mutual combat language after explanation of the first prong of self-defense, *i.e.*, being "without fault in bring on the difficulty." (R. 326, line 24 – p. 327, line 20). After the jury charge concluded, the trial judge asked if there were "[a]ny additions or exceptions before we dismiss the jury," and both the State and defense counsel responded there were none. (R. 331, lines 13-16).

Procedural Bar:

"Issues not raised and ruled upon in the trial court will not be considered on appeal." *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693–94 (2003). Here, defense counsel posed only a general, very broad concern regarding the instruction and failed to participate in any

discussion about the propriety of the charge. That was insufficient to preserve an issue at the charge conference. *See State v. Morales,* 439 S.C. 600, 609, 889 S.E.2d 551, 556 (2023) ("A trial court's opportunity to rule necessarily includes both parties being aware of the nature of the objection such that they may present their best arguments addressing *that* objection.") (emphasis in original). *Cf. State v. Carlson*, 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005) ("A party cannot complain of an error which his own conduct has induced.")

Further, defense counsel failed to object to the charge after the jury was instructed. Again, that does not preserve an issue for review. *See* Rule 20(b), SCCrimP ("Notwithstanding any request for legal instructions, the parties shall be given the opportunity to object to the giving or failure to give an instruction before the jury retires, but out of the hearing of the jury. Any objection shall state distinctly the matter objected to and the grounds for objection. Failure to object in accordance with this rule shall constitute a waiver of objection."); *see also State v. Whipple*, 324 S.C. 43, 52, 476 S.E.2d 683, 688 (1996) ("[F]ailure to object to the charge as given … constitutes a waiver of [the defendant's] right to complain on appeal."); *State v. Rios*, 388 S.C. 335, 342, 696 S.E.2d 608, 612 (Ct. App. 2010) ("Even after the trial court specifically asked if there were any objections to the charges given, Rios responded, 'None.' By failing to contemporaneously object to the jury charges, Rios has waived his right to allege error on appeal.").

To be sure, our appellate courts have eschewed a "hyper-technical" application and instructed that the record should be viewed "with a practical eye" when considering preservation. *State v. Bowers*, 428 S.C. 21, 29, 832 S.E.2d 623, 627 (Ct. App. 2019), *aff'd*, 436 S.C. 640, 875 S.E.2d 608 (2022) (citing *Herron v. Century BMW*, 395 S.C. 461, 470, 719 S.E.2d 640, 644 (2011)). But eschewing a "hyper-technical" approach does not save an issue that an appellant failed to argue below. Discussion is a key part of preservation. *Id,* at 29, 832 S.E.2d at 627 (citing

State v. Johnson, 333 S.C. 62, 64 n.1, 508 S.E.2d 29, 30 n.1 (1998), and acknowledging that "[o]nce a party objects to a jury charge and, *after opportunity for discussion,* is denied on the record, no further action is necessary in order to preserve the issue for appeal.") (emphasis added). Here, the opportunity for discussion was not merely available, the State questioned various aspects of the instruction. The defense, though, remained silent. Rather than a "hyper-technical" application of the procedural bar rules here, the procedural bar is applicable because the defense prevented the judge from considering its point of view (which may or may not have been consistent with the State's concerns). At the very least, joining in the State's concern would point to some expression of the defense's position. That did not occur and the trial judge was given no opportunity to consider the defense position – either at the charge conference or after the giving of the instruction. Thus, Appellant's issue is procedurally barred.

If not procedurally barred, however, Appellant is still not entitled to any relief because he fails to show an abuse of discretion.

Discussion in the Alternative:

"[T]he purpose of jury instructions is to enlighten the jury as to what law is applicable to a certain state of facts in order that a just, fair and proper verdict can be reached." *State v. Peer*, 320 S.C. 546, 554, 466 S.E.2d 375, 380 (Ct. App. 1996). Consequently, "[t]he law to be charged to the jury is determined by the evidence presented at trial." *State v. Hill*, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). "Unless justified by the evidence, an instruction should not be given because it can confuse the jury." *Bowers*, 428 S.C. at 28, 832 S.E.2d at 627 (citing *State v. Commander*, 384 S.C. 66, 75, 681 S.E.2d 31, 36 (Ct. App. 2009)).

"An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." *State v. Custer*, 443 S.C. 172, 179, 903 S.E.2d 237,

240 (Ct. App. 2024) (quoting *State v. Lemire*, 406 S.C. 558, 565, 753 S.E.2d 247, 251 (Ct. App. 2013)). This requires a showing that the decision lacked support in the law or "evidentiary support." *Lemire,* at 564, 753 S.E.2d at 251. To state it differently, the trial court does not abuse its discretion by instructing the jury on a correct principle of law that is supported by the facts of the case. That is precisely what happened here. Therefore, Appellant cannot show an abuse of discretion and is not entitled to any relief on appeal.

