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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Edgefield County
Walton J. McLeod, IV, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BARRY WAYNE JONES,

PETITIONER

Opinion No. 6147 (S.C. Ct. App. Filed June 10, 2026)

APPELLATE CASE NO. 2026-002098

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Appeal from Edgefield County

Honorable Walton J. McLeod, IV, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BARRY WAYNE JONES,

APPELLANT

APPELLATE CASE NO. 2022-000046

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

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

2.

Did the trial judge abuse his discretion by admitting evidence that Appellant allegedly attempted suicide in the moments before he was taken into custody where, pursuant to State v. Cartwright, 425 S.C. 81, 819 S.E.2d 756 (2018), the state failed to prove an unmistakable nexus existed by clear and convincing evidence linking the suicide attempt to a guilty conscious derivative of the offenses for which Appellant was being tried, and where any probative value of the evidence was substantially outweighed by the danger of unfair prejudice pursuant to Rule 403, SCRE?

3

Did the trial judge abuse his discretion by failing to tailor the self-defense instruction to adequately reflect the facts and theories presented by Appellant, specifically that Appellant was not required to wait until his assailant got the drop on him, that he had the right to act under the law of self-preservation and prevent his assailant from getting the drop on him, since the charge was supported by the evidence and was crucial to the jury's understanding of the law on self-defense?

STATEMENT OF THE CASE

An Edgefield County Grand Jury indicted Appellant on October 24, 2018 for the offenses of murder and attempted murder. R. 1578-1581. A pretrial hearing pursuant to the Protection of Persons and Property Act (“the Act”) was held on September 7-8, 2021 before the Honorable Walton J. McLeod, IV. R. 1. Solicitor Rick Hubbard and Assistant Solicitor Robert McNair represented the state. R. 1. Luke Shealy, Brian Shealy, and Casey Secor represented Appellant. R. 1. By order filed October 15, 2021, Judge McLeod found Appellant was not immune from prosecution pursuant to the Act. R. 1501-1512.

Appellant’s case was called to trial on December 3, 2021 before Judge McLeod, and a jury. Solicitor Rick Hubbard and Assistant Solicitor Robert McNair represented the state. R. 380. Luke Shealy, Brian Shealy, and Casey Secor represented Appellant. R. 380. On December 13, 2021, the jury acquitted Appellant of attempted murder, but found him guilty of murder. R. 1491, l. 22 – 1492, l. 4. He was sentenced to thirty-five years imprisonment. R. 1494, ll. 14-16.

On December 20, 2021, Appellant filed a motion for a new trial. R. 1547-1555. By order dated January 7, 2022, Judge McLeod denied the motion. R. 1556-1560.

This appeal follows.

STATEMENT OF FACTS

Appellant was raised in Johnston, South Carolina. R. 1079, l. 13. After he graduated from Lander University, he was hired at Savannah River Site (SRS), where he eventually met his wife, Dana, who also worked at SRS. R. 1080, l. 6 – 1082, l. 4. After Appellant married, he and his wife moved to Barnwell, South Carolina, closer to SRS. R. 1079, ll. 12-14. The pair were married for twenty years until Dana tragically succumbed to cancer after an eight year battle. R. 1082, ll. 5-16. The last two years were particularly difficult for Appellant. R. 1082, ll. 12-13. After his wife's death, Appellant was "too depressed" to continue working at Savannah River Site without her and decided to retire early with a reduced pension after twenty-seven years of employment. R. 1080, ll. 23-25; R. 1082, ll. 20-25.

In 2017, after he retired, Appellant moved back to Johnston to help care for his elderly father who was ill. R. 1083, ll. 13-25. Johnston is a small town and there were not many establishments to socialize or eat. Appellant discovered the Johnston Pool Room, a local sports bar. R. 1084, ll. 1-19. Appellant frequented the pool room about four to five times a week. R. 1085, ll. 6-9. In September 2017, Appellant met Angie Smith at the pool room and the two began dating. R. 1085, l. 10 – 1086, l. 6. Appellant, who had been living with his father, moved into Angie's house shortly after they began dating. R. 1086, ll. 7-25. While he kept most of his possessions at his father's house, he predominately lived with Angie and kept his valuables, clothing, and toiletries at her house. R. 1086, l. 19 – 1087, l. 4.

Angie introduced Appellant to Milledge Hall, the decedent. Milledge was Angie's cousin. Appellant knew Milledge only by his nickname, "B'Boy," which was short for "Big Boy." R. 1087, ll. 5-21; R. 888, ll. 8-20. Milledge was "six feet one inch tall" and three hundred pounds at the time of his death. R. 882, ll. 19-23.

In late 2017, Milledge's grandson, Clayton Hall, and his wife, Madison Hall, purchased the Johnston Pool Room. R. 487, l. 10 – 488, l. 2. Milledge allegedly invested sixteen thousand dollars in the business when his grandson purchased it. R. 488, l. 22 – 489, l. 2. However, Milledge was not listed as an owner nor was he employed by the pool room. R. 512, ll. 6-23. Rather, Milledge frequented the pool room as a patron and, like most other patrons, drank alcohol when he did so. R. 512, ll. 18-23.

Clayton had frustrations with Appellant, as a patron, from the time Clayton purchased the pool room. R. 512, l. 24 – 513, l. 5. Appellant had criticisms about how the business was ran and complained about the quality of the food, the cold temperature inside, and the allowance of smoking inside the establishment. R. 513, ll. 6-14; R. 1090, l. 8 – 1092, l. 11. These complaints “rubbed” Clayton and the other employees the “the wrong way.” R. 513, ll. 15-17. However, Appellant's behavior never rose to the level of needing to ban him from the establishment nor did Clayton ever have to call law enforcement due to Appellant's behavior. R. 513, ll. 18-20.

Sometime in April 2018, about a month before the shooting which led to Appellant's conviction, Appellant learned Milledge had been telling others that Appellant had been fired from Savannah River Site rather than retired. R. 1097, l. 14 – 1098, l. 3. This was upsetting to Appellant because his retirement from SRS was “deeply personal” given his reason for retiring early (due to his wife's passing). R. 1098, ll. 4-7. Appellant approached Milledge one evening at the pool room and asked him whether it was true that he was telling others Appellant had been fired. Milledge admitted he told others this untruth, but refused to tell Appellant from whom he had heard the rumor. R. 1098, l. 15 – 1099, l. 1. Milledge told Appellant it did not matter who he had heard it from and he did not seem to care that it was untrue. R. 1099, ll. 7-14. However, Appellant made clear that it mattered to him who was spreading the rumor. R. 1099, ll. 9-11.

During the exchange, Milledge quickly stood up from his bar stool and “got . . . in [Appellant’s] face.” Appellant put his hands up, “like, whoa,” and backed up. Milledge then threatened Appellant. He said, “I’ll beat your ass all about this bar.” R. 1101, ll. 2-10. Appellant immediately went back to where he was sitting with Angie and told her they needed to leave. They paid their tab and left. R. 1102, ll. 16-21.

Appellant had never had any “problems” with Milledge before this encounter and it left him feeling uneasy. R. 1101, ll. 22-25; R. 1102, ll. 24-25. He was “scared” of Milledge and did not “want to be around him unless he had to.” R. 1106, ll. 5-7. Consequently, Appellant stopped going to the pool room as frequently and started going to Foley’s, a bar in nearby Saluda, South Carolina. When Appellant did go to the pool room, he “kept [his] distance from” Milledge and began sitting at the front of the establishment since Milledge usually sat at the back of the bar. R. 1103, ll. 1-3; R. 1105, l. 15 – 1107, l. 4.

Tony Friar, who lived in Johnston his entire life, knew both Appellant and Milledge. Friar worked with Appellant and his wife at Savannah River Site and the three carpooled together for ten to twelve years. R. 1036, l. 1 – 1037, l. 19. Friar grew up with Milledge and knew him from living in the same small community. R. 1037, ll. 20-24. He maintained Milledge had “a reputation of being a fighter.” R. 1039, ll. 20-22. There was also an occasion during a “disagreement” with others where Friar saw Milledge seated in his truck with a rifle. R. 1038, l. 5 – 1039, l. 19; R. 1047, ll. 6-14. Friar would sometimes see Milledge “around town” and Milledge would encourage Friar to eat at the pool room. R. 1040, ll. 18-20. Friar was aware that Milledge’s grandson was running the establishment. R. 1040, ll. 17-25.

One evening in April 2018, about a month or less before the shooting, Friar went to the pool room to eat with his wife and brother on Milledge’s invitation. R. 1040, ll. 9-21. When

Friar walked in, he saw Appellant. He did not know Appellant had moved back to Johnson. Appellant got up and quickly said hello to Friar before Friar was seated at a table. R. 1041, ll. 8-17. Later on, Appellant came and sat down with Friar and his family. Milledge was also at the pool room that evening. Appellant commented that he did not like Milledge “and that Milledge had a problem with him.” R. 1041, ll. 18-23. Appellant explained that he did not like Milledge because “Milledge was telling people that Barry [Appellant] had gotten fired from Savannah River Site.” R. 1041, l. 24 – 1042, l. 2. Friar knew this was not true and that Appellant had retired from SRS “due to his wife’s passing.” R. 1042, ll. 3-10. Appellant was venting his frustration that Milledge was spreading this lie. R. 1042, ll. 11-17.

After Appellant returned to where he was sitting, Milledge came and sat in the booth with Friar. R. 1042, ll. 18-21. Milledge asked Friar if he knew Appellant. Friar explained that he had known Appellant basically “all his life” and that the two had worked together at SRS. R. 1042, l. 22 – 1043, l. 1. Milledge then asked, “Well, he got fired from out there, didn’t he?” Friar corrected Milledge and told him Appellant did not get fired, but Milledge did not seem convinced. R. 1043, ll. 1-11. Milledge admitted “he couldn’t stand Barry [Appellant]” and “with aggression” said, “I’m gonna take care of him.” Simultaneously, Milledge “took his hand and did his fist like that in his hand.” R. 1043, ll. 12-19. Friar, who again knew Milledge’s reputation of being a fighter, told Milledge that the two needed to work it out, but Milledge again said he was going to “take care of him [Appellant].” R. 1043, ll. 17-19.

After this conversation, Friar “warned” Appellant that he “better be aware of” Milledge and to “be careful around him” because he was “violent” and known to be a fighter. This caused Appellant additional concern. R. 1107, l. 16 – 1108, l. 8.

On May 5, 2018, two days before the shooting, Appellant was at the pool room with his girlfriend, Angie. There was an error on his bar tab that resulted in Appellant being overcharged. Appellant brought the mistake to his server's attention who told Clayton. Clayton came over to where Appellant was sitting and Appellant explained the error. However, Clayton "just shook his head and walked off." R. 1108, l. 9 – 1110, l. 14. Appellant paid the tab and denied "losing [his] cool." R. 1109, l. 24 – 1110, l. 2. Clayton, on the other hand, claimed Appellant complained about the overcharge with an "aggressive tone." R. 491, l. 3 – 492, l. 2. Clayton "could . . . feel the tension from him [Appellant] a lot worse than just a friendly patron." R. 492, ll. 2-3.

The following morning, Sunday, May 6, 2018, Clayton and his wife, Madison, decided to "take a one night trip" just "to get out of town" "due to the stress" allegedly caused by Appellant. R. 494, ll. 2-12. Prior to leaving, Clayton allegedly told his grandfather, Milledge, about Appellant's "behavior" and that he intended to ask Appellant "not to come back to the establishment [the pool room] anymore." R. 494, ll. 13-17. Clayton claimed Milledge recommended Clayton have this conversation with Appellant outside the pool room so as not to affect the other patrons or embarrass Appellant. R. 495, ll. 4-19.

On Monday, May 7, 2018, the day of the shooting, Appellant "checked on his dad" as usual and then ran errands. On his way back from running errands, Appellant stopped at the pool room sometime between 4:00 and 4:45 to meet his friends. R. 1119, ll. 5-24. He and his friends met every Monday or Tuesday at the pool room to catch up with each other. R. 1119, l. 21 – 1120, l. 19. No one stopped Appellant at the door and said he was not permitted at the pool room. He was served as usual. R. 1120, ll. 5-16.

As Appellant was socializing with his friends, he realized he had several text messages from Angie, his girlfriend. He received a text from her at 5:06 asking him if everything was okay and another text at 5:15 that simply said, “Hello?” Appellant responded at 5:17 stating he was sorry, that he did not hear his phone when she texted, and that he was meeting his friends at the pool room as usual. Angie responded with a series of angry text messages: “I can’t believe you;” “We’re not gonna make it like this. You need to come talk to me;” “I’m really pissed now;” “If you don’t come talk to me, it won’t be pretty when you get home;” “Answer me;” and “I’ll come show out.” R. 1120, l. 20 – 1123, l. 21. Appellant did not respond to these messages.

Appellant had been growing tired of his relationship with Angie. He found that she was no longer fun to be around anymore in part due to her excessive drinking and her “smothering” behavior. R. 1110 1, l. 23 – 1111, l. 17. For example, if Appellant was at his father’s house for longer than he had been the previous day, Angie would constantly be texting asking him where he was even though he was merely at his father’s house. R. 1111, ll. 18-23. Additionally, Angie had been “drinking more and more” and often became belligerent and physically aggressive when she did so. R. 1111, ll. 11-13; R. 1134, ll. 9-11. During the early morning hours of Sunday, May 6, 2018, after returning home from the pool room, Appellant was forced to text Sergeant Mathis of the Johnston Police Department, an acquaintance of Appellant, to come calm Angie down as she refused to stop drinking and go to sleep. Appellant did not want to call 911 because he was afraid he or Angie would get arrested. R. 1117, l. 21 – 1118, l. 3. Sergeant Mathis came to their house minutes later and Angie agreed to stop drinking and go to bed. R. 1118, ll. 6-24.

After Appellant did not respond to Angie’s series of angry text messages that evening, she showed up at the pool room. When she walked in, she did not acknowledge Appellant who

was sitting with his friends. Instead, she walked to the back of the bar and sat next to Milledge, her cousin. R. 1125, l. 14 – 1126, l. 1. Appellant decided to leave. R. 1126, ll. 18-20. He also decided that he was “finished with Angie.” R. 1126, ll. 21-24. He was going to break up with her and move out of her house. R. 1127, ll. 2-5. Appellant walked out of the pool room followed by his friend, Randy Yonce. R. 1127, l. 19 – 1128, l. 9; See State’s Exhibit No. 13 (Pool Room Video). Unbeknownst to Appellant, Milledge walked outside shortly after Randy. R. 1128, ll. 10-13; R. 1129, ll. 8-10; See State’s Exhibit No. 13 (Pool Room Video). As Appellant was pulling out of the parking lot, Milledge struck the “rear right fender” of Appellant’s car with his hand. R. 1129, ll. 1-7; See State’s Exhibit No. 13 (Pool Room Video). Milledge yelled something and then threw his hands up in the air as Appellant drove away. R. 1129, ll. 11-25; See State’s Exhibit No. 13 (Pool Room Video). The loud noise “startled” Appellant, who at the time was looking both ways in an effort to pull out into traffic. R. 1129, l. 20 – 1130, l. 2. Appellant saw Milledge in his rear view mirror. R. 1129, ll. 13-14. In that moment, Appellant believed Milledge had an “aggressive intent.” R. 1130, ll. 3-6. Appellant did not stop to engage Milledge in any way. He merely drove away. R. 1130, ll. 15-18.

At some point after leaving the pool room, Appellant texted his friend, Joe Mims, “Can you come calm me down?” R. 890, ll. 12-17. Followed by, “I’m gonna kill that B’Boy [Milledge].” R. 891, ll. 4-18. Appellant explained that he was merely venting his frustration with what he perceived as Milledge interfering with Appellant’s relationship with Angie and causing “more problems for” Appellant as he was trying to break up with Angie, which was a difficult task to begin with. R. 1137, l. 8 – 1138, l. 25. Appellant denied that he meant he was literally going to kill Milledge. R. 1137, ll. 21-23.

Appellant drove straight to Angie's house and packed up all his valuables, including his guns and a safe. He also packed his medication and toiletries as well as several treasured Clemson shirts his wife had bought him over the years. R. 1131, l. 10 – 1132, l. 25. While Appellant was packing up his possessions, Angie texted him several times. The first read, "You couldn't even come and speak." Followed by, "Everyone stared at me." Finally, about fifteen minutes later at 6:47, Angie texted, "See you soon. No fighting." R. 1139, l. 3 – 1140, l. 2. Appellant perceived this final text as evidence that Angie had "calmed down" and that it was "safe" to return to the pool room to talk to her with the goal of ending their relationship. R. 1140, ll. 3-5. He also assumed that Angie had "taken care of" the "situation" with Milledge, her cousin. R. 1140, ll. 6-7.

As a precaution, at 6:52, before he returned to the pool room to speak with Angie and end their relationship, Appellant texted Sergeant Mathis and asked if he was available. R. 1140, ll. 15-24. Appellant hoped Mathis could be present at the pool room while Appellant broke up with Angie. His plan was to get Angie to come outside and speak with her in his car. However, Mathis never responded to this text. Apparently, he was not on duty that day. R. 1141, ll. 5-11.

After packing his possessions, Appellant drove back to the pool room and parked directly in front of the business. R. 1142, ll. 5-22; See State's Exhibit No. 14 (Pool Room Video). He hoped Angie would see his car through the window and come outside so the two could talk inside Appellant's car. If Angie did not come outside, Appellant planned to text or call her. R. 1143, ll. 2-6. Appellant did not feel comfortable going inside based on his earlier interaction with Milledge in which Milledge struck the back of Appellant's car, yelled, and threw his hands into the air. R. 1143, ll. 12-17; R. 1144, ll. 9-20.

After Appellant had been sitting in his car for several minutes, Milledge walked outside. R. 1144, l. 21 – 1145, l. 4. He approached Appellant’s vehicle but paused a few feet away. See State’s Exhibit No. 14 (Pool Room Video). Milledge then motioned for Appellant to get out of the car. See State’s Exhibit No. 14 (Pool Room Video). Appellant refused because he was “scared of him.” R. 1145, ll. 5-12. Instead, Appellant rolled down his window about six inches. R. 1145, ll. 10-12. Appellant did not want to roll the window down any farther because he was afraid Milledge would grab him and pull him out of the car. R. 1145, ll. 10-14.

When Milledge first began talking to Appellant outside his window, it was all about Angie. R. 1145, ll. 14-16. Milledge told Appellant “that it wasn’t nice” Appellant had left the pool room earlier without speaking to Angie and that it had embarrassed her. R. 1146, ll. 17-21. Milledge also wanted to know why Appellant had “called the law on [his] cousin” the night before and complained Appellant had been going to Foley’s with Angie, taking business away from the pool room. R. 1145, l. 17 – 1146, l. 9.

Milledge repeatedly demanded Appellant get out of the car so Milledge could “beat [his] ass.” R. 1147, ll. 4-13. Milledge tried to open Appellant’s door. He pulled on the handle, but the door was locked. R. 1147, ll. 20-25. Milledge stood outside Appellant’s window for nearly ten minutes. His tone and demeanor became progressively more aggressive. R. 1148, ll. 6-13. Milledge began talking about Clayton and the pool room and complained Appellant “was basically trying to run the bar.” R. 1148, ll. 13-17.

As the confrontation escalated, Milledge invited Appellant out of the car to fight. Appellant continued to refuse. Appellant was scared of Milledge. He knew Milledge could harm him with just his bare hands. Milledge was larger and stronger than Appellant. R. 1149, ll. 9-19. Milledge lunged at Appellant several times. See State’s Exhibit No. 14 (Pool Room

Video). Appellant could smell alcohol on Milledge's breath and knew he was intoxicated. R. 1151, l. 25 – 1152, l. 6. It was later estimated that at the time of the shooting Milledge's blood alcohol content (BAC) was 0.12, well above the legal limit to operate a vehicle. R. 1267, ll. 1-21. When Milledge repeatedly lunged at Appellant's window, it made Appellant feel threatened and "fearful [for his] life." R. 1152, ll. 7-11.

Eventually, Milledge pulled out a gun. See State's Exhibit No. 14 (Pool Room Video). Appellant was about three feet from Milledge while he was brandishing the gun. While the state alleged this object was a phone, Appellant knew it was a gun. R. 1152, l. 19 – 1154, l. 12; R. 1156, ll. 7-8. However, Milledge also had a large phone clipped on his right front pocket. R. 1156, ll. 18-19. After initially pointing the gun, Milledge put the gun back in his waistband. See State's Exhibit No. 14 (Pool Room Video). However, Milledge subsequently pulled his shirt up with his left hand and showed Appellant the gun again, which was on his right side, the same side as his phone. R. 1156, ll. 2-6; R. 1157, l. 25 – 1158, l. 8; See State's Exhibit No. 14 (Pool Room Video). Appellant felt "threatened for [his] life." R. 1155, ll. 19-20. He knew Milledge could shoot him at any moment. R. 1155, ll. 21-22. At that point, Appellant reached for his gun bag that was on the back seat. He grabbed the first gun he could. R. 1158, ll. 17-23. It ended up being his wife's .38 special handgun that Appellant had previously bought her "for self protection." R. 1159, ll. 11-17. Appellant put the gun on his lap. R. 1161, l. 9.

Milledge eventually began telling Appellant to leave. R. 1157, ll. 2-4. Milledge became increasingly angry and frustrated that Appellant would not get out of the car to fight. R. 1157, ll. 5-14. Appellant was also asking Milledge to leave the side of his car. Knowing Milledge was armed and could shoot him at any time, Appellant did not want to pull out of the parking lot until Milledge was safely back inside the pool room. R. 1165, ll. 7-22.

Toward the end of the confrontation, Milledge began to walk back toward the front door of the pool room. See State's Exhibit No. 14 (Pool Room Video). Appellant was hopeful that he was finally going back inside. R. 1157, ll. 20-24. However, Milledge spun on his heels and headed back toward Appellant's car. See State's Exhibit No. 14 (Pool Room Video). Milledge motioned aggressively with his arms and hands for Appellant to leave. See State's Exhibit No. 14 (Pool Room Video). He continued to walk aggressively toward Appellant's car. See State's Exhibit No. 14 (Pool Room Video). Appellant knew Milledge was armed but could not see Milledge's right hand. R. 1162, ll. 7-10. When Milledge began to turn the corner toward Appellant's car, Appellant got out of the car and fired twice striking Milledge. Appellant knew his life was "on the line" and his heart was beating "150 beats per minute." R. 1162, ll. 7-13. Appellant wanted to live. R. 1162, ll. 14-15. Once Milledge was on the ground, Appellant got back into the car and drove away. See State's Exhibit No. 14 (Pool Room Video).

Milledge's friends quickly began coming out of the pool room. See State's Exhibit No. 14 (Pool Room Video). Appellant did not feel comfortable staying there with Milledge's friends present so he quickly backed up and drove away. R. 1167, ll. 2-5. Milledge's friends tended to him until law enforcement arrived. See State's Exhibit No. 14 (Pool Room Video). There were numerous individuals around Milledge as he laid on the ground. See State's Exhibit No. 14 (Pool Room Video). On the surveillance footage, it appears a man identified as Roger picked up a black object that was on the ground around Milledge's body with a towel. See State's Exhibit No. 14 (Pool Room Video).

After leaving, Appellant eventually began being followed by a marked Edgefield County Sheriff's Office patrol vehicle driven by Captain James Florida. R. 1170, l. 24 – 1171, l. 8. Florida never activated his blue lights or sirens as he maintained he was waiting for backup.

before attempting to stop Appellant. R. 1172, ll. 5-13. Appellant testified that Florida was “laying way back” from his car but would aggressively pull up very close behind Appellant’s vehicle like he was going to “run [Appellant] off the road.” R. 1173, ll. 1-5. Florida did this several times. Appellant thought Florida was going to hit him. R. 1173, ll. 9-23. He was startled as such behavior was “not normal . . . for a police officer.” R. 1173, ll. 21-23. The last time Florida pulled up close to Appellant, Appellant noticed Florida had a gun in his hand. R. 1174, ll. 2-12. Consequently, after Florida backed up again as he had been doing, Appellant turned right onto Pleasant Lane. Appellant was hoping to lose Florida.

From Pleasant Lane, Appellant turned right onto Log Creek Road, a dirt road. Appellant quickly “threw” the vehicle “in park.” R. 1175, l. 1 – 1176, l. 18. He got out of his car and retrieved his AR-15 style rifle from his trunk. R. 1177, ll. 11-15. As he was putting the rifle on the back passenger seat, he saw Florida drive by him down Pleasant Lane. Appellant knew Florida had seen him as he drove by. R. 1177, ll. 16-24. Appellant continued driving down Log Creek Road. He wanted to find somewhere safe. R. 1179, ll. 14-24. He backed into a small clearing. As he was parked off the side of the dirt road, Captain Florida drove past Appellant and began firing at him. Florida then stopped his vehicle and fired at Appellant again. R. 1180, l. 12 – 1185, l. 2. Appellant was struck in the chest by one of these bullets. R. 1057, ll. 1-25. Appellant decided to defend himself. He returned fire. R. 1186, ll. 4-13. Florida then fired twice at Appellant with a shotgun. Appellant was hit in the shoulder with buckshot. R. 1197, l. 24 – 1-72, l. 15. Unsurprisingly, Captain Florida claimed Appellant shot at him first and he merely returned fire. R. 692, ll. 15-23.

Unbeknownst to Appellant, Keith Kathmann with the Edgefield Police Department was behind Captain Florida providing backup. The shooting was captured by Kathmann’s dash

camera. See State's Exhibit No. 8 (Kathmann Dash Camera Video). Appellant presented considerable evidence that Florida fired at Appellant first and the jury ultimately acquitted Appellant of the attempted murder of Florida.

ARGUMENT

1.

The trial judge erred by denying Appellant immunity from prosecution pursuant to the Protection of Persons and Property Act, when Appellant proved by a preponderance of the evidence he was entitled to immunity pursuant to the Act.

Relevant Facts

Appellant moved pretrial for immunity from prosecution pursuant to the Protection of Persons and Property Act. R. 1497. The trial judge held a pretrial hearing to determine whether Appellant was immune from prosecution. R. 1. Appellant presented the testimony of Tony Friar, Douglas Lacey, Randy Yonce, David Eagerton, and Appellant. Douglas Lacey, who was qualified as an expert in video enhancement without objection, was retained by the defense to enhance certain portions of the surveillance footage that captured the shooting at the Johnston Pool Room. R. 31, l. 17 – 35, l. 22. He cropped and zoomed in on specific identified portions of the video to make the images “more visually appealing.” R. 40, ll. 1-23. The enhanced videos and still images were admitted for purposes of the hearing as Defendant’s Exhibit No. 1. R. 43, l. 24 – 45, l. 13.

Tony Friar, who lived in Johnston his entire life, knew both Appellant and Milledge. R. 8, ll. 5-20. Friar worked with Appellant and his wife at Savannah River Site and the three carpooled together for ten to twelve years. R. 15, l. 14 – 16, l. 12. Friar grew up with Milledge and knew him from living in the same small community. R. 8, l. 21 – 9, l. 10. He maintained Milledge had a reputation of being a fighter. R. 9, ll. 11-19. There was a specific occasion Friar recalled where Milledge physically threatened his grandson’s football coach after the coach

disciplined Milledge's grandson. Friar testified Milledge told him that if he did not "take care of it" Milledge "would come down and take care of the problem." R. 10, l. 21 – 13, l. 16.

One evening in April 2018, about a month or less before the shooting, Friar went to the pool room to eat with his wife and brother on Milledge's invitation. R. 17, l. 13 – 18, l. 5; R. 21, ll. 8-15. When Friar walked in, he saw Appellant. He did not know Appellant had moved back to Johnson. Appellant got up and quickly said hello to Friar before Friar was seated at a table. Later on, Appellant came and sat down with Friar and his family. Milledge was also at the pool room that evening. Appellant commented that Milledge did not like Appellant and "basically" that the two "had some beef." R. 18, l. 6 – 19, l. 5. Friar learned that Milledge was telling people that Appellant had been fired from Savannah River Site. R. 19, ll. 5-7. Friar knew this was not true and that Appellant had retired from SRS after his wife died because "he was kind of down." R. 17, ll. 3-8.

After Appellant returned to where he was sitting, Milledge came and sat down with Friar. Milledge asked Friar how well he knew Appellant. Friar explained that he had known Appellant "all his life." R. 19, ll. 7-11. Milledge then asked, "Well, didn't he get fired out at Savannah River Site?" R. 19, ll. 11-12. Friar corrected Milledge and told him Appellant did not get fired. R. 19, ll. 12-13. Milledge admitted he did not like Appellant and then "said you know me, I got something for him [Appellant]." R. 19, ll. 13-15. Simultaneously, Milledge made a "balled up fist" and hit it into his "other hand." R. 20, l. 24 – 21, l. 4. Friar, who again knew Milledge's reputation of being a fighter, told Milledge that the two "ought to quit arguing." R. 19, ll. 15-18.

Randy Yonce was at the pool room on May 7, 2018, but left before the shooting. He testified that he met friends at the pool room every Monday or Tuesday. R. 47, l. 3 – 48, l. 3. On the Monday of the shooting, he saw both Appellant and Milledge at the pool room. Appellant

was sitting with Yonce at the front of the establishment while Milledge “was sitting over on the other part of the bar.” R. 50, l. 23 – 51, l. 18. Yonce did not see Appellant and Milledge interact at all that day. R. 48, ll. 4-17. He did not hear Appellant express any concerns about Milledge nor Milledge express any concerns about Appellant. R. 50, ll. 16-21. At some point, Angie Smith, Appellant’s girlfriend walked in. She did not sit with Appellant. When Angie came in, Appellant “said something to the effect of oh, hell, here comes Angie.” He then said he was concerned Angie was going to “start some trouble.” Eventually, Yonce told Appellant he was going to leave. Appellant left when Yonce left. R. 49, l. 10 – 50, l. 8.

Appellant’s testimony at the pretrial immunity hearing mirrored his testimony before the jury. He explained his background, his relationship with Angie, and his prior interaction with Milledge about a month before the shooting in which he confronted Milledge about Milledge telling others Appellant had been fired from Savannah River Site rather than retired. R. 58, l. 12 – 77, l. 4. During the confrontation, Milledge “got up off his barstool and came at [Appellant].” Milledge “got all up in [Appellant’s] face.” Appellant backed up and put his hands up. Milledge then threatened, “I’ll beat your ass all over this bar.” R. 76, ll. 2-7. Milledge weighed “280 or more pounds” and was bigger, taller, and stronger than Appellant. R. 76, ll. 10-17. Milledge’s threat scared Appellant and he immediately walked away and told Angie they needed to leave. They paid their tab and left. R. 76, l. 18 – 77, l. 4. Appellant explained, as he did before the jury, that after this confrontation, he “tried to keep his distance” from Milledge by sitting at the front of the pool room when he visited and by frequenting a different establishment called Foley’s in nearby Saluda. R. 78, l. 7 – 79, l. 6. Sometime after this confrontation, Tony Friar warned Appellant to be careful with B’Boy [Milledge] because he’s been fighting all his life.” R. 80, l. 24 – 82, l. 17.

Appellant then described what occurred on Saturday, May 5, 2018, and what occurred leading up to the shooting on May 7, 2018, including how Milledge struck the back of Appellant's car as he was pulling out of the pool room parking lot less than an hour before the shooting. R. 83, l. 8 – 97, l. 14. Appellant testified that when Milledge “beat” on the back of his car, it “startled” him. Milledge then yelled. Appellant was scared and “knew something was up.” R. 97, l. 12 – 98, l. 7.

After gathering his valuables from Angie's house, Appellant returned to the pool room to break up with Angie. R. 98, l. 8 – 99, l. 19; R. 101, ll. 2-4. Milledge repeatedly demanded Appellant get out of the car so Milledge could “beat [his] ass.” Milledge tried to open Appellant's door. He pulled on the handle, but the door was locked. Milledge stood outside Appellant's window for nearly ten minutes. His tone and demeanor became progressively more aggressive.

As the confrontation escalated, Milledge invited Appellant out of the car to fight. Appellant continued to refuse. Appellant was scared of Milledge. He knew Milledge could harm him with just his bare hands. Milledge was larger and stronger than Appellant. Milledge lunged at Appellant several times. See State's Exhibit No. 14 (Pool Room Video). Appellant could smell alcohol on Milledge's breath and knew he was intoxicated. When Milledge repeatedly lunged at Appellant's window, it made Appellant feel threatened and fearful for his life.

Eventually, Milledge pulled out a gun. See State's Exhibit No. 14 (Pool Room Video). Appellant was about three feet from Milledge while he was brandishing the gun. While the state alleged this object was a phone, Appellant knew it was a gun. However, Milledge also had a large phone clipped on his right front pocket. After initially pointing the gun, Milledge put the

gun back in his waistband. See State's Exhibit No. 14 (Pool Room Video). However, Milledge subsequently pulled his shirt up with his left hand and showed Appellant the gun again, which was on his right side, the same side as his phone. See State's Exhibit No. 14 (Pool Room Video). Appellant felt threatened for his life. He knew Milledge could shoot him at any moment. At that point, Appellant reached for his gun bag that was on the back seat. He grabbed the first gun he could. It ended up being his wife's .38 special handgun that Appellant had previously bought her for protection. Appellant put the gun on his lap.

Milledge eventually began telling Appellant to leave. Milledge became increasingly angry and frustrated that Appellant would not get out of the car to fight. Appellant was also asking Milledge to leave the side of his car. Knowing Milledge was armed and could shoot him at any time, Appellant did not want to pull out of the parking lot until Milledge was safely back inside the pool room. Toward the end of the confrontation, Milledge began to walk back toward the front door of the pool room. See State's Exhibit No. 14 (Pool Room Video). Appellant was hopeful that he was finally going back inside. However, Milledge spun on his heels and headed back toward Appellant's car. See State's Exhibit No. 14 (Pool Room Video). Milledge motioned aggressively with his arms and hands for Appellant to leave. See State's Exhibit No. 14 (Pool Room Video). He continued to walk aggressively toward Appellant's car. See State's Exhibit No. 14 (Pool Room Video). Appellant knew Milledge was armed but could not see Milledge's right hand. When Milledge began to turn the corner toward Appellant's car, Appellant got out of the car and fired twice striking Milledge. Once Milledge was on the ground, Appellant got back into the car and drove away. See State's Exhibit No. 14 (Pool Room Video).

David Eagerton, who was qualified as an expert in forensic toxicology and pharmacology without objection, testified that Milledge's blood alcohol content (BAC) at the time of the

shooting was somewhere between .1 and .13. R. 222, l. 20 – 223, l. 7; R. 228, ll. 15- 20. Eagerton explained that an individual with a BAC of .1 to .13 will have “pronounced impaired judgment.” R. 231, ll. 8-10. “Their decision making ability is going to be impacted in a negative way. They usually have a little bit more difficulty in self-control and things of that nature.” R. 231, ll. 10-13. Additionally, Eagerton explained that it is “not unusual to see a change in demeanor over time . . . Like you can have a very docile, nice person and then they can be loud and boisterous and obnoxious as they start to get to those levels or you can have a loud, boisterous, obnoxious person and they become quiet and withdrawn at those levels.” R. 231, ll. 13-19. Individuals may also become angrier at those levels. R. 231, ll. 20-23.

The state presented several witnesses, including Renee Kaigler, Clayton Hall, Laynce Hatcher, and Brenda Hall, who claimed Milledge was not a violent person, was not the type of person who like to fight, and was never known to carry a gun. R. 257, ll. 1-11; R. 300, l. 16 – 301, l. 8; R. 303, l. 10 – 307, l. 3; R. 333, l. 22 – 334, l. 22; R. 344, ll. 2-16.

On May 7, 2018, Kaigler lived across the street from the pool room. She heard the gunshots and saw someone on the ground. She ran across the street and discovered it was Milledge and that he had been shot. R. 254, l. 22 – 255, l. 9. While there were several people outside, Kaigler testified that only she and Mr. Gessner were next to Milledge. R. 255, ll. 10-18. Kaigler denied that Milledge had a gun. She claimed she did not see a gun on the ground next to Milledge nor did she see anyone pick up a gun from around Milledge’s body. R. 256, ll. 19-25. Kaigler later admitted that she did not know how many people had been outside before she reached Milledge. R. 262, ll. 9-24.

Betty Jean Edwards testified that, at the time of the shooting, she was at the IGA grocery store, which was located immediately adjacent to the Johnston Pool Room. R. 275, ll. 19-25.

While she was outside in the parking lot, she heard two people arguing. She looked up the hill and saw Milledge standing next to a gray car. He was arguing and “making motions with his hands.” R. 276, l. 3 – 277, l. 3. Her “perception” was that “Milledge wanted this man to” leave. R. 277, l. 9 – 278, l. 7. She claimed the man in the car called Milledge’s name. R. 291, l. 13 – 293, l. 25. She then saw the man get out of the car and heard two shots. Milledge fell backward. The man got back into the car and “sped away.” R. 276, l. 24 – 277, l. 8. Edwards got into her car and drove to the pool room. She saw Milledge on the ground and went to comfort him. R. 278, ll. 10-15. She claimed she did not see a gun on Milledge or around him nor did she see anyone remove a gun. R. 279, l. 22 – 280, l. 3. Edwards later admitted that she did not have a “clear line of sight” from the IGA parking lot to the pool room parking lot where Milledge was standing. There were trees blocking her view. R. 285, ll. 2-8.

Clayton Hall testified to the problems he had with Appellant as a patron of the pool room. R. 294, l. 19 – 298, l. 20. As a result of the “stress” caused by Appellant, Clayton and his wife left for an overnight trip on Sunday, May 6, 2018, the day before the shooting. Before Clayton left for the trip, he claimed he told his grandfather, Milledge, that he intended to ask Appellant not to return to the pool room. Milledge allegedly advised Clayton to “handle any business” in “the most professional way, not to embarrass anybody” and if Clayton was going to have such a conversation with Appellant, to do it “[o]ut in the parking lot not to damage [the] business.” R. 298, l. 21 – 300, l. 15. Clayton admitted that he kept a .40 caliber revolver in a secure location behind the cash register inside the pool room. However, he claimed his grandfather, Milledge, did not know about this gun. R. 304, l. 14 – 305, l. 20.

Layne Hatcher, a regular patron at the Johnston Pool Room, testified that he went to the pool room on May 7, 2018. When he arrived, he saw Milledge outside. Milledge was arguing

with somebody in a car. However, Hatcher could not see or hear the person in the car as the car window was tinted and only slightly “cracked” open. R. 327, ll. 1-20. As Hatcher was walking by Milledge into the establishment, he heard Milledge say “no, I’ll tell you what you’re gonna do, you’re gonna leave and not come back.” R. 330, ll. 19-25. Several minutes later, Hatcher heard a gunshot. After he heard the first shot, he turned and saw Appellant fire a second shot. R. 331, ll. 9-23. Hatcher claimed he did not see Milledge with a gun before or after the shooting. R. 333, ll. 12-16.

Brenda Hall, Milledge’s wife, testified that she was present during the confrontation between Appellant and Milledge about a month before the shooting when Appellant questioned Milledge about whether he had told others Appellant had been fired from SRS. R. 344, l. 17 – 345, l. 2. She claimed Milledge never stood up during the confrontation and never threatened Appellant. Instead, all Milledge said was “the best thing for you [Appellant] to do is just go back and sit down.” Appellant did so and “[t]here was nothing else to it.” R. 345, ll. 6-24. Brenda also testified that Milledge was overweight and had previously had triple bypass surgery. R. 346, ll. 7-10.

Arguments of Counsel

Defense counsel argued Appellant proved by a preponderance of the evidence that he was entitled to immunity pursuant to both § 16-11-440(A) and § 16-11-440(C). R. 354, ll. 15-17. Counsel discussed the prior difficulties between Appellant and Milledge, including the confrontation that occurred about a month before the shooting in which Milledge threatened Appellant. He also mentioned the interaction Tony Friar had with Milledge in which Milledge again threatened Appellant. During the confrontation leading up to the shooting, counsel emphasized that as Milledge’s “gestures escalate” Milledge is clearly seen holding a black object

that Appellant identified as a gun. Milledge then did the “universal gesture” (lifting his shirt to expose his waistband) indicating he had a gun. Counsel figuratively questioned that if Milledge did not have a gun “then why did he do this [lift his shirt]?” R. 364, ll. 3-8. Counsel further argued that even assuming Milledge did not have a gun, under common law principles, Appellant is allowed to act on appearances. Additionally, Appellant was permitted under the law to judge Milledge “more harshly” due to the pair’s prior difficulties. R. 364, l. 20 – 365, l. 13.

Defense counsel emphasized Appellant’s testimony that leading up to the shooting, Milledge repeatedly ordered Appellant to get out of the car and fight, and pulled on Appellant’s door handle in an effort to remove Appellant from the car. Appellant refused to get out of the car, which increasingly frustrated Milledge. R. 366, ll. 7-18. While counsel asserted Appellant had no duty to retreat pursuant to the Act, “case law says” the court must apply common law rules of self-defense first, one being that “you should retreat” unless it puts you in more harm. Counsel emphasized Appellant’s testimony that he was worried Milledge would have harmed him if he had taken his eyes off Milledge in order to reverse out of the parking lot since he knew Milledge was armed and Milledge kept repeatedly walking back to the vehicle. R. 366, l. 22 – 367, l. 7.

Pursuant to § 16-11-440(A), counsel argued that the unrefuted evidence showed Milledge was pulling on Appellant’s door handle, demanding he get out of the car, and telling him “I’ve got something for you,” and “if you don’t get out, I’ll make you get out.” R. 369, ll. 12-19. Counsel asserted that after Milledge brandished a gun, he turned “quite quickly for a big man and then continues to come forward, as Mr. Jones [Appellant] said, with steam, that is an on-going attempt to remove him [Appellant] from his vehicle.” R. 369, ll. 19-24. Appellant only

shot when “he thought it was the last thing to do, otherwise he wouldn’t be here, he would be mangled by a larger man who he had clearly seen had a gun.” R. 371, l. 20 – 372, l. 7.

Order Denying Immunity

The trial judge ultimately denied Appellant immunity from prosecution. The judge found Appellant was at fault in bringing on the difficulty. R. 1508. The judge emphasized that Appellant returned to the pool room with multiple guns minutes after he sent a text message to Joe Mims stating, “I’m going to kill that Be Boy.” R. 1508. Additionally, the judge found there was evidence Milledge ordered Appellant to leave multiple times but Appellant “refused to adhere to this request.” R. 1508. The judge determined Appellant’s “refusal to leave upon the request of Mr. Hall [Milledge], with the ability to do so, supports the finding that he was at fault in bringing on the difficulty and his claim for self-defense fails.” R. 1508.

Even assuming Appellant was not at fault in bringing on the difficulty, the judge concluded Appellant’s “claim of self-defense fails under the next two elements.” R. 1508. The judge found Appellant failed to show he was in actual imminent danger or that he reasonably believed he was in imminent danger. R. 1508. The judge emphasized the testimony from state witnesses who claimed they did not know Milledge to carry a gun and the fact that no gun was allegedly ever seen nor recovered around Milledge’s body after the shooting. R. 1508-1509. Accordingly, the judge found Appellant did not establish by a preponderance of the evidence the common law principles of self-defense. R. 1509.

The judge further found Appellant failed to establish he was entitled to immunity pursuant to § 16-11-440(A) or § 16-11-440(C). As to subsection (A), the judge emphasized that the surveillance footage “showed that when [Appellant] exited his vehicle and subsequently fired the first shot, Mr. Hall [Milledge] was at the front of the vehicle not in the process of entering his

[Appellant's] car.” R. 1510. Consequently, the judge concluded Appellant was not entitled to the presumption of reasonable fear. R. 1510.

Regarding § 16-11-440(C), the judge emphasized that this portion of the Act “does away with any common law duty to retreat, so long as an individual can prove he (1) was not engaged in an unlawful activity, (2) was attacked, (3) was in a place where he had a right to be, and (4) reasonable believed the use of deadly force was necessary to prevent death or great bodily injury to himself or another person.” R. 1510. The judge found Appellant was not in a place he had a right to be. He emphasized that although Appellant was lawfully present at the pool room initially, once he was asked to leave by Milledge, he was stripped of that right and became a trespasser. R. 1510. Therefore, Appellant was not permitted to use deadly force. R. 1511.

Appellant subsequently filed a written objection to the judge's order denying immunity. See R. 1513-1535.

Standard of Review

“A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which [the appellate court] reviews under an abuse of discretion standard of review.” State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013). “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.” State v. Jones, 416 S.C. 283, 289, 786 S.E.2d 132, 136 (2016).

Discussion

The trial judge erred by denying Appellant immunity from prosecution pursuant to the Protection of Persons and Property Act, when Appellant proved by a preponderance of the evidence he was entitled to immunity pursuant to the Act.

In 2006, the South Carolina General Assembly adopted the Protection of Persons and Property Act. S.C. Code Ann. § 16-11-410, et seq. The General Assembly explained its intent was to “codify the common law Castle Doctrine which recognizes that a person’s home is his castle and to extend the doctrine to include an occupied vehicle and the person’s place of business.” S.C. Code Ann. § 16-11-420(A). The Act expresses the General Assembly’s finding “that it is proper for law-abiding citizens to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves and others.” S.C. Code Ann. § 16-11-420(B). The General Assembly recognized “that persons residing in or visiting this State have a right to expect to remain unmolested and safe within their homes, businesses, and vehicles.” S.C. Code Ann. § 16-11-420(D). Finally, the General Assembly explained “that no person or victim of crime should be required to surrender his personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack.” S.C. Code Ann. § 16-11-420(E).

To effectuate its intent, the General Assembly created a statute providing for immunity from prosecution to “[a] person who uses deadly force as permitted by the provisions of this article or another applicable provision of law.” S.C. Code Ann. § 16-11-450(A). Section 16-11-440 sets forth the circumstances under which the Act allows the use of deadly force. Id. The statute states in relevant part:

(A) A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:

- (1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, or if he removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle; and

- (2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.

...

- (C) A person who is not engaged in an unlawful activity and who is attacked in another place where he has the right to be, including, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60.

Our Supreme Court emphasized in State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013) “that immunity under the Act ‘is predicated on an accused demonstrating the elements of self-defense to the satisfaction of the trial court by a preponderance of the evidence,’ save the duty to retreat.” State v. Douglas, 411 S.C. 307, 318, 768 S.E.2d 232, 238 (Ct. App. 2014) (quoting Curry, 406 S.C. at 371-372, 752 S.E.2d at 266-267). “[A] valid case of self-defense must exist, and the trial court must necessarily consider the elements of self-defense in determining a defendant’s entitlement to the Act’s immunity.” Id. at 318, 768 S.E.2d at 238 (quoting Curry, 406 S.C. at 371, 752 S.E.2d at 266) (alteration in original).

“There are four elements required by law to establish a case of self-defense: First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, if his defense is based upon his belief of imminent danger, a reasonably man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Fourth, the defendant had

no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.” Id. at 318, 768 S.E.2d at 238-239 (internal citation omitted). As mentioned, the last element, the duty to retreat, need not be shown when seeking immunity under the Act. Id. at 318, 768 S.E.2d at 239 (citing Curry, 406 S.C. at 371, 752 S.E.2d at 266).

Recently, in State v. Glenn, the Court explained that “a trial court should first consider whether the defendant has proved the elements of self-defense by a preponderance of the evidence.” State v. Glenn, 429 S.C. 108, 118 838 S.E.2d 491, 496 (2019). “If the defendant has failed to meet the elements of reasonable fear or the duty to retreat, the court should then determine whether section 16-11-440(A) or (C) is applicable.” Id. Where section 16-11-440(C) is applicable, “it replaces the duty to retreat element required to establish self-defense.” Id. at 119, 838 S.E.2d at 497. “In determining whether a defendant satisfies section 16-11-440(C), the circuit court must analyze whether, at the time of the incident, he was engaged in an unlawful activity and was attacked in another place where he had a right to be.” Id.

Furthermore, when considering whether the defendant was in a place where he had a right to be as required by the Act, the trial court must consider proximate cause or a causal connection to the incident. Id. at 119-120, 838 S.E.2d at 497. “[T]o bar a victim of crime from claiming immunity based on a hyper-technical reading of the statute would lead to absurd results when his presence in the place he was attacked had no relation to the incident itself.” Id. at 120, 838 S.E.2d at 497. Additionally, “a proximate cause analysis must also be applied to the unlawful activity element of subsection (C).” Id.

“A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard.” Curry, 406 S.C. at 370, 752 S.E.2d at 266. The judge

must “sit as fact-finder at this hearing, weigh the evidence presented, and reach a conclusion under the Act.” State v. Cervantes-Pavon, 426 S.C. 442, 451, 827 S.E.2d 564, 569 (2019).

Appellant proved by a preponderance of the evidence that he was immune from prosecution under the common law elements of self-defense. Appellant was not at fault in bringing on the difficulty. Appellant was preoccupied with his decision to end his relationship with Angie. He had no interaction with Milledge on the day of the shooting until Milledge, unbeknownst to Appellant, walked out after Appellant and aggressively struck the rear of his vehicle. This caused Appellant renewed fear of Milledge after Milledge’s threat against Appellant about a month prior coupled with Appellant’s knowledge of Milledge’s reputation for violence. Appellant’s decision to return to the pool room was not unlawful or intended to start a conflict with Milledge. Rather, it was Appellant’s best option under the circumstances to end his eight month relationship with Angie.

The state alleged Appellant’s test message, “I’m gonna kill that B’Boy,” was literal. However, Appellant’s text messages when read as a whole indicate he was seeking help from Joe Mims and Sergeant Mathis to assist in avoiding any conflict with both Angie and Milledge. It is telling that when Appellant arrived at the pool room, he remained in his car and did not seek a conflict. Rather, it was Milledge who came outside and confronted Appellant. The surveillance footage is consistent with Appellant’s account that Milledge aired his personal grievances against Appellant with increasing animosity.

The state argued Milledge told Appellant to leave early in the encounter and therefore Appellant was at fault in bringing on the difficulty when he refused to leave. While it was disputed whether Milledge asked Appellant to leave early on, even if true, Appellant’s failure to instantly do so does not make him at fault in bringing on the difficulty. Appellant testified that as Milledge’s aggression continued to escalate, he wanted to leave which was corroborated by his headlights

turning on when he started his car as seen in the surveillance footage. However, Appellant believed using his hands to operate the vehicle and taking his eyes off of Milledge even for an instant would expose him to further harm. Appellant was not required to retreat “if by doing so he would increase his danger of being killed or suffering serious bodily injury.” See State v. Fuller, 297 S.C. 440, 444, 377 S.E.2d 328, 331 (1989).

Further, it is apparent from Appellant’s testimony and the surveillance footage that Appellant actually was in imminent danger of losing his life or sustaining serious bodily injury. The footage shows Milledge brandishing and threatening Appellant with a gun during the confrontation. Milledge’s act of lifting his shirt to show Appellant the black object concealed on his waistband is almost universally recognized as a signal that one is armed. When Appellant fired the fatal shots, Milledge, who again Appellant knew was armed, was charging at Appellant. Accordingly, Appellant actually was in imminent danger and the circumstances were such as would warrant a man of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. However, even if Appellant was not in actual danger, based on Milledge’s words and actions coupled with Milledge’s prior threat and his reputation for violence, it was reasonable for Appellant to believe he was in such imminent danger and a reasonable man of ordinary firmness and courage would have entertained the same belief.

Under the common law principles, Appellant was entitled to step out of his car and strike the fatal blow in order to prevent Milledge from “getting the drop on him,” and even if Milledge did not appear to have a gun raised in the moment Appellant shot, Appellant was permitted to judge Milledge’s actions more harshly based on his prior threat and reputation. See State v. Starnes, 340 S.C. 312, 531 S.E.2d 907 (200); State v. Day, 341 S.C. 410, 535 S.E.2d 431 (2000); State v. Rash, 182 S.C. 42, 188 S.E.2d 435 (1936).

The above analysis proves that Appellant was entitled to immunity pursuant to the common law principles of self-defense. However, for purposes of argument, even if Appellant's claim failed in one or more respects, he was still entitled to immunity pursuant to § 16-11-440(A) and § 16-11-440(C). Section 16-11-440(A) is applicable in this case and provides the Act's strongest protections:

A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:

- (1) against whom the deadly force is used **is in the process of unlawfully and forcefully entering**, or has unlawfully and forcibly entered a dwelling, residence, or **occupied vehicle**, or if he removes **or is attempting to remove another person against his will from** the dwelling, residence, or **occupied vehicle**; and
- (2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.

(emphasis added). Appellant testified that Milledge demanded Appellant get out of his car and fight and pulled on his door handle in an effort to get Appellant out of the vehicle. Appellant described how Milledge became increasingly frustrated that Appellant would not get out of the car, which was corroborated by Milledge's actions as seen in the surveillance footage demonstrating his escalating aggression, including his act of brandishing a gun. Appellant testified that it was his belief Milledge intended to forcibly remove him from the car as Milledge came toward him "with steam" immediately prior to Appellant making the decision to shoot. This is also corroborated by the surveillance footage which shows Milledge approaching Appellant's vehicle with aggression immediately before Appellant fired. These facts fall squarely within subsection (A) of the Act, which states, even in the absence of an obvious attack, that the act of attempting to remove an individual against his will from his vehicle creates a presumption of reasonable fear of imminent

death or great bodily injury such that the individual can use deadly force against his assailant. Appellant proved by a preponderance of the evidence that he was entitled to immunity pursuant to § 16-11-440(A).

Although Appellant proved by a preponderance of the evidence that he was entitled to immunity pursuant to the common law principles of self-defense and § 16-11-440(A), Appellant also proved he was entitled to immunity pursuant to § 16-11-440(C), which states:

A person who is not engaged in an unlawful activity and who is attacked in another place where he has the right to be, including, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground **and meet force with force, including deadly force**, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60.

(emphasis added). This portion of the Act specifically does away with any common law duty to retreat so long as an individual can prove he was attacked while acting lawfully in a place he had a right to be. There has been no claim by the state that Appellant was acting unlawfully at the time of his fatal encounter with Milledge, and Appellant was in a place where he had a right to be as he was sitting in his car in the parking lot of the pool room. Factually consistent with findings of immunity in cases like State v. Douglas, 411 S.C. 307, 768 S.E.2d 232 (Ct. App. 2014), and State v. Jones, 416 S.C. 283, 786 S.E.2d 132 (2016), Appellant had a right to use deadly force in the face of an attack by an intoxicated Milledge, who was determined to fight and was armed with a gun. Appellant's use of a gun to combat the threat of an armed attack by Milledge was a proper "force for force" response to end the assault and prevent death or great bodily injury to himself. Appellant had no duty to retreat pursuant to the Act. Accordingly, Appellant proved by a preponderance of the evidence that he was entitled to immunity pursuant to § 16-11-440(C).

Respectfully, this Court should hold the trial judge erred by denying Appellant immunity from prosecution and reverse Appellant's conviction and sentence.

2.

The trial judge abused his discretion by admitting evidence that Appellant allegedly attempted suicide in the moments before he was taken into custody where, pursuant to *State v. Cartwright*, 425 S.C. 81, 819 S.E.2d 756 (2018), the state failed to prove an unmistakable nexus existed by clear and convincing evidence linking the suicide attempt to a guilty conscious derivative of the offenses for which Appellant was being tried, and where any probative value of the evidence was substantially outweighed by the danger of unfair prejudice pursuant to Rule 403, SCRE.

Relevant Facts

Appellant moved pretrial to exclude any evidence that Appellant allegedly attempted to commit suicide shortly before he was taken into custody pursuant to *State v. Cartwright*, 425 S.C. 81, 819 S.E.2d 756 (2018) and Rule 403, SCRE. R. 1536. The judge held an *in camera* hearing on the motion. R. 388, ll. 17-18.

Deputy Robert Harter of the Edgefield County Sheriff's Office testified that he participated in the "actual takedown" of Appellant on Log Creek Road. R. 391, ll. 3-5. He was one of the officers who "converged" on Appellant as he was lying on the ground in the apex of the driver's door of his vehicle. R. 391, l. 16-23. When Harter walked up, he saw two weapons on the ground beside Appellant. One was an "AR-15 type rifle" and the other was a silver .38 revolver. R. 392, ll. 1-5. Appellant was placed in handcuffs. Another officer asked Appellant "if he was hurt" because he was covered in blood. Appellant allegedly said "he had shot himself." R. 392, ll. 8-21. Appellant never mentioned the word suicide nor did he say anything about trying to kill himself. R.

392, l. 22 – 393, l. 2. He also did not give any explanation for why he shot himself. R. 393, ll. 3-5. In his statement shortly after the event, Harter wrote Appellant said “he was hurting and had tried to shoot himself under the chin.” R. 400, l. 3 – 401, l. 5.

Officer Samuel Sherrill with the Edgefield County Sheriff’s Office also responded to Log Creek Road in regard to the shooting. R. 403, ll. 4-25. Appellant was already in custody when Sherrill arrived. R. 404, ll. 8-12. Sherrill was asked to accompany Appellant to the ambulance and ride with him to the hospital. R. 404, ll. 1-7. While Appellant was on a stretcher being transported to the ambulance, he volunteered several statements. R. 404, l. 13 – 405, l. 12. Appellant allegedly said to Sherrill, “I wish y’all would have killed me. Y’all should have just let me die.” R. 405, ll. 16-25. Appellant did not offer any explanation for why he wanted to die. R. 406, ll. 12-14. While in the ambulance in route to the hospital, Appellant allegedly said, “The only hole that hurts if the one I put in my neck.” R. 407, ll. 13-16.

Sergeant James Morgan with the Edgefield County Sheriff’s Office likewise responded to Log Creek Road. He arrived after the gunfire had ceased but before Appellant was taken into custody. R. 413, l. 23 – 415, l. 4. He teamed up with Sergeant Densmore and the pair moved in together to arrest Appellant when the command was given. R. 415, ll. 5-25. After Appellant was in custody and handcuffed, Densmore asked him “about his current medical state.” R. 416, ll. 5-6. There was blood all over Appellant’s face and chest. R. 416, ll. 7-10. According to Densmore, Appellant told him “where he was shot at, where he was hurting at, around his chest, stomach, arm there, and then he lifted his head and he said I’m also shot here (referring to the “chin area”).” Appellant then voluntarily told Densmore, “I tried to kill myself and I couldn’t even do that.” R. 416, ll. 11-19. Appellant did not give a reason why he attempted to kill himself. R. 423, ll. 7-14.

Lastly, Captain James Florida, the Edgefield County officer involved in the shootout with Appellant, testified that while he was giving Appellant commands before his arrest, such as “stop shooting . . . let me see your hands . . . clear your hands,” Appellant allegedly told Florida “that he wanted me to let him bleed to death.” R. 424, l. 4 – 425, l. 8. Appellant did not provide a reason as to why he wanted Florida to let him bleed to death. R. 429, ll. 4-15. Florida claimed Appellant made this statement after all the gunfire had ended. R. 426, ll. 20-24. He later admitted he did not include Appellant’s alleged statement in the typed statement he provided to the South Carolina Law Enforcement Division. R. 427, l. 12 – 428, l. 9.

At the conclusion of the *in camera* testimony, defense counsel argued the state failed to meet its burden of proving the evidence was admissible. Counsel outlined the three factors enumerated by our Supreme Court in Cartwright: (1) a jury could reasonably find that a suicide attempt occurred; (2) the defendant was aware of the occurrence of the alleged crimes at the time of the suicide attempt; and (3) an unmistakable nexus exists by clear and convincing evidence linking the suicide attempt to a guilty conscience derivative of the offense for which the defendant is on trial. R. 432, l. 20 – 433, l. 22; See Cartwright, 425 S.C. at 92, 819 S.E.2d at 761-62. Counsel conceded the state met its burden of proving the first two factors. R. 432, l. 22 – 433, l. 15; R. 445, ll. 16-18. As to the third factor, counsel asserted the state failed to show Appellant attempted suicide because he [felt] so guilty, one, for the crime of murder against Milledge Hall, and two, that he [felt] so guilty for his participation in the shootout with law enforcement on Log Creek Road.” R. 433, l. 19 – 434, l. 4. Counsel emphasized that there was no evidence in the record as to why Appellant attempted suicide. Appellant never offered any explanation for doing so and the state failed to prove by clear and convincing evidence that it

was because of Appellant’s “overwhelming guilt for shooting Milledge Hall or his overwhelming guilt for shooting at Officer Florida.” R. 434, ll. 5-16.

As to Rule 403, SCRE, defense counsel argued any probative value of the evidence was substantially outweighed by the danger of unfair prejudice. R. 446, ll. 10-16. He emphasized our Supreme Court’s finding in Cartwright that “suicide attempt evidence is fraught with the potential for extreme prejudice.” R. 446, ll. 16-19; See Cartwright, 425 S.C. at 92, 819 S.E.2d at 761-62. Counsel argued suicide is “a bad act.” It is a crime under common law and “a moral crime to many people.” R. 446, l. 24 – 447, l. 1. Consequently, counsel asserted the admission of such evidence would lead the jury to convict Appellant on an improper basis. Specifically, counsel stated, “They’re [the jurors are] sitting here wrestling with these issues of malice, or self defense, and all of a sudden their mental doors are proverbially just blown off by hearing about how he [Appellant] tried to commit suicide and they’re not thinking. They’re not applying the facts to the law now. They’re thinking about what a bad man he [Appellant] is for doing that. I can’t believe he would do that. . . . I’m done. I’m done listening. And that is the problem.” R. 447, ll. 1-8. Counsel continued, “[T]hey may be so overborne by disgust for a man [who] would try to take his own life regardless of the circumstances.” R. 447, ll. 17-19. Counsel further argued the evidence had little probative value given that Appellant had a “strong self defense claim at the pool hall” and therefore it was less likely that the attempted suicide was related to Appellant’s alleged guilty conscious. R. 448, l. 10 – 449, l. 3.

The trial judge ultimately found evidence of Appellant’s attempted suicide was admissible. He concluded that the three factors outlined in Cartwright had been met. R. 455, ll. 22-23. He maintained that the “chain of events” including the shooting at the pool room, what occurred leading up to the confrontation with law enforcement about forty minutes after the shooting, and the

statements Appellant made concerning the self-inflicted wound “demonstrate a nexus by clear and convincing evidence of attempted suicide that can be linked to a guilty conscious.” R. 455, l. 23 – 456, l. 11. As to Rule 403, the judge ruled that “in light of the specific facts of this case,” in which Appellant asserted self-defense, “the highly probative nature that encapsulates that entire story of facts outweighs the prejudicial effect of the evidence of attempted suicide.” R. 456, ll. 12-25. The judge emphasized that “it is a close call and it’s supposed to be.” R. 457, ll. 1-2. Yet, he found the evidence admissible after considering the “rigorous framework.” R. 457, ll. 2-7.

Appellant contemporaneously objected when the attempted suicide evidence was admitted before the jury. R. 706, ll. 14-24; R. 783, l. 4 – 784, l. 3; R. 793, l. 9 – 794, l. 9; R. 799, l. 24 – 801, l. 17.

Standard of Review

“The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice.” State v. Cartwright, 425 S.C. 81, 89, 819 S.E.2d 756, 760 (2018) (quoting State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006)) (internal quotation marks omitted). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” Id. at 89-90, 819 S.E.2d at 760 (quoting Douglas, 369 S.C. at 429-430, 632 S.E.2d at 848) (internal quotation marks omitted).

Discussion

The trial judge abused his discretion by admitting evidence that Appellant allegedly attempted suicide in the moments before he was taken into custody where, pursuant to State v. Cartwright, 425 S.C. 81, 819 S.E.2d 756 (2018), the state failed to prove an unmistakable nexus

existed by clear and convincing evidence linking the suicide attempt to a guilty conscious derivative of the offenses for which Appellant was being tried, and where any probative value of the evidence was substantially outweighed by the danger of unfair prejudice pursuant to Rule 403, SCRE.

“Evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy.” Cartwright, 425 S.C. at 90, 819 S.E.2d at 760 (quoting Rule 401, SCRE) (internal quotation marks omitted); See State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991). “All relevant evidence is admissible, except as otherwise provided . . .” Id. (quoting Rule 402, SCRE) (internal quotation marks omitted); See State v. Langley, 334 S.C. 643, 515 S.E.2d 98 (1999). “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” Id. at 90, 819 S.E.2d at 761 (quoting Rule 403, SCRE) (internal quotation marks omitted). “The determination of the prejudicial effect of the evidence must be based on the entire record and the result will generally turn on the facts of each case.” Id. (quoting State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007)) (internal quotation marks omitted). “Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one.” Id. at 91, 819 S.E.2d at 761 (quoting State v. Wilson, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001)) (internal quotation marks omitted).

Suicide attempt evidence “is fraught with the potential for extreme prejudice” and “the admission of such evidence should be approached with the utmost caution.” Id. Consequently, before admitting such evidence, the “trial court shall determine whether the State has proven that: (1) a jury could reasonably find that a suicide attempt occurred; (2) the defendant was aware of the occurrence of the alleged crimes at the time of the suicide attempt; and (3) an unmistakable nexus exists by clear and convincing evidence linking the suicide attempt to a

guilty conscience derivative of the offense for which the defendant is on trial.” Id. at 92, 819 S.E.2d at 761-62. “Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established.” In re Dickey, 395 S.C. 336, 354, 718 S.E.2d 739, 748 (2011) (internal citation omitted). “If the trial court concludes that the three factors have been established, the evidence is relevant and may be admitted, subject to a Rule 403, SCRE analysis. The suicide attempt evidence may be admitted only when all three factors have been met, and the evidence survives a Rule 403 analysis.” Id. at 92, 819 S.E.2d at 762. In light of this “rigorous framework,” suicide attempt evidence “will rarely be admitted.” Id. at 93, 819 S.E.2d at 762.

In Cartwright, the appellant was charged with molesting his daughter and two stepdaughters. While he was detained prior to trial, Cartwright attempted to commit suicide. Id. at 89, 819 S.E.2d at 760. A guard at the local detention center found Cartwright hanging from his bunk with a sheet wrapped tightly around his neck. Id. The guard recalled that Cartwright was unresponsive, but still breathing. Id. During his testimony, Cartwright offered the following explanation as to why he attempted suicide: “I turned myself in. I’d been there for 30 days. I couldn’t get a bond. I was charged with the most heinous crimes that somebody could ever think about being charged with . . . I’m in my cell with all these things on my mind, and then the daughter that I loved . . . hates me so much because I had her husband . . . locked up . . . and she held a grudge against me, and they come and served me ten warrants . . . At that time I didn’t feel I wanted to live anymore.” Id. While noting the “case presents a close question,” our Supreme Court held evidence of Cartwright’s suicide attempt was admissible. Id. at 93, 819 S.E.2d at 762. The Court emphasized that prison staff found Cartwright hanging in his cell on the same day Cartwright was served with additional warrants and that Cartwright admitted he

attempted suicide after he became aware of the new charges. Id. The record also showed that Cartwright had previously threatened to commit suicide if his daughter or stepdaughters “told anyone about the sexual abuse.” Id. The Court held the “fact that Cartwright acted on his threat and attempted suicide enhances the probative value of the evidence.” Id. The Court concluded evidence of Cartwright’s suicide attempt was relevant, that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, and thus properly admitted. Id.

In this case, the state failed to establish “an unmistakable nexus exists by clear and convincing evidence linking” Appellant’s suicide attempt to a guilty conscience derivative of the offenses for which Appellant was on trial, the alleged murder of Milledge and attempted murder of Captain Florida. Appellant attempted to commit suicide after being followed by and ultimately fired upon by law enforcement. Such actions by law enforcement suggested they did not believe Appellant acted in self-defense when he shot Milledge and further indicated Appellant faced imminent incarceration at best and death by law enforcement at worst.

Appellant’s suicide attempt is not evidence of a guilty conscience from having to defend himself against Milledge or law enforcement. First, Appellant’s encounter with law enforcement served as a break in the causal chain between Appellant shooting Milledge in self-defense and his suicide attempt where almost an hour passed between when Appellant shot Milledge and when he attempted suicide, particularly where Appellant did not attempt suicide during that hour. Second, Appellant testified at the pretrial immunity hearing that shot Milledge out of necessity and not out of malice which is incongruous with a guilty conscience. Appellant freely testified that he shot Milledge in self-defense and only shot at law enforcement after he was shot and wounded by Captain Florida. Appellant’s ability to testify about shooting Milledge and at law

enforcement and his justification for doing so is contradictory to a guilty mind. Accordingly, the state failed to establish an “unmistakable nexus” linking Appellant’s suicide attempt to a guilty conscience derivative of the offenses for which Appellant was tried.

Additionally, any probative value of Appellant’s suicide attempt was substantially outweighed by the danger of unfair prejudice. The evidence has no probative value because it does not make it more or less probable that Appellant shot Milledge or at Captain Florida with malice. The only permissible use of suicide attempt evidence pursuant to Cartwright is to prove a guilty conscience where there is evidence of an unmistakable nexus between the suicide attempt and the offenses for which the defendant is on trial. As argued above, no such nexus exists in this case. Accordingly, the evidence has no probative value. However, the evidence was extremely prejudicial to Appellant. Suicide is considered morally reprehensible in many different religions and cultures. As our Supreme Court recognized in Cartwright, such evidence is “fraught with the potential for extreme prejudice.” Cartwright, 425 S.C. at 91, 819 S.E.2d at 761. There is a reasonable probability that the evidence Appellant attempted suicide may have led the jury to convict Appellant on an improper basis, namely an emotional one. Consequently, it should have been excluded pursuant to Rule 403.

Respectfully, this Court should hold the trial judge abused his discretion by admitting evidence of Appellant’s suicide attempt, reverse Appellant’s conviction, and remand for a new trial.

3.

The trial judge abused his discretion by failing to tailor the self-defense instruction to adequately reflect the facts and theories presented by Appellant, specifically that Appellant was not required to wait until his assailant got the drop on him, that he had the right to act under the law of self-preservation and prevent his assailant from getting the drop on him, since the charge was supported by the evidence and was crucial to the jury's understanding of the law on self-defense.

Relevant Facts

Appellant submitted numerous written requests to charge to the trial judge. Appellant's Request to Charge No. 6 concerned the right to act on appearance as it relates to self-defense.

See R. 1495. The request read in part:

One who acts in self-defense may act on appearances. He may be mistaken. The law does not hold him to a *refined assessment* of the danger, provided, of course, he acted as the person of ordinary coolness and courage would have acted or should have acted in meeting the appearance of danger. **He doesn't have to wait until his assailant gets the drop on him. He has a right to act under the law of self-preservation and prevent his assailant from getting the drop on him; if it is apparent his assailant is taking steps to get the drop on him, one who acts in self-defense must take steps first to prevent such assailant from getting the drop on him.** See State v. Rash, 182 S.C. 42, 50 (1936); State v. Starnes, 340 S.C. 312, 322 (2000).

(emphasis added)

The parties "had an extensive charge conference" with the judge in chambers. R. 1389, l. 8. After the charge conference, defense counsel put his objections on the record. Counsel objected to the judge not charging the entirety of Request to Charge No. 6. R. 1390, ll. 16-25. The judge emphasized that he granted the request to charge "in part." While he acknowledged he did not "take your charge verbatim," he maintained he "took the spirit of the charge." R. 1390, ll. 18-20.

The judge ultimately charged the jury concerning the right to act on appearances as it pertains to self-defense as follows:

The defendant does not have to show that he was actually in danger. It is enough if the defendant believed he was in imminent danger and a reasonably prudent person of ordinary firmness and courage would have had the same belief. **One who acts in self-defense may act on appearances. He may be mistaken. The law does not hold him to a refined assessment of the danger, provided, he acted as the person of ordinary coolness and courage would have acted or should have acted in meeting the appearance of the danger.** It is for you to decide whether the defendant's fear of immediate danger of death or serious bodily injury was reasonable and would have been felt by an ordinary person in the same situation.

R. 1480, ll. 4-16 (emphasis added).

As seen, the trial judge refused to charge a critical part of Appellant's Request to Charge No. 6, specifically:

He doesn't have to wait until his assailant gets the drop on him. He has a right to act under the law of self-preservation and prevent his assailant from getting the drop on him; if it is apparent his assailant is taking steps to get the drop on him, one who acts in self-defense must take steps first to prevent such assailant from getting the drop on him.

R. 1495.

In Appellant's motion for a new trial filed several days after his conviction, Appellant argued he was denied a fair trial in part because of the trial judge's refusal to charge the above language. R. 1547.

Standard of Review

"An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." State v. Marin, 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016) (quoting State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010)) (internal quotation marks omitted).

Discussion

The trial judge abused his discretion by failing to instruct the jury on the critical language contained in Appellant’s Request to Charge No. 6: “He doesn’t have to wait until his assailant gets the drop on him. He has a right to act under the law of self-preservation and prevent his assailant from getting the drop on him; if it is apparent, or reasonably apparent his assailant is taking steps to get the drop on him, one who acts in self-defense must take steps first to prevent such assailant from getting the drop on him.” R. 1495. This charge was supported by the evidence and was crucial to the jury’s understanding of the law of self-defense.

“A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law.” State v. Williams, 400 S.C. 308, 314, 733 S.E.2d 605, 608 (Ct. App. 2012) (quoting State v. Mattison, 388 S.C. 469, 478, 697 S.E.2d 578, 583 (2010)) (internal quotation marks omitted). “The law to be charged must be determined from the evidence presented at trial.” Id. (quoting State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 512 (2000)) (internal quotation marks omitted); See Mattison, 388 S.C. at 478, 697 S.E.2d at 583 (stating appellate courts should “consider the court’s jury charge as a whole in light of the evidence and issues presented at trial”).

“When reviewing the circuit court’s refusal to deliver a requested jury instruction, appellate courts must consider the evidence in a light most favorable to the defendant.” Id. at 314, 733 S.E.2d at 608-609 (citing Cole, 338 S.C. at 101, 525 S.E.2d at 512-513). “If there is any evidence in the record from which it could reasonably be inferred that the defendant acted in self-defense, the defendant is entitled to instructions on the defense, and the [circuit court’s] refusal to do so is reversible error.” Id. at 314, 733 S.E.2d at 609 (quoting State v. Day, 341 S.C. 410, 416-417, 535 S.E.2d 431, 434 (2000)) (alteration in original).

In State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984), our Supreme Court suggested a standard self-defense instruction. However, in State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989), the Court made clear that it did not intend Davis to be the exclusive self-defense charge. State v. Burkhardt, 350 S.C. 252, 262, 565 S.E.2d 298, 303 (2002). Instead, “a trial judge should specifically tailor the self-defense instruction to adequately reflect the facts and theories presented by the defendant.” State v. Day, 341 S.C. 410, 418, 535 S.E.2d 431, 435 (2000) (citing Fuller, 297 S.C. 440, 377 S.E.2d 328). “A self-defense charge is erroneous where the trial court fails to charge on elements of the defense which were applicable to the issues raised by the defendant.” Id. (citing Fuller, 297 S.C. 440, 377 S.E.2d 328).

In State v. Day, our Supreme Court held the trial judge’s failure to charge the specific elements of self-defense that were applicable to Day’s theory constituted reversible error. Day, 341 S.C. at 418, 535 S.E.2d at 435. The Court found the trial judge’s instruction was incomplete because it failed to include a charge indicating: (1) Day had a right to judge the conduct of the decedent more harshly than otherwise because of the decedent’s drug consumption, and (2) the jury could consider prior instances of violence or unprovoked aggression by the decedent in determining whether Day had a reasonable belief of imminent danger. Id. Part of Day’s defense was his argument that the decedent had previously pulled a gun on him and that the decedent was in a “drug induced paranoia” the day of the incident. Id. Consequently, the Court held the jury charge, which only included the standard self-defense instruction as outlined by our Supreme Court in Davis along a the charge on the right to act on appearances, was incomplete because the trial judge failed to charge on the decedent’s substance abuse or his prior acts of violence. Id. Ultimately, the Court reversed Day’s convictions and remanded for a new trial.

In State v. Nichols, 325 S.C. 111, 116-117, 481 S.E.2d 118, 121 (1997), the defendant argued the trial judge's instructions on the law of self-defense were inadequate under State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989), where the judge instructed the jury solely on the common law elements of self-defense. Nichols objected to the charge and requested additional instructions on: (1) the right to act on appearances; (2) relevance of prior difficulties; and (3) that a person does not have to wait before acting in self-defense. Id. at 117, 481 S.E.2d at 121. Nichols contended the trial judge's refusal to give further instructions was reversible error. Our Supreme Court agreed. Id.

The Court emphasized that the charge suggested in Davis was not intended to be the exclusive charge for self-defense and that trial courts have been instructed to consider the facts and circumstances of the case at hand to fashion a proper charge. Id. (citing Fuller, 297 S.C. at 443, 377 S.E.2d at 330). The Court held Nichols was entitled to a charge on the right to act on appearances because Nichols testified he thought he had seen a shiny object in the deceased's hand. Id. (citing State v. Jackson, 227 S.C. 271, 87 S.E.2d 681 (1955)). The Court also found the evidence showed there had been prior difficulties between Nichols and the deceased including an instance where the deceased pointed a rifle at Nichols. Consequently, the Court concluded Nichols was entitled to a charge on the relevance of prior difficulties. Id. (citing State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978) (prior bad blood, intoxication, and prior threats by deceased were relevant to defendant's reasonable apprehension of bodily harm)). Further, the Court held Nichols was entitled to a charge that he did not have to wait before acting in self-defense since Nichols testified he thought he saw a gun in the deceased's hand and did not wait for the deceased to fire or aim at him. Id. (citing State v. Rash, 182 S.C. 42, 188 S.E. 435

(1936)). Accordingly, the Supreme Court reversed Nichols conviction and remanded for a new trial. Id. at 118, 481 S.E.2d at 122.

In State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978), our Supreme Court held Hendrix was entitled to a directed verdict since he was acting in self-defense as a matter of law when he shot the decedent. Id. at 661-662, 244 S.E.2d at 507. Hendrix was celebrating Labor Day with his family at his property on the shore of Lake Murray. Id. at 655, 244 S.E.2d at 504. Evidence established that “ill feelings characterized the relationship” between Hendrix and the decedent. Id. The decedent had confronted Hendrix earlier in the day and warned “they were going to have to fight to settle” the matter. Id. Hendrix was standing next to his truck, which was parked on his land, when the decedent arrived at the property, stopped his vehicle in the road, jumped out, and advanced toward Hendrix. Id. at 656, 244 S.E.2d at 505. Hendrix reached into the cab of his truck, pulled out a shotgun, leveled it at the decedent, and told him three times to back off. Id. The decedent immediately turned around, walked back to his truck, reached into the cab, drew out his own shotgun, and walked straight back to where Hendrix was standing. Id. A neighbor of the decedent observed the commotion and approached the scene. Id. at 657, 244 S.E.2d at 505. When she saw the two men facing each other with shotguns, she screamed the decedent’s name. Id. The decedent turned his head in the direction of the scream. Id. As the decedent turned, Hendrix began firing. Id. He fired four times in rapid succession, killing the decedent. Id.

The Court determined Hendrix was not at fault in bringing on the difficulty since he armed himself on his own land in a legal manner after he was threatened. Id. at 659, 244 S.E.2d at 506. The Court further found the second and third elements of self-defense were established since the evidence showed Hendrix was actually in imminent danger of losing his life. Id. at

659-660, 244 S.E.2d at 506. Having no duty to retreat because he was on his own property and being without fault in bringing on the fatal confrontation, the Court held Hendrix was warranted in reacting to the situation with force. Id. at 660, 244 S.E.2d at 507. In so holding, and relevant to this case, the Court emphasized, “Once [Hendrix’s] right to fire in self-defense arose, he was not required to wait until his adversary was on equal terms or until he fired or aimed his weapon.” Id. at 660-661, 244 S.E.2d at 507. This is significant since the evidence showed Hendrix shot the decedent when he was distracted by his neighbor’s scream.

In this case, as in Day and Nichols, the trial judge erred by refusing to instruct the jury on the specific element of self-defense requested by Appellant since it was applicable to Appellant’s account of what occurred. Appellant testified that toward the end of the confrontation, Milledge began to walk back toward the front door of the pool room. See State’s Exhibit No. 14 (Pool Room Video). Appellant was hopeful that he was finally going back inside. R. 1157, ll. 20-24. However, Milledge spun on his heels and headed back toward Appellant’s car. See State’s Exhibit No. 14 (Pool Room Video). After motioning aggressively with his arms and hands for Appellant to leave, Milledge continued to walk aggressively toward Appellant’s car. See State’s Exhibit No. 14 (Pool Room Video). Appellant knew Milledge was armed and could not see Milledge’s right hand. R. 1162, ll. 7-10. When Milledge began to turn the corner toward Appellant’s car, Appellant got out of the car and fired twice striking Milledge. See State’s Exhibit No. 14 (Pool Room Video).

As seen, before waiting for Milledge to aim the gun at him and perhaps fire, Appellant shot him in self-defense. Consequently, there was evidence to support the requested instruction. As our Supreme Court stated in Day, “A self-defense charge is erroneous where the trial court fails to charge on elements of the defense which were applicable to the issues raised by the

defendant.” Day, 341 S.C. 410, 418, 535 S.E.2d 431, 435 (2000) (citing Fuller, 297 S.C. 440, 377 S.E.2d 328). Since the trial judge failed to charge an important element of self-defense relevant to Appellant’s account of what occurred, respectfully, this Court should reverse Appellant’s conviction and sentence and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his conviction and sentence and remand for a new trial.

Respectfully submitted,

s/ Lara M. Caudy
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Appellate Defender

ATTORNEY FOR APPELLANT

This 20th day of September, 2023.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Edgefield County

Honorable Walton J. McLeod, IV, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BARRY WAYNE JONES,

APPELLANT

APPELLATE CASE NO. 2022-000046

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Final Brief of Appellant in the above referenced case has been served upon Julianna E. Battenfield, Esquire, at her primary email address listed in the Attorney Information System (AIS), this 20th day of September, 2023.

s/ Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM EDGEFIELD COUNTY
Honorable Walton J. McLeod, IV, Circuit Court Judge

Appellate Case No. 2022-000046

THE STATE,RESPONDENT,

v.

BARRY WAYNE JONES,APPELLANT.

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

1. Did the trial judge err by denying Appellant immunity from prosecution pursuant to the Protection of Persons and Property Act, when Appellant proved by a preponderance of the evidence that he was entitled to immunity pursuant to the Act?
2. Did the trial judge abuse his discretion by admitting evidence that Appellant allegedly attempted suicide in the moments before he was taken into custody where, pursuant to *State v. Cartwright*, 425 S.C. 81, 819 S.E.2d 756 (2018), the state failed to prove an unmistakable nexus existed by clear and convincing evidence linking the suicide attempt to a guilty conscience derivative of the offenses for which Appellant was being tried, and where any probative value of the evidence was substantially outweighed by the danger of unfair prejudice pursuant to Rule 403, SCRE?
3. Did the trial judge abuse his discretion by failing to tailor the self-defense instruction to adequately reflect the facts and theories presented by Appellant, specifically that Appellant was not required to wait until his assailant got the drop on him, that he had the right to act under the law of self-preservation and prevent his assailant from getting the drop on him, since the charge was supported by the evidence and was crucial to the jury's understanding of the law on self-defense?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Whether Judge McLeod properly denied immunity because Appellant did not prove he was without fault in bringing on the difficulty, that he was in actual danger of harm, or that he was in a place he had the right to be, among other elements of self-defense and the PPPA, when Appellant returned to the bar with a loaded gun after threatening to kill the victim, refused to leave when asked to by the victim who had the right to eject, and the victim was at the front of the vehicle unarmed and not doing anything threatening when Appellant fired?
2. Whether Judge McLeod properly found the State proved a nexus existed between the murder and Appellant's suicide attempt a mere forty minutes later when the judge thoroughly analyzed the three *State v. Cartwright* factors and conducted a Rule 403, SCRE, analysis on the record?
3. Whether Judge McLeod was within his zone of discretion to omit the portion of Appellant's requested charge that Appellant had the right to act on the appearance of imminent danger (and that he did not have to wait for the victim to get the drop on him) when Appellant was not, in fact, in imminent danger at the moment he fired and it was factually impossible for the victim to "get the drop on him" at that moment; and no person of ordinary firmness or courage would find either?

STATEMENT OF THE CASE

Appellant was indicted for murder and attempted murder in October of 2018 by an Edgefield County Grand Jury. A Protection of Persons and Property Act hearing was held from September 7th to 8th, 2021, before the Honorable Walter J. McLeod, IV, with Solicitor Rick Hubbard and Assistant Solicitor Robert McNair representing the State. R. 1. Appellant was represented by Luke and Brian Shealy along with Casey Secor. R. 1. Judge McLeod denied immunity on October 15, 2021 via a written order. (Amended Order.) R. 1501

Appellant proceeded to trial by jury from December 3 to 13, 2021, after which he was found guilty of murder but not guilty of attempted murder. R. 1491-1492. Judge McLeod sentenced him to thirty-five years' imprisonment. R. 1494. Appellant timely filed a motion for a new trial on December 20th, but Judge McLeod issued a written Order denying it on January 7, 2022. Appellant timely appealed; this brief of Respondent follows.

STANDARD OF REVIEW

“Circuit courts utilize pretrial hearings to determine whether a defendant is entitled to immunity under the Act, employing a preponderance of the evidence standard.” *State v. McCarty*, 437 S.C. 355, 365, 878 S.E.2d 902, 908 (2022); *State v. Cervantes-Pavon*, 426 S.C. 442, 449, 827 S.E.2d 564, 567 (2019). “This Court, in turn, reviews an immunity determination for an abuse of discretion.” *McCarty*, 437 S.C. at 365, 878 S.E.2d at 908. “An abuse of discretion occurs when the [circuit] court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support.” *State v. Jones*, 416 S.C. 283, 290, 786 S.E.2d 132, 136 (2016).

“The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice.” *State v. Cartwright*, 425 S.C. 81, 89, 819 S.E.2d 756, 760 (2018) (*quoting State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847-848 (2006)). “An appellate court will not reverse the trial judge’s decision regarding a jury charge absent an abuse of discretion.” *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010).

ARGUMENT

I. Judge McLeod properly denied immunity as Appellant did not prove he was without fault in bringing on the difficulty, that he was actually in danger of harm, or that he was in a place he had the right to be (among other elements), as the victim only turned back toward Appellant's vehicle after Appellant called his name and the victim was unarmed in the front of the vehicle when Appellant got out of his car and shot him.

Appellant argues Judge McLeod abused his discretion by denying him immunity from prosecution under the Protection of Persons and Property Act, S.C. Code §16-11-440 ("PPPA"). IBOA p. 15. The State disagrees and submits his argument is without merit. In order to be granted relief from this Court, Appellant has to prove there was no evidentiary support for Judge McLeod's conclusions in his October 15, 2021 written Order, and Appellant has not done so.

Law of Self-Defense

To be entitled to immunity after using deadly force, a defendant must prove he met all four elements (or applicable sections of the Act) of self-defense by a preponderance of the evidence. He:

- (1) Must be without fault in bringing on the difficulty;
- (2) Must have believed he was in imminent danger of losing his life or sustaining serious bodily injury, or actually was in such danger;
- (3) "Reasonable Fear." If based on belief, a reasonably prudent person of ordinary fitness and courage would have entertained that same belief; and
- (4) The defendant had no other probable means of avoiding the danger or sustaining serious bodily injury than to act how he did.

State v. Curry, 406 S.C. 364, 371, 752 S.E.2d 263, 266 n. 4 (2013).

If a defendant only meets the first two elements, then he must also prove he meets the applicable section(s) of the PPPA that replace elements (3) reasonable fear; and (4) the duty to retreat. However, if the State disproves one element at any point, the judge may deny immunity right then and there and send the case to a jury. *State v. Bixby*, 388 S.C. 528, 554, 698 S.E.2d 572,

586 (2010) (“It is an axiomatic principle of law that the defense has not been established if any one element is disproven.”)

Section (A): The presumption of reasonable fear applies (replacing element 3) if:

- (1) The victim was in the process of unlawfully and forcefully entering or had entered an occupied vehicle or attempted to remove another person against his will from the vehicle; and
- (2) Knows or has reason to believe that unlawful and forcible entry is or has occurred.

Section (B): Section A does not apply, however, if:

- (1) The victim had the right to be in the residence or vehicle; or
- (3)² The defendant was engaged in an unlawful activity at the time or used an occupied vehicle to further such unlawful activity.

Section (C): A person who:

- Is not engaged in unlawful activity; and
- Who is attacked in a place he had the right to be . . .
- Has no duty to retreat (replacing element 4) and has the right to meet force with force to prevent death or GBI to himself or others.

Section (D): A person who attempts to enter a person’s occupied vehicle is presumed to be doing so with the intent to commit an unlawful act or violent crime.

First, Judge McLeod found Appellant was at fault in bringing on the difficulty because he returned to the bar with multiple guns minutes after he sent a text to his friend Joe “Jo Jo” Mims saying, “I’m going to kill that Be Boy.”³ Amended Immunity Order R. 1508. Clayton Hall, the victim’s grandson, testified at the immunity hearing he had asked his grandfather to tell Appellant not to come back to the bar. Amended Immunity R. 294-298. Judge McLeod therefore rightly found the victim had asked Appellant to leave multiple times and he had refused to

² Items 2 and 4 of Section B are omitted as they are irrelevant to the facts of this case.

³ “Be Boy” was the nickname of the victim.

submit to it. The judge wrote, the defendant's "refusal to leave upon the question of Mr. Hall, with the ability to do so, supports the finding that he was at fault in bringing on the difficulty and his claim for self-defense fails." Amended Immunity Order R. 1508. This was a finding based on evidentiary support. Thus, Judge McLeod did not abuse his discretion and this Court should affirm.

Second, even if Appellant was not at fault, Judge McLeod found Appellant failed to show he was in actual imminent danger or reasonably believed he was in imminent danger. Amended Immunity Order R. 1508-1509. No one testified that the victim carried a gun and no gun was recovered; he actually only ever carried a cell phone. *Id.* The judge also found Appellant armed himself before returning to the bar. *Id.* Therefore, Appellant was not in actual imminent danger. This was a ruling backed by evidentiary support so the judge did not abuse his discretion.

Moving to the Act, the judge found Appellant did not establish either Section A or C by a preponderance of the evidence. Amended Immunity Order R. 1509-1510. Regarding Section A, Judge McLeod found Appellant was not entitled to the presumption of reasonable fear as the encounter lasted nine minutes and the victim did not do anything overtly threatening during that time. (The immunity judge is not required to accept the defendant's version of the facts, which would have been the victim had a gun.) "[T]he video showed that when the Defendant exited his vehicle and subsequently fired the first shot, Mr. Hall was at the front of the vehicle not in the process of entering [Appellant's] car." Amended Immunity Order R. 1510. Further, evidence was presented that the victim stopped and took a step back before Appellant fired, and a witness heard Appellant calling the victim's name before he fired. The video also corroborates this testimony showing something happened that caused the victim to turn around that final time toward Appellant's vehicle and shows he was at the front of the car when the shot rang out. *See*

State's Exhibits 13 and 14 (videos) and Defense Exhibit 12 (photo showing how far away the victim was when Appellant opened his door). This was a reasonable ruling backed by evidentiary support.

Regarding Section C, Judge McLeod disagreed with the defense, who argued Appellant was in a place he had the right to be just because he was in his occupied vehicle. Amended Immunity Order R. 1510. The judge found Appellant was not in a place he had the right to be because he was stripped of his right to be at the bar when he was asked to leave. The judge cited *Wright v. United Parcel Service, Inc.*, 315 S.C. 521 (Ct. App. 1994) (although entry by a person on the premises of another may initially be lawful, a person becomes a trespasser when they fail to depart after being asked by the owner to leave.") and S.C. Code §16-11-620 (1976): "Any person who, without legal cause or good excuse . . . fails and refuses . . . to leave immediately upon being ordered or requested to do so by the person in possession or his agent or representative is a trespasser" in support. Thus, the judge rightly found Appellant was not entitled to use deadly force before retreating. Amended Immunity Order R. 1511. Appellant has not shown any way Judge McLeod abused his discretion as all of his conclusions were backed up with evidentiary support and Appellant has not shown how Judge McLeod made an error of law. This Court should affirm.

II. The trial court properly analyzed the attempted suicide evidence under Rule 403, SCRE, and admitted it as the State proved by clear and convincing evidence a nexus existed between the attempt and the murder. The attempt occurred a mere forty minutes after the murder and Appellant told officers he meant to kill himself multiple times.

Appellant argues the trial court erred by denying his pretrial *in camera* motion to exclude evidence of his suicide attempt shortly after he killed the victim because the danger of unfair prejudice substantially outweighed the prejudicial effect. IBOA at p. 34. The State disagrees and submits Appellant's argument is without merit. The admission or exclusion of evidence is a matter best left to the sound discretion of Judge McLeod and his ruling should not be disturbed unless this Court finds the judge manifestly abused his discretion and probable prejudice resulted. *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847-848 (2006). Judge McLeod's conclusions would have to lack evidentiary support or be controlled by an error of law, and Appellant has not demonstrated either occurred here. *Id.* at 429-430, 632 S.E.2d at 848.

As a general rule, any guilty act, conduct, or statement by the defendant is admissible as evidence of consciousness of guilt.⁴ *State v. McDowell*, 266 S.C. 508, 515, 224 S.E.2d 889, 892 (1976). "Relevant circumstantial evidence regarding a defendant's guilty conduct may be admissible under Rule 403 as a circumstance tending to show the defendant's consciousness of guilt even though it is not conclusive evidence of guilt." *State v. White*, 437 S.C. 490, 497-498, 879 S.E.2d 21, 25 (Ct. App. 2022). "[C]ourts have unanimously held that an accused's attempt to commit suicide is probative of consciousness of guilt and is therefore admissible." Dale Joseph Gilsinger, *Admissibility of Evidence Relating to Accused's Attempt to Commit Suicide*, 73 A.L.R.

⁴ Noting here the Supreme Court's admonition that, "[e]vidence of attempted suicide is not easily analogized to evidence of guilt" as "suicide-attempt evidence is fraught with the potential for extreme prejudice." *Cartwright*, 425 S.C. at 91, 819 S.E.2d at 761. But also noting the Supreme Court, in abrogating *State v. Orozco*, 392 S.C. 212, 708 S.E.2d 227 (Ct. App. 2011) on this issue, did *not* ban this line of reasoning but only added safeguards to the line of reasoning in its elemental framework and *in camera* hearing requirement.

5th 615, 624 (1999); *see also* 22A C.J.S. *Criminal Law* § 1011 (2006) (“Evidence is generally admissible that the accused attempted . . . suicide subsequent to the time the crime was committed. Such evidence ordinarily is admissible as indicating a consciousness of guilt.”)

Attempted suicide evidence is analyzed similarly (adding in the three elements and *in camera* hearing requirement) to how evidence of flight is analyzed in this state because the test used to determine it is “equally useful in determining the admissibility of evidence of other types of evasive conduct.” *State v. Martin*, 403 S.C. 19, 28, 742 S.E.2d 42, 47 (Ct. App. 2013). The rationale behind the admissibility is “one who is innocent and conscious of that fact would [not] flee.” *Martin*, 403 S.C. at 29-30, 742 S.E.2d at 47 (internal citations omitted). “The courts should not suppose a person who knew he was innocent but under suspicion would disguise himself, hide from the police, or lie to officers investigating the crime of which he is suspected.” *Id.* Courts consider the “chain of inferences leading from evidence of [the defendant’s conduct]” to figure out whether the inferences logically “lead to consciousness of guilt of the crime charged.” *Martin*, 403 S.C. at 29, 742 S.E.2d at 47 (*quoting United States v. Porter*, 821 F.2d 968, 976 (4th Cir. 1987)).

In *State v. Cartwright*, our Supreme Court held evidence of a defendant’s attempted suicide was admissible if there was an unmistakable nexus linking the attempt to a guilty conscience of the crime for which the defendant was on trial. *State v. Cartwright*, 425 S.C. 81, 91, 819 S.E.2d 756, 761 (2018). Finding a nexus is a case-by-case determination to be made outside the presence of the jury. *Id.* at 92, 819 S.E.2d at 761-762. A court should determine admissibility by examining three factors and by conducting a Rule 403, SCRE, analysis:

(1) The State proved the jury could reasonably find a suicide attempt occurred;

(2) The State proved the defendant was aware of the occurrence of the alleged crimes at the time of his attempt;⁵ and

(3) The State proved an unmistakable nexus existed by clear and convincing evidence between the attempt and a guilty conscience derivative of the crime.⁶

Cartwright, 425 S.C. at 91-92, 819 S.E.2d at 761-762.

If a judge admits the evidence, a limiting instruction, jury instruction, or further comment by the judge is not permitted, but both parties may make full arguments in closing regarding how they believe the jury should consider the evidence. *Id.* at 92-93, 819 S.E.2d at 762.

All relevant evidence is admissible. Rule 402, SCRE; *State v. Pittman*, 373 S.C. 527, 578, 647 S.E.2d 144, 170 (2007). “Evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy.” Rule 401, SCRE. Here, that would be whether Appellant knew he shot the victim with malice or not. “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” Rule 403, SCRE. “The determination of the prejudicial effect of the evidence must be based on the entire record and the result will generally turn on the facts of each case.” *State v. Gillian*, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007). “Evidence is unfairly prejudicial

⁵ *Cf. State v. Crawford*, 362 S.C. 627, 635-636, 608 S.E.2d 886, 890-891 (Ct. App. 2005) (“The critical factor to the admissibility of evidence of flight is whether the totality of the evidence creates an inference that the defendant had knowledge that he was being sought by the authorities.”)

⁶ *Cf. State v. Pagan*, 369 S.C. 201, 209, 631 S.E.2d 262, 266 (2006) (“Flight evidence is relevant when there is a nexus between the flight and the offense charged.”); *Crawford*, 362 S.C. at 636, 608 S.E.2d at 891 (“It is sufficient that the circumstances justify an inference that the accused’s actions were motivated as a result of his belief that police officers were aware of his wrongdoing and were seeking him for that purpose.”)

6 continued: Clear and convincing evidence is “that degree of proof which will produce in the minds of the trier of facts a firm belief as to the allegations sought to be established.” *In re Dickey*, 395 S.C. 336, 354, 718 S.E.2d 739, 748 (2011).

if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one.” *State v. Wilson*, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001). An appellate court reviews 403 rulings with an abuse of discretion standard and gives great deference to the trial court’s decision. *State v. Myers*, 359 S.C. 40, 48, 596 S.E.2d 488, 492 (2004).

The defense and the State’s arguments and nexus the State proved in *Cartwright* are very similar to what Appellant presents to this Court here. Petitioner Cartwright was found hanging by a sheet from his jail cell bunk the same day he received additional criminal sexual conduct warrants, and the State moved photographs and other evidence in at trial to prove the attempt occurred. *Cartwright*, 425 S.C. at 89-90, 819 S.E.2d at 760. Cartwright admitted he attempted suicide after he became aware of the new charges, and the fact he had previously threatened to commit suicide if any of the three minors told anyone of his abuse enhanced the probative value of the attempt. *Id.* at 93, 819 S.E.2d at 762. At trial, Cartwright argued the State had to prove more than showing he knew he was charged with a crime, and evidence of his attempt could not be viewed as evidence of guilt because suicide was and is a complex act. *Id.* at 90, 819 S.E.2d at 760. But our Supreme Court found the evidence was relevant and its probative value outweighed any prejudicial effect. *Id.* at 93, 819 S.E.2d at 762.

Similarly, here, this Court should affirm because Judge McLeod properly found the evidence was relevant, a nexus existed by clear and convincing evidence, and the probative value outweighed any prejudicial effect. The court held a pre-trial *in camera* motion hearing after Appellant moved to exclude the evidence. R. 388-457. Respondent agrees with Appellant’s recitation of the facts and summary of the proffered testimony presented during the hearing – IBOA pp. 34-38 – but underscores certain portions. Appellant left the bar’s parking lot after shooting the victim and drove straight to Log Creek Road, where he then immediately attempted

suicide, then engaged in a shootout with police before he was “taken down.” R. 391-400. During the shootout, he told police he wanted them to “let him bleed to death.” R. 424.425. He had an AR-15 rifle and the silver .38 revolver with him that he had used to shoot the victim. R. 392.

When asked why he was covered in blood, Appellant stated, “he had shot himself,” and “he was hurting and had tried to shoot himself under the chin.” R. 392. R. 400-401. He also said, notably, “I tried to kill myself and I couldn’t even do that.” R. 416. While in the ambulance, Appellant also said, “I wish y’all would have killed me. Y’all should have just let me die,” and “[t]he only hole that hurts is the one I put in my neck.” R. 405, 407. *See* State’s Exhibit 8 (Kathmann Dashcam); State’s Exhibit 60 (Densmore Body Cam); State’s Exhibit 18 (CD with Log Creek Video Clips).

During the hearing, Judge McLeod rightly oversaw the parties’ arguments regarding the three *Cartwright* elements and concluded from the facts that **(1)** a jury could reasonably find that a suicide attempt occurred; **(2)** the defendant was aware of the occurrence of the crime at the time of the attempt; and **(3)** an unmistakable nexus existed between the attempt and a guilty conscience and the State had proved it by clear and convincing evidence. R. 432-433, R. 455-457. The defense, in fact, only challenged the third factor, conceding the first two were met. R. 432-434, R. 445.

The judge found the probative value was not substantially outweighed by any danger of unfair prejudice “in light of the specific facts of the case.” R. 456. The judge considered the whole of the testimony and the whole of the events that led up to the attempt in making his ruling as appellate courts have instructed him to. R. 456-457. He found the “chain of events” including the “self-inflicted wound by the defendant and the statements that followed in close time and proximity in a non-custodial manner after . . . demonstrate[d] a nexus by clear and convincing

evidence of attempted suicide that can be linked to a guilty conscience.” R. 456 Judge McLeod followed this Court’s and our Supreme Court’s guidance to the letter in analyzing the evidence. There is evidentiary support for his decisions and there are no errors of law. This Court should thus affirm.

III. Judge McLeod properly denied Appellant's request to charge on his right to act on appearances as Appellant had not yet established his right to fire in self-defense had arisen, the judge charged the portion of Appellant's requested charge that was supported by the facts and omitted the portion that was not, and Appellant cannot show prejudice from any alleged error of omission.

Appellant argues the trial court erred by omitting the portion of his requested jury charge that he had the right to act on appearances. IBOA p. 41. The State disagrees and submits Appellant's argument is without merit. A trial court's decision regarding jury instructions will not be reversed where the charges as a whole properly charged the law to be applied. *State v. Wharton*, 381 S.C. 209, 213, 672 S.E.2d 786, 788 (2009). This Court will have to find Judge McLeod abused his discretion by way of an error of law to provide Appellant the relief he asks for, and he has not demonstrated such an error of law occurred here. *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001).

Appellant wanted the following charge:

One who acts in self-defense may act on appearances. He may be mistaken. The law does not hold him to a refined assessment of the danger, provided, of course, he acted as the person of ordinary coolness and courage would have acted or should have acted in meeting the appearance of danger.

He doesn't have to wait until his assailant gets the drop on him. He has a right to act under the law of self-preservation and prevent his assailant from getting the drop on him; if it is apparent his assailant is taking steps to get the drop on him one who acts in self-defense must take steps first to prevent such assailant from getting the drop on him. *See State v. Rash*, 182 S.C. 42, 50 (1936); *State v. Starnes*, 340 S.C. 312, 322 (2000).

Defendant's Request to Charge #6.

The defense first raised the issue about the right to act on appearances right after they rested at trial. R. 1294-1388. They argued, "the right to act on appearances gives the defendant the right to judge the conduct of his adversary more harshly than he otherwise would and there are a non-exhaustive list of factors that are taken into consideration" *Id.*

The defense stated the factors were:

- (1) The deceased's reputation for violence;
- (2) Prior bad blood or difficulties between the defendant and the deceased;
- (3) The deceased's alcohol consumption; and
- (4) The deceased's prior threats against the defendant.

Tr. 1295-1298.

The defense reminded the judge he had heard testimony that the victim had a reputation for liking to fight and liking to drink, and Appellant knew that. The defense also reminded the judge that the victim had spread a false rumor that Appellant had been fired from his last job, and Appellant had confronted him about it in the months or weeks leading up to the day of the shooting. Tr. 1295-1297. Further, the day of, the victim had walked out of the bar as Appellant was leaving and tried to tap the back right corner of his car as Appellant turned onto the road to the right. Tr. 1297. Regarding the third factor, alcohol consumption, the defense stated the victim's BAC was .12, and Appellant knew the victim had been drinking. Tr. 1297. Finally, the defense stated Appellant had felt threatened when he confronted the victim about the job rumor weeks before and had felt threatened when the victim tapped his car. Tr. 1297-1298.

When reviewing the exhibits entered into evidence, the bar surveillance videos show Appellant leaving the bar at 6:30 P.M.,⁷ and the victim exiting at 6:31:30 P.M. Appellant was in his silver Mercedes Benz parked in the upper right hand corner of the screen (the camera was in the lower left hand corner of the screen) nearest to the road by then and pulled out when the victim walked up to his car and tried to swat the back lower right part of Appellant's car. He then put both hands out in a "man, I wanted to talk to you" fashion as Appellant turned right out of the parking

⁷ Clayton Hall, the bar owner and the victim's grandson, testified the surveillance video was an hour off because of Daylight Savings Time. R. 504-505.

lot. The videos show Appellant returned to the lot at 7:06 P.M. and, if one is facing the bar, (seen along the entire right side of the video), parked in the space furthest to the left in the spaces directly in front of the bar. His lights were off. The victim came out a few moments later and calmly walked down the sidewalk to Appellant's driver's side window.

The video shows the victim talked to the Appellant through the window for nearly 10 minutes. The conversation was calm at first and other vehicles and people entered the lot and the bar while it was going on. At 7:10:30 P.M., the victim motioned to the bar with his hand then back to Appellant. At 7:12, the victim pointed nonthreateningly to the bar again in a "please leave" fashion while talking then started walking back into the bar slowly. When Appellant still refused to leave, the victim started to look angry and motioned to the bar with both hands. He leaned toward the car at 7:13 P.M., then walked back toward the bar at 7:13:15 P.M. He returned to Appellant's driver's side window at 7:14 and waved a black cell phone around.⁸ He backed off a little at 7:15 P.M and things calmed down.

By 7:16 P.M., when Appellant still refused to leave after clearly being asked,⁹ the victim slung his left hand then right hand (that were empty) and pointed to the bar and started walking back in again. He motioned with his right hand in a "get out of here! Leave, please!" fashion to Appellant. He was about six or eight feet from Appellant, about two or three feet down the sidewalk toward the entrance of the bar (in the lower right-hand corner of the video) when he turned around yet again. He had nothing in his hands and was moving slowly. Appellant opened his car door, stood up with both feet out of the car, put both hands on his gun, and fired, killing the

⁸ Appellant testified it was a gun, but multiple witnesses testified the victim did not own or carry a gun, and no gun was found on him or anywhere near him right after he was shot.

⁹ As has been said, the victim was the grandfather of the owner of the bar. The bar owner testified he had asked his grandfather to get Appellant to leave the premises. The victim therefore had the right to eject Appellant from the lot.

victim. Law enforcement arrived at 7:19 and 7:20 P.M. State's Exhibits 13 and 14 (videos); Defense Exhibit 12 (photo showing how far away the victim was when Appellant opened his door); Defense Exhibits 71 (CD of photos); Defense Exhibits 96 and 97 (CDs of videos).

After a lengthy charge conference in chambers, Judge McLeod told the defense he would grant their request to charge in part, not taking it verbatim but maintaining the spirit of the charge.

R. 1389-1390. The judge charged the following:

The defendant does not have to show that he was actually in danger. It is enough if the defendant believed he was in imminent danger and a reasonably prudent person of ordinary firmness and courage would have had the same belief. One who acts in self-defense may act on appearances. He may be mistaken.

The law does not hold him to a refined assessment of the danger, provided he acted as the person of ordinary coolness and courage would have acted or should have acted in meeting the appearance of danger. It is for you to decide whether the defendant's fear of immediate danger or death or serious bodily injury was reasonable and would have been felt by an ordinary person in the same situation.

R. 1480.

Appellant objected to Judge McLeod leaving the part out about waiting for his assailant to get the drop on him. R. 1390; Defendant's Motion for a New Trial. However, Judge McLeod is required to charge only the current and correct law as it is supported by the evidence in the record. *State v. Peer*, 320 S.C. 546, 466 S.E.2d 375 (Ct. App. 1996); *State v. Gates*, 269 S.C. 557, 561, 238 S.E.2d 680, 681 (1977). An appellate court should not reverse his decision unless he committed an abuse of discretion, and it determines whether that occurred by considering the jury instructions in their entirety. *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000); *State v. Kerr*, 330 S.C. 132, 144, 498 S.E.2d 212, 218 (Ct. App. 1998). The judge should only charge the law as it will "enlighten the jury and aid it in arriving at a correct verdict." *State v. Blurton*, 352 S.C. 203, 207-208, 573 S.E.2d 802, 804 (2002). Here, it is factually impossible for

the victim to have in any way “gotten the drop on” Appellant when Appellant fired on him. Therefore, Judge McLeod charged the correct law according to the facts.

An erroneous jury instruction is not grounds for reversal unless the appellant can show prejudice from the erroneous instruction. *Ellison v. Simmons*, 238 S.C. 364, 372, 120 S.E.2d 209, 213 (1961) (citing *Cole v. Raut*, 378 S.C. 398, 405, 663 S.E.2d 30, 33 (2008)). “A person has the right to act on appearances, even if the person’s belief is ultimately mistaken.” *State v. Dickey*, 394 S.C. 491, 501, 716 S.E.2d 97, 102 (2011); *State v. Fuller*, 297 S.C. 440, 443-444, 377 S.E.2d 328, 331 (1989). “Once the right to fire in self-defense arises, a defendant is not required to wait until his adversary is on equal terms or until he has fire or aimed his weapon in order to act.” *State v. Starnes*, 340 S.C. 312, 322, 531 S.E.2d 907, 913 (2000) (emphasis added) (additional citation omitted) (finding the petitioner was entitled to a directed verdict on the issue of self-defense because he was a security guard who was in the process of ejecting the petitioner and petitioner was advancing toward him with a gun with a clear intent to assault him when he fired.)

Here, Judge McLeod made no error of law as the requested and omitted charge was not supported by evidence in the record. *See Cole*, 378 S.C. at 404, 663 S.E.2d at 33 (quoting *Clark*, 339 S.C. at 389, 529 S.E.2d at 539). The right to self-defense never arose for Appellant because he at the very least could not establish he was in actual danger of death or great bodily injury and could not establish the victim ever tried to enter his occupied vehicle, among other elements he could not and did not prove. The evidence shows Appellant leaving the bar around 6:30 P.M. He was mad the victim tried to swat his car, and he was in an argument with his girlfriend over text message at the time because he had not invited her to the bar when he was there. Defense Exhibit 10 (text messages.) He then texted his friend Jo Jo at 6:49 P.M. and said, “I’m gonna kill that Be

boy” (the victim’s nickname), then at 6:51 P.M. said, “Yeah they talked shit the last time and my brother was in there but that’s all I’m saying.” Defense Exhibit 10.

The bar video then shows Appellant returning to the bar at 7:06 P.M., less than twenty minutes after threatening to kill the victim via text. Appellant had an almost ten-minute conversation with the victim while seated in his vehicle in the parking lot, and at no time did the victim ever attempt to enter his vehicle. Words and gestures were exchanged, but the physical evidence unequivocally shows the victim walked back toward the bar then barely turned around, still 6-8 feet from Appellant, when Appellant got out of his car, put both hands on his weapon, and shot and killed the victim. Defense Exhibit 12. Just like in *State v. Oates*, even if the victim had a weapon like Appellant claimed he did (which multiple witnesses testified to never seeing the victim carrying a gun and that no gun was found on or near him when he died), the physical evidence shows the victim was walking away and then was turning when he was shot and killed. He was not charging at Appellant, he had no weapon drawn, and Appellant got out of his car to shoot him. Therefore, Appellant’s right to self-defense never arose and Judge McLeod was not required to even charge self-defense. However, Judge McLeod was certainly within his discretion to deny the “act on appearances” charge.

While *State v. Oates*, 421 S.C. 1, 803 S.E.2d 911 (Ct. App. 2017), was an appeal from the trial court’s denial of the appellant’s motion for immunity, this Court’s conclusion to affirm the denial shows how fact-intensive each self-defense case is, and that no matter what the victim necessarily did in the moments leading up to their death, what they were doing in the exact moment they were killed is of prime importance in making self-defense determinations on appeal. *Oates*, 421 S.C. at 10-11, 803 S.E.2d at 916-917. The *Oates* victim actually ordered the appellant out of his truck at gunpoint, entered the occupied vehicle, ratcheted his gun and said, “Nobody’s going

to take my car.” *Id.* However, this Court affirmed the denial of immunity because *the moment* the appellant fired, the victim had holstered his weapon in his waistband and was walking away. *Id.* This Court found Section (A) of the Protection of Persons and Property Act did not apply (the presumption of reasonable fear replacing elements 2 or 3 of self-defense depending on the facts) because at the moment of the shooting, the victim was not unlawfully or forcibly entering the appellant’s vehicle. *Id.* at 14, 803 S.E.2d at 918.

Similarly, here, the victim was not aiming a weapon at Appellant, charging at Appellant, or endangering Appellant in any way when he was shot. Therefore, Judge McLeod properly denied Appellant’s request to charge his right to not wait “until his assailant got the drop on him” because he had the right to “act on appearances.” It was factually impossible for the victim to have in any way been able to “get the drop on” Appellant in the moment he fired.

Further, to receive his omitted charge, the physical evidence would have had to show an ordinary person would also have believed he was in immediate danger of death or great bodily injury, and the evidence does not show that. Therefore, Judge McLeod correctly stated the law according to the facts, because under the circumstances as they appeared to Appellant, he did not prove “he believed he was in such [imminent] danger and a reasonably prudent man of ordinary firmness and courage would have entertained the same belief.” *State v. Jackson*, 277 S.C. 271, 87 S.E.2d 681, 684-685 (1955). Even if he were in actual danger, however, Appellant has not shown how but-for this alleged error of omission, the result of his trial would have been different. He cannot do so here, especially considering the malice found in his text message less than twenty minutes before he returned to the bar, “I’m going to kill that Be boy.” Defense Exhibit 10. He did, in fact, return and kill “that Be boy.” This Court should affirm, as Appellant has not shown an error of fact or law occurred, and he has not shown prejudice.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

Respectfully submitted,

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Columbia, South Carolina
October 4, 2023

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM EDGEFIELD COUNTY
Honorable Walton J. McLeod, IV, Circuit Court Judge

Appellate Case No. 2022-000046

THE STATE,RESPONDENT,

v.

BARRY WAYNE JONES,APPELLANT.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, Order of the South Carolina Supreme Court entitled “Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.”

This 4th day of October 2023.

s/Julianna E. Battenfield
Julianna E. Battenfield
Assistant Attorney General

ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA
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APPEAL FROM EDGEFIELD COUNTY
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THE STATE,RESPONDENT,

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PROOF OF SERVICE

I, Julianna Battenfield, as the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Final Brief of Respondent, Certificate of Compliance, and Proof of Service has been forwarded to Appellant's counsel, Lara M. Caudy, Esq., via email today, October 4, 2023 to lcaudy@sccid.sc.gov, and her assistant Hannah Bryant at hbryant@sccid.sc.gov.

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

This 4th day of October 2023.

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ATTORNEY FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Barry Wayne Jones, Appellant.

Appellate Case No. 2022-000046

Appeal From Edgefield County
Walton J. McLeod, IV, Circuit Court Judge

Opinion No. 6147
Heard March 11, 2025 – Filed June 10, 2026

AFFIRMED

Senior Appellate Defender Lara Mary Caudy, of
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Attorney General Donald J. Zelenka, Senior Assistant
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Attorney General Richard Brandon Larrabee, all of
Columbia; and Solicitor Samuel R. Hubbard, III, of
Lexington, all for Respondent.

MCDONALD, J.: An Edgefield County jury convicted Barry Wayne Jones of the murder of Milledge Hall and acquitted him of the subsequent attempted murder of a police officer. Jones appeals his murder conviction and sentence, arguing the circuit court erred in (1) denying him immunity from prosecution under the Protection of Persons and Property Act; (2) declining to exclude evidence that he

attempted suicide shortly before he was taken into custody; and (3) failing to tailor the self-defense instruction to adequately reflect the facts and theories Jones presented at trial. We affirm the conviction and sentence.

Factual and Procedural Background

Numerous witnesses testified at Jones's pretrial immunity hearing and at his subsequent trial. Jones testified at both proceedings as to his background, the incidents leading up to the day of the shootings, and the events for which he was indicted. Jones explained that after the death of his wife, he took early retirement from his job at the Savannah River Site (SRS) and moved back to Johnston, where he became a frequent patron at the Johnston Pool Room, a local sports bar. Jones began dating Angie Smith in September 2017 and eventually moved in with her. During their relationship, Angie introduced Jones to her cousin, Milledge "B'Boy" Hall (Decedent).

In late 2017, Decedent's grandson, Clayton Hall (Hall), and his wife purchased the Pool Room. Decedent invested in his grandson's business and occasionally helped with cleaning and other tasks. Decedent was also a frequent patron and often visited with friends and family at the Pool Room.

From the time Hall purchased the Pool Room, he had "frustrations" with Jones. Jones criticized how Hall ran the business and complained about the food, the staff's clothing, the temperature, and the fact that Hall allowed smoking. Jones's criticisms bothered Hall and "the entire bar staff," but his behavior had not yet caused Hall to ban Jones from the establishment or call the police.

In April 2018, Jones learned Decedent had been telling others that Jones was fired from his job at SRS. This upset Jones because he considered his early retirement "deeply personal." When Jones asked Decedent if he was spreading these rumors, Decedent admitted that he told others Jones was fired but refused to tell Jones from whom he learned this. During this exchange, Decedent quickly stood up from his bar stool and "got all up in [Jones's] face." According to Jones, he "had to start backing up to get away from [Decedent] and put [his] hands up like this, like, whoa." Jones stated Decedent also told him, "I'll beat your little a-s-s all about this bar." On this occasion, Jones and Angie immediately left, and Jones stopped going to the Pool Room so often. He further claimed that when he did go, he kept his distance from Decedent.

On Saturday, May 5, 2018, Jones and Angie were back at the Pool Room. Jones believed there was an error of approximately fifty cents on his bill, and he brought this to the attention of his server. Hall testified that Jones argued with him over the discrepancy in an "aggressive tone," but Jones denied losing his cool that day. The next morning, Hall and his wife decided to take an overnight trip to "get out of town specifically due to stress from Jones." Hall also told Decedent that the next time he saw Jones, he was "gonna ask him not to come back to the establishment anymore." Decedent advised Hall to have this conversation with Jones outside to avoid disturbing other patrons or embarrassing Jones.

Two days later, Jones checked on his elderly father and ran some errands before stopping at the Pool Room between 4:00 and 4:45 p.m. to meet friends. As Jones socialized, he realized he had missed Angie's text messages at 5:06 and 5:15 p.m. Jones responded at 5:17, apologizing for not hearing the text notices and letting Angie know he was at the Pool Room. Angie then sent a series of texts stating, "[W]hat? I can't believe you. . . . [W]e're not gonna make it like this. You need to come talk to me. . . . I'm really pissed now. . . . If you don't come talk to me, it won't be pretty when you get home. . . . Answer me. . . . I'll come show out." Jones did not respond to these texts.

A few minutes later, Angie strolled into the Pool Room and declined to acknowledge Jones. Instead, she went to the back of the bar and sat next to Decedent. Jones claimed that at that point, he decided to leave. He also decided he was finished with Angie—he planned to break up with her and move out of her house. Jones left the Pool Room at 6:30 p.m. and was followed by his friend, Randy Yonce; Decedent walked outside at 6:31. As Jones pulled out of the parking lot, Decedent slapped the rear right fender of Jones's silver Mercedes sedan, yelled something, and threw his hands up in the air. Jones claimed this startled him as he was pulling out onto the road.

Jones drove straight to Angie's house and packed his valuables, including his mail, medicine, a safe, several Clemson shirts his wife had given him, and a bag of guns—along with magazines and ammunition. Between 6:33 and 6:47 p.m., Angie sent Jones a series of texts: "You couldn't even come and speak"; "Everyone stared at me"; and "See you soon. No fighting." Jones claims he interpreted this final text to mean Angie had calmed down and that it was safe for him to return to the Pool Room.

At 6:49 p.m., Jones texted his friend, Joe Mims, "Can you come calm me down?" Thirty seconds later, he sent Mims another text, which read, "I'm gonna kill that

B'Boy." Jones maintains he was merely venting his frustrations and denies that this text suggested he was literally going to kill B'Boy. At 6:52 p.m., Jones texted a Johnston Police Department sergeant to ask if he was available to be at the Pool Room while he broke up with Angie, but the officer did not respond.¹

At 7:06 p.m., Jones parked directly in front of the Pool Room in the hope that Angie would see his car and come outside to talk. Jones claimed he planned to call or text Angie if she did not come outside on her own. But after Jones had been sitting in the parking lot for several minutes, Decedent walked outside and approached his vehicle.² Decedent motioned for Jones to get out of the car, but Jones refused because he was "scared of him." Instead, Jones rolled down his window about six inches—he testified that he did not want to roll it down any farther because he did not know if Decedent "was gonna grab [him] and [pull] him out of the car." Jones stated Decedent berated him for nearly ten minutes about his treatment of Angie and for trying to ruin the Pool Room. Jones testified that when he started his car to "try to leave," Decedent lunged at him several times while repeatedly demanding that he exit his vehicle so Decedent could "beat [his] ass." Jones smelled alcohol on Decedent's breath and alleged he felt "threatened" and "fearful [for his] life."³ According to Jones, Decedent presented a gun, returned it to his waistband, and later pulled up his shirt again to show Jones the weapon.⁴ At that point, Jones felt "threatened for [his] life," reached for his gun bag on the back seat, and grabbed "the first gun [he] could get off the top."

Jones testified that he placed this gun on his lap and rolled down his window as Decedent became increasingly angry about his refusal to get out of the car to fight. Although Jones admitted that Decedent told him to leave the premises, he stated he

¹ Jones knew this officer from the Pool Room and testified that he had previously asked him to help him calm Angie when she was drinking.

² One of the Pool Room patrons, Roger Bryan, had reported Jones's return. Bryan witnessed Decedent point at Jones in a manner indicating Jones should leave; Decedent then "turned and started back towards the building and [Jones] must have said something to him. . . . That's when [Decedent] raised his hands again like telling him to leave again."

³ At the time of his death, Decedent was 6'1" and weighed approximately 300 pounds; his blood alcohol content was 0.12. Decedent's widow testified that he was still under a doctor's care following a 2016 triple bypass surgery.

⁴ The State contends this object was a phone. Multiple witnesses testified that Decedent did not own or carry a gun, and no gun was found. Jones did not deny that Decedent had a large phone clipped to his right front pocket.

did not want to back out of the parking lot until Decedent returned inside the bar. The video reflects that Decedent began walking toward the bar door before abruptly spinning around and heading back towards Jones's sedan. Although Jones admitted Decedent was still telling him to leave at this time, Jones exited his vehicle and shot him, twice.⁵

At his trial, Jones explained:

There's a certain point where I can't see his right hand. I know he's got a gun. I know he can draw it, and it gets to the point where I don't feel safe at all. My life is threatened and on the line and my heart's beating 150 beats per minute.

Once Decedent was on the ground and his friends began coming outside, Jones returned to his car and drove away.

Captain James Florida of the Edgefield County Sheriff's Office (ECSO) was off duty when he heard the dispatch call reporting the Pool Room shooting and the suspect's silver Mercedes. He saw a silver Mercedes at an intersection, ran the tag, and began following Jones. Florida testified that he did not initially activate his blue lights because he was waiting for backup before attempting to stop the suspect's vehicle.⁶ Jones also described this pursuit, contending the officer was "laying way back" from his car before aggressively pulling up very close like he was going to "run me off the road." Jones claimed that the last time the officer pulled up close, Jones saw a gun in his hand. Once the officer backed away again, Jones turned onto Pleasant Lane, hoping to lose him.

⁵ Betty Edwards, who was shopping at a nearby IGA, "heard a confrontation between two people . . . [she] couldn't hear what they [were] saying, but . . . it was loud." She identified the individuals as Decedent and the "gentleman that was in the car." Another witness, Lanyce Hatcher, testified that when he arrived at the Pool Room, Decedent "was arguing with somebody in a car. I couldn't see who was in the car, but you could tell they were arguing." Decedent said "no, I'll tell you what you're gonna do, you're gonna leave and not come back, and that's—that's all I heard and by then I was almost to the door and I didn't hear any more."

⁶ Captain Florida's dashcam was not working properly on the day of the murder, but dashcam footage from Corporal Keith Kathman, a City of Edgefield police officer providing backup, supports Florida's version of Jones's attempted ambush.

Jones then turned onto Log Creek Road and "threw" his vehicle in park, retrieved an AR-15 style rifle from his trunk, and moved the assault weapon to his back seat when the officer "sped by." Jones explained that once he found "somewhere safe," he backed into a small clearing, exited his car, and started drinking a beer. He claimed the officer then drove by and fired a weapon at him before stopping and—unprovoked—firing at him again. Jones testified that only then did he return fire; he maintained he felt "helpless" because "somebody was trying to kill [him]" and he thus decided "that no matter who was in the car that [he] had to defend [himself]."

Captain Florida's description of his encounter with Jones differed significantly. Florida testified that he lost sight of Jones when he veered off onto Pleasant Lane. As Florida drove slowly looking for the silver sedan, he saw that Jones had "turned his vehicle facing Pleasant Lane on Log Creek Road which is a dirt road." The driver's side door was open, and Jones "was standing outside aiming the assault rifle at [Florida]." Florida then accelerated past Jones, radioed to report that the suspect was armed with an AR-15, and "started hollering to [Corporal Kathman] on the radio to back up, back up." At this time, Jones began shooting at him.⁷

While taking cover, Florida initially returned fire with his Glock but switched to his shotgun. After Jones shot out the back window of Florida's marked patrol vehicle, Jones "turned and started shooting toward Officer Kathman." Jones sustained several gunshot wounds, including a self-inflicted shot to his chin/neck area. Jones later told Florida "that he wanted [him] to let him bleed to death," but Florida responded that he could not do that."⁸ Eventually, other officers who had arrived on scene pulled Jones from behind his car, handcuffed him, and placed him on an ambulance stretcher for transport to the hospital.

Jones was indicted for Decedent's murder and the attempted murder of Captain Florida. After a two-day hearing, the circuit court found Jones was not entitled to immunity under the Protection of Persons and Property Act. Following his subsequent seven-day trial, the jury convicted Jones of Decedent's murder but

⁷ Florida knew Kathman was also in pursuit and explained that he did not want him to enter Jones's line of fire. Kathman confirmed that Jones "shot first at us."

⁸ Jones denied saying this. Instead, Jones claimed he asked for help and Florida responded that he could not do that. Jones testified, "That's what I remember as far as I cannot do that and also he told me even while I was laying back on the ground, I couldn't hardly move at all, he told me that he was gonna get his fully automatic AR-15 and come kill me."

acquitted him of the attempted murder of Captain Florida. The circuit court sentenced Jones to thirty-five years' imprisonment. Jones filed a motion for a new trial, which the circuit court denied. Jones timely appealed.

Law and Analysis

I. Protection of Persons and Property Act

Jones argues the circuit court erred in denying him immunity from prosecution because he proved by a preponderance of the evidence that he was entitled to immunity under the Protection of Persons and Property Act (the Act).⁹ We disagree.

"Circuit courts utilize pretrial hearings to determine whether a defendant is entitled to immunity under the Act, employing a preponderance of the evidence standard." *State v. McCarty*, 437 S.C. 355, 365, 878 S.E.2d 902, 908 (2022) (quoting *State v. Cervantes-Pavon*, 426 S.C. 442, 449, 827 S.E.2d 564, 567 (2019)). "This Court, in turn, reviews an immunity determination for an abuse of discretion." *Id.* "An abuse of discretion occurs when the [circuit] court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Id.* (quoting *State v. Jones*, 416 S.C. 283, 290, 786 S.E.2d 132, 136 (2016)).

The Act grants a person immunity "'from criminal prosecution and civil action for the use of deadly force' in circumstances that are permitted by the Act or by another provision of law." *McCarty*, 437 S.C. at 366, 878 S.E.2d at 908 (quoting S.C. Code Ann. § 16-11-450(A) (2015)). The General Assembly stated its intent in section 16-11-420 of the South Carolina Code (2015):

(A) It is the intent of the General Assembly to codify the common law Castle Doctrine which recognizes that a person's home is his castle and to extend the doctrine to include an occupied vehicle and the person's place of business.

(B) The General Assembly finds that it is proper for law-abiding citizens to protect themselves, their families, and others from intruders and attackers without fear of

⁹ S.C. Code Ann. §§ 16-11-410 to -450 (2015).

prosecution or civil action for acting in defense of themselves and others.

. . . .

(E) The General Assembly finds that no person or victim of crime should be required to surrender his personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack.

Section 16-11-440 of the South Carolina Code (2015) sets forth the circumstances under which the Act allows the use of deadly force. In relevant parts, the statute provides:

(A) A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:

(1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, or if he removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle; and

(2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.

. . . .

(C) A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death

or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60.

In *State v. Curry*, our supreme court discussed "the legislative intent regarding a trial court's authority to weigh the underlying claim of self-defense in determining an accused's entitlement to immunity." 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013). "Consistent with the Castle Doctrine and the text of the Act, a valid case of self-defense must exist, and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity. This includes all elements of self-defense, save the duty to retreat." *Id.*; accord *Jones*, 416 S.C. at 301, 786 S.E.2d at 141. The court then noted the elements necessary to establish a claim of self-defense:

First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

Curry, 406 S.C. at 371 n.4, 752 S.E.2d at 266 n.4 (quoting *State v. Davis*, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984)). "It is the fourth element—the duty to retreat—that is excused under the Act and the Castle Doctrine." *Id.*

Jones claims he is entitled to immunity because he feared for his life and was "not at fault in bringing on the difficulty" with Decedent. The circuit court properly rejected this assertion. Although Jones may have been preoccupied with his decision to end his relationship with Angie—and it is undisputed that he had no interaction with Decedent on the day of the shooting until Decedent slapped

Jones's car when he first left the parking lot—such does not negate the fact that Jones returned to the Pool Room parking lot just thirty-five minutes later with a veritable arsenal.

Jones argues that when Decedent "aggressively struck" the rear of his car, it "caused Appellant renewed fear of [Decedent] after [Decedent]'s threat against Appellant about a month prior coupled with Appellant's knowledge of [Decedent]'s reputation for violence."¹⁰ However, Jones's decision to return to the Pool Room parking lot that night belies any claimed feelings of "renewed fear." Even if one accepts Jones's claim that he only returned to the Pool Room to end things with Angie, his decision to return necessarily factors into the immunity analysis. Further, during the short period of time in which Jones left and returned to the Pool Room parking lot with his bag of guns; several magazines; and ammunition, he texted Mims, "I'm gonna kill that BBoy." Although Jones asserted he was merely venting and denied this text meant he intended to kill anyone, the fact remains that he returned to the Pool Room—heavily armed—a mere seventeen minutes after sending this text. Thus, in our view, Jones failed to establish by a preponderance of the evidence that he was without fault in "bringing on the difficulty."

But even if we accept for purposes of argument that Jones was without fault in bringing on the difficulty, his self-serving testimony is the only evidence in the record suggesting Jones was in imminent danger (or, indeed, any danger at all). After reviewing the surveillance video, we are unable to identify the black object that Jones argues was Decedent's gun. Multiple witnesses testified Decedent did not own or carry a gun, and no gun was found on or anywhere near him just after the shooting. Still, we recognize Jones's implication that Roger Bryan can be seen picking up the "black object" in the surveillance video.¹¹

Jones also disputes that Decedent asked him to leave the premises early into their approximately ten-minute encounter, although he admits Decedent eventually did ask him to leave. Hatcher, who saw the two men arguing, testified that Decedent said "no, I'll tell you what you're gonna do, you're gonna leave and not come back, and that's—that's all I heard and by then I was almost to the door and I didn't hear any more." Jones maintains he started his vehicle because he wanted to leave but

¹⁰ In addition to Jones's testimony that Decedent had previously threatened to beat him up, Jones's friend, Tony Friar, testified that Decedent "was a fighter based on what [he] knew about [Decedent] *in elementary school*" and that Decedent previously told Friar he was going to "take care" of Jones.

¹¹ Only Jones claims to have seen a gun, and we do not see this on the video.

was afraid to do so because he "believed using his hands to operate the vehicle and taking his eyes off of [Decedent] even for an instant would expose him to further harm." Yet, we note that even when Decedent initially walked away from Jones's vehicle to go back inside the Pool Room, Jones made no attempt to leave—and some witnesses testified Jones called to the Decedent as Decedent walked away.

Jones next argues that even if his self-defense claim fails in one or more respects, he is still entitled to immunity under sections 16-11-440(A) and (C). As noted above, Jones testified that Decedent demanded that he exit his vehicle and fight him. He further alleges Decedent, "pulled on [his] door handle to check and see if it was locked or not" and "put his hands on top of the vehicle." These actions might approach the statute's intent to protect against someone "unlawfully and forcefully entering . . . [an] occupied vehicle" or "attempting to remove another person against his will from entering . . . [an] occupied vehicle," but only if the person making such claims is credible. And Jones is not credible—indeed, like Officer Kathman's dashcam video, the parking lot surveillance video (along with the testimony of multiple witnesses) contradicts Jones's story. *See, e.g., State v. Oates*, 421 S.C. 1, 13, 803 S.E.2d 911, 918 (Ct. App. 2017) (reiterating that a trial court is not required "to accept the accused's version of the underlying facts" in considering a claim of immunity (quoting *Curry*, 406 S.C. at 371, 752 S.E.2d at 266)). The surveillance video shows that when Jones exited his vehicle and fired at Decedent, Decedent was merely reapproaching the front of the Mercedes from the Pool Room's entrance; he was neither close enough to "unlawfully and forcefully" enter (or try to enter) the car nor in a position to try to remove Jones from it. Finally, while it is undisputed that Jones was initially "not engaged in an unlawful activity" and was in a "place where he ha[d] a right to be," Jones lost his right to be on the Pool Room premises when Decedent asked him to leave. For all of these reasons, we find the circuit court did not abuse its discretion in ruling Jones failed to prove by a preponderance of the evidence that he was entitled to immunity.

II. Evidence of Attempted Suicide

Jones next contends the circuit court erred in denying his motion to exclude evidence that he attempted suicide in the moments before he was taken into custody. He argues *State v. Cartwright* precluded this evidence because the State failed to prove "an unmistakable nexus exists by clear and convincing evidence linking the suicide attempt to a guilty conscience derivative of the offense for which the defendant is on trial." 425 S.C. 81, 92, 819 S.E.2d 756, 762 (2018). Jones further asserts that the probative value of this evidence was substantially

outweighed by the danger of unfair prejudice. *See* Rule 403, SCRE. Again, we disagree.

"The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." *Cartwright*, 425 S.C. at 89, 819 S.E.2d at 760 (quoting *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.* at 89-90, 819 S.E.2d at 760 (quoting *Douglas*, 369 S.C. at 429-30, 632 S.E.2d at 848). "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina." Rule 402, SCRE. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. "The determination of the prejudicial effect of the evidence must be based on the entire record and the result will generally turn on the facts of each case." *State v. Gillian*, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007).

Evidence of attempted suicide may be admitted if the State establishes:

(1) a jury could reasonably find that a suicide attempt occurred; (2) the defendant was aware of the occurrence of the alleged crimes at the time of the suicide attempt; and (3) an unmistakable nexus exists by clear and convincing evidence linking the suicide attempt to a guilty conscience derivative of the offense for which the defendant is on trial. If the trial court concludes that the three factors have been established, the evidence is relevant and may be admitted, subject to a Rule 403, SCRE analysis.

Cartwright, 425 S.C. at 92, 819 S.E.2d at 762. "Clear and convincing evidence is that degree of proof which will produce in the minds of the trier of facts a firm belief as to the allegations sought to be established." *In re Dickey*, 395 S.C. 336, 354, 718 S.E.2d 739, 748 (2011) (quoting *Peeler v. Spartan Radiocasting, Inc.*, 324 S.C. 261, 265 n.4, 478 S.E.2d 282, 284 n.4 (1996)). This is an intermediate

measure of proof, "more than a mere preponderance" but less than that "required for proof beyond a reasonable doubt; it does not mean clear and unequivocal." *Id.*

In *Cartwright*, the appellant was charged with molesting his daughter and two stepdaughters. 425 S.C. at 85, 819 S.E.2d at 758. While he was detained prior to trial, Cartwright attempted suicide by hanging himself from his bunk with a sheet wrapped tightly around his neck. *Id.* at 89, 819 S.E.2d at 760. Noting the case presented "a close question," our supreme court found:

[T]he facts here survive the strict test for admissibility, including the trial court's Rule 403 determination that the probative value of the suicide-attempt evidence was not substantially outweighed by the danger of unfair prejudice. Prison authorities found Cartwright hanging in his cell, the same day Cartwright was served with additional warrants. Cartwright admitted that he attempted suicide after he became aware of the new charges. The record further reflects Cartwright threatened to commit suicide if the victims (Daughter, Stepdaughter One, and Stepdaughter Two) told anyone about the sexual abuse. The fact that Cartwright acted on his threat and attempted suicide enhances the probative value of the evidence. Therefore, we hold evidence of Cartwright's suicide attempt was relevant and properly admitted.

Id. at 93, 819 S.E.2d at 762.

Here, ECSO Deputy Robert Harter participated in the takedown on Log Creek Road. Harter was one of the officers who converged on Jones as he was lying on the ground near his vehicle. When Harter approached, he saw two weapons on the ground next to Jones: an "AR-15 type rifle" and a silver .38 revolver. Once Jones was in handcuffs, "[s]omeone asked [him] if he was hurt because he had a lot of blood on the front of him. He did say that he was hurting and that he had shot himself." Jones did not "give any explanation for why he shot himself" and he did not mention the word "suicide." In a statement prepared shortly after the event, Harter wrote that Jones said "he was hurting and had tried to shoot himself under the chin."

Sergeant James Morgan arrived on the Log Creek scene after the gunfire had ceased but before Jones was taken into custody. He and Sergeant James Densmore moved in to arrest Jones when Captain Florida gave the command. Once Jones was in custody and handcuffed, Morgan asked "about his current medical state." Jones told Morgan "where he was shot at, where he was hurting at, around his chest, stomach, arm there, and then he lifted his head and he said I'm also shot here." Jones then volunteered, "I tried to kill myself and I couldn't even do that."

Jones was already in custody when Officer Samuel Sherrill arrived. Sherrill accompanied Jones to the ambulance and rode with him to the hospital. He testified that while on the stretcher, Jones said, "I wish y'all would have killed me. . . . Y'all should have just let me die." Later, on the way to the hospital, Jones said, "The only hole that hurts is the one . . . I put in my neck."

While Jones conceded at trial that the State met its burden of proof as to the first two elements of the *Cartwright* analysis, he asserts the State failed to prove by clear and convincing evidence that he "tried to commit suicide because he feels so guilty [about] his participation in the shootout with law enforcement on Log Creek Road that he's just going to commit suicide over his guilt over those two things." Emphasizing our supreme court's finding in *Cartwright* that "suicide attempt evidence is fraught with the potential for extreme prejudice," 425 S.C. at 91, 819 S.E.2d at 761, Jones argues any probative value such evidence might have was substantially outweighed by the danger of unfair prejudice.

The circuit court disagreed, finding the State met all three *Cartwright* factors. The circuit court noted the chain of events, including the Pool Room shooting; the events leading up to the confrontation with law enforcement some forty minutes later; and Jones's own statements about his self-inflicted wound "demonstrate a nexus by clear and convincing evidence of attempted suicide that can be linked to a guilty conscience." The court then explained that in light of the specific facts of this case, "the highly probative nature that encapsulates that entire story of facts outweighs the prejudicial effect of the evidence of attempted suicide."

Although there is no testimony that conclusively establishes why Jones shot himself, his own actions and statements demonstrate "an unmistakable nexus exists by clear and convincing evidence linking the suicide attempt to a guilty conscience derivative of" the offenses for which Jones was on trial. *Cartwright*, 425 S.C. at 92, 819 S.E.2d at 762. First, if Jones believed he acted in self-defense in shooting Decedent, there was no need for him to flee the scene with his weapons and ammunition, hunker down, and engage law enforcement in a shootout. Jones

claims his "encounter with law enforcement served as a break in the causal chain between [Jones] shooting [Decedent] in self-defense and his suicide attempt where almost an hour passed between when [Jones] shot [Decedent] and when he attempted suicide, particularly where [Jones] did not attempt suicide during that hour."

We see no such break in the causal chain and find the circuit court properly exercised its discretion in denying Jones's motion to exclude evidence of his suicide attempt. There is no evidence in the record to suggest Jones was suicidal on the day he armed himself and returned to the Pool Room after threatening by text to "kill that BBoy" or that he made any statements suggesting he was suicidal before starting his shootout with law enforcement. Nor did the circuit court abuse its discretion in finding the probative value of Jones's suicidal actions and statements was not substantially outweighed by the danger of unfair prejudice. *See Gillian*, 373 S.C. at 609, 646 S.E.2d at 876 (explaining a Rule 403 "determination of the prejudicial effect of the evidence must be based on the entire record and the result will generally turn on the facts of each case").

III. Jury Charge – Self Defense

Finally, Jones argues the circuit court erred in failing to tailor the self-defense charge to adequately reflect the facts and theories he presented at trial. He contends the circuit court should have instructed the jury that Jones had the right to act under the law of self-preservation to prevent his assailant from "getting the drop on him." He asserts such a tailored charge was supported by the evidence and crucial to the jury's understanding of the law of self-defense. We see no error in the circuit court's well-reasoned, tailored instruction.

"In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." *State v. Zeigler*, 364 S.C. 94, 106, 610 S.E.2d 859, 865 (Ct. App. 2005). "A jury charge which is substantially correct and covers the law does not require reversal." *Id.* "To warrant reversal, a trial judge's charge must be both erroneous and prejudicial." *State v. Otts*, 424 S.C. 150, 155, 817 S.E.2d 540, 543 (Ct. App. 2018) (quoting *State v. Taylor*, 356 S.C. 227, 231, 589 S.E.2d 1, 3 (2003)).

Jones submitted numerous written charge requests including "Request to Charge No. 6," which addressed self-defense and the right to act on appearances. The requested charge stated, in pertinent part:

One who acts in self-defense may act on appearances. He may be mistaken. The law does not hold him to a *refined assessment* of the danger, provided, of course, he acted as the person of ordinary coolness and courage would have acted or should have acted in meeting the appearance of danger. He doesn't have to wait until his assailant gets the drop on him. He has a right to act under the law of self-preservation and prevent his assailant getting the drop on him; if it is apparent, or reasonably apparent his assailant is taking steps to get the drop on him, one who acts in self-defense must take steps first to prevent such assailant from getting the drop on him. *See State v. Rash*, 182 S.C. 42, 50 (1936); *State v. Starnes*, 340 S.C. 312, 322 (2000).

Following a lengthy charge conference in chambers, defense counsel put his arguments on the record, specifically objecting to the circuit court's ruling not to charge "Request to Charge No. 6" in full. The circuit court acknowledged it did not "take [the] charge verbatim," but noted it granted the request in part.

The circuit court ultimately gave the following charge as to a defendant's right to act on appearances:

The defendant does not have to show that he was actually in danger. It is enough if the defendant believed he was in imminent danger and a reasonably prudent person of ordinary firmness and courage would have had the same belief. One who acts in self-defense may act on appearances. He may be mistaken. The law does not hold him to a refined assessment of the danger, provided, he acted as the person of ordinary coolness and courage would have acted or should have acted in meeting the appearance of the danger. It is for you to decide whether the defendant's fear of immediate danger of death or serious bodily injury was reasonable and would have been felt by an ordinary person in the same situation.

"[T]he trial court is required to charge only the current and correct law of South Carolina." *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) (quoting *Sheppard v. State*, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004)). "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). "The substance of the law is what must be instructed to the jury, not any particular verbiage." *State v. Angie*, 315 S.C. 547, 554, 446 S.E.2d 411, 415 (1994).

Here, the circuit court properly declined to give the defense's requested charge verbatim and correctly addressed the substance of the law, including the legal tenet that "one who acts in self-defense may act on appearances." The circuit court instructed the jury on this point even though the video evidence suggests Decedent was not attempting to forcibly (or otherwise) enter Jones's vehicle or remove Jones from it and was not pointing—or in possession of—any weapon. The charge included language instructing that the law does not hold a defendant to a "refined assessment of the danger" and that a defendant may even be mistaken in his perception of the danger. It was then the jury's prerogative to determine whether "a reasonably prudent person of ordinary firmness and courage" would have believed he was in immediate danger of death or bodily injury at the time of the shooting.

The video surveillance alone demonstrates most—if not all—of the elements of self-defense are absent here. Decedent was not charging at Jones, had no weapon drawn, and was not endangering anyone when Jones chose to get out of his car and shoot the Decedent twice before fleeing the scene. The evidence at trial simply did not support a jury charge instructing that a defendant "doesn't have to wait until his assailant gets the drop on him." For this and the other reasons discussed, we find the circuit court's instruction was properly tailored to the evidence, issues, and theories presented at trial.

Conclusion

For the foregoing reasons, Jones's murder conviction and sentence are

AFFIRMED.

KONDUROS and VINSON, JJ., concur.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

BARRY WAYNE JONES,

APPELLANT

APPELLATE CASE NO. 2022-000046

Appeal from Edgefield County

Honorable Walton J. McLeod, IV, Circuit Court Judge

Opinion No. 6147

PETITION FOR REHEARING

On June 10, 2026, this Court affirmed Appellant's conviction. State v. Barry Wayne Jones, Op. 6147 (S.C. Ct. App. filed June 10, 2026) (Howard Ad. Sh. No. 22 at 35). Pursuant to Rule 221(a), SCACR, Appellant respectfully requests this Court rehear the matter based upon the significant points overlooked and/or misapprehended by this Court in reaching its decision.

Protection of Persons and Property Act

On appeal, Appellant argued the trial court abused its discretion by denying him immunity from prosecution because Appellant proved by a preponderance of the evidence that he was entitled to immunity pursuant to the Protection of Persons and Property Act. This Court

disagreed. For the reasons that follow, Appellant respectfully requests this Court grant rehearing and hold the trial court abused its discretion by denying him immunity from prosecution.

Respectfully, in holding the trial court did not abuse its discretion by finding Appellant was not entitled to immunity, this Court failed to apply the correct standard of review. See State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013) (“A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which *this court reviews under an abuse of discretion standard of review.*”) (emphasis added). Based on this Court’s analysis, it appears the Court engaged in a de novo review of the evidence rather than applying the correct abuse of discretion standard. The Court rarely, if ever, mentioned the trial court’s factual findings or legal conclusions and failed to discuss whether the trial court’s findings were supported by the evidence. For example, after discussing the evidence presented during the pretrial hearing, this Court stated, “Thus, *in our view*, Jones failed to establish by a preponderance of the evidence that he was without fault in ‘bringing on the difficulty.’” Op. at 45 (emphasis added). Respectfully, this Court’s opinion reads like an order by the trial court denying immunity as opposed to an appellate decision applying the abuse of discretion standard.

Moreover, along the same lines, this Court determined Appellant was not credible. Op. at 45. Significantly, the trial court in denying Appellant immunity *never* found Appellant was not credible. See R. 1501-1512. Credibility findings are factual findings. See State v. Johnson, 413 S.C. 458, 467-68, 776 S.E.2d 367, 371-72 (2015). The determination of credibility must be left to the trial court, which saw and heard Appellant and the other witnesses testify. State v. Cutro, 332 S.C. 100, 117, 504 S.E.2d 324, 333 (1998) (“The determination of credibility *must* be left to

the trial judge who saw and heard the witnesses and is therefore in a better position to evaluate their veracity.”) (emphasis added).

This Court’s factual finding that Appellant is not credible appears to be based in part on this Court’s view of Officer Kathman’s dashcam video. Op. at 45-46. Notably, the jury acquitted Appellant of the attempted murder of Captain Florida, which strongly suggests, contrary to this Court’s finding, that the jury found Appellant more credible than Captain Florida. Moreover, again contrary to this Court’s factual finding, Appellant presented expert testimony that, based on Kathman’s dashcam footage, Captain Florida fired first.

Unlike the trial court concluded, Appellant proved by a preponderance