Here, the only challenge on appeal is to the giving of the mutual combat instruction. As this Court has previously noted, our case law on mutual combat is somewhat sparse; however, "that case law unequivocally indicates that it is essential there is evidence of a pre-existing ill-will between the parties and that both parties are armed with deadly weapons and have knowledge that the other is armed." *Bowers,* 428 S.C. at 34, 832 S.E.2d at 630. Moreover, there must be some evidence of a "willingness to" engage. *See State v. Graham*, 260 S.C. 449, 450, 196 S.E.2d 495, 495 (1973) (to support the instruction, the evidence must be able to support a "mutual intent and willingness to fight" that is "manifested by the acts and conduct of the parties and the circumstances attending and leading up to the combat").

In explaining her reasoning for giving the instruction, the trial judge focused on the key points—some evidence existed that the two were armed and that after a first shot into the air by Appellant, both began to fire toward the other. The reason is sound and supported by Appellant's own statement and testimony.[1] [2] In his statement, he claimed that the victim "ran out of the store"

[1] Again, the instruction was not requested by either party. Further, the State argued that the evidence supported the victim held not a "willingness to fight" but an intent to do nothing more that purchase his lottery tickets, ice and beer, and be on his way. (*See* R. 268-269). The State argued the victim was ambushed and shot in the back by Appellant. (R. 271-273).

and starting shooting at him. (R. 124). He shot back. (R. 124; 126; 135). In his testimony, Appellant claimed Michael began cursing at him, getting his attention, then reached for his gun, and that cause him to reach for his gun. (R. 192-193). Appellant also admitted that he only started carrying a gun after a Family Dollar store incident when he claimed Michael threatened him. (R. 191; *see also* 182-183). Credibility aside; the evidence existed and that was sufficient for the charge. *See State v. Mathis*, 174 S.C. 344, 348–49, 177 S.E. 318, 319 (1934) (no error in instructing on mutual combat when "[t]here was testimony that the appellant and the deceased were on the lookout for each other; that they were armed in anticipation of a combat; that each drew his pistol and each fired upon the other").

Respondent maintains there is no error based on the above, but if error, it could only be harmless. "When considering whether an error with respect to a jury instruction was harmless," the question is whether the reviewing court is satisfied, '''beyond a reasonable doubt that the error complained of did not contribute to the verdict.'" *State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014) (quoting State *v. Kerr*, 330 S.C. 132, 144-45, 498 S.E.2d 212, 218 (Ct. App. 1998)). A court will consider "whether the erroneous charge contributed to the verdict rendered." *Id.* (quoting *Kerr,* 330 S.C. at 145, 498 S.E.2d at 218). In this case, there is no possibility the instruction could have impacted the jury's verdict.

Appellant hid out by the gas pumps attempting to ambush the victim. That is evidence of malice. *State v. Johnson*, 291 S.C. 127, 128, 352 S.E.2d 480, 481 (1987) ("Malice has been defined as the wrongful intent to injure another"). Moreover, as to the only element of self-defense the charge could affect, *i.e.*, being "without fault in bring on the difficulty," to avoid the victim,

[2] There is also little support for any confusion on the instruction. The only notes from the jury requested review of Appellant's statement, and further instruction on murder and voluntary manslaughter. (R. 332-335).

Appellant had merely to leave the open area by the gas pumps. Moreover, Appellant shot the victim in the back and shot first by his own admission. Appellant moved closer to the victim rather than turning away. There were multiple points that showed he was not without fault for bringing about the incident, and that he acted with malice. *See State v. Slater,* 373 S.C. 66, 69, 644 S.E.2d 50, 52 (2007) (stating that to establish self-defense, the defendant must have been without fault in bringing on the difficulty); *State v. Bryant,* 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999) ("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."). Further, his guilt is strongly inferred by the fact that he ran from the scene, buried the gun, and changed his clothes, and his statement to the police was little more than attempting to mislead the investigation. *See State v. Beckham*, 334 S.C. 302, 314, 513 S.E.2d 606, 612 (1999) (destruction of evidence and evidence of flight may show "guilty knowledge and intent"); *State v. Ballington,* 346 S.C. 262, 273, 551 S.E.2d 280, 286 (Ct. App. 2001) (acknowledging that attempts to mislead can be evidence of malice).

Simply, Appellant could not meet the prongs of self-defense independent of his attempt to make it appear to be so. The record heavily leans to multiple ways of showing malice such that the only reasonable interpretation of Appellant's actions was that he intended to murder the victim that day. Accordingly, the mutual combat charge was at worst merely extraneous and harmless. *Middleton, supra.*

CONCLUSION

For all the foregoing reasons, this Court should affirm.

Respectfully submitted,

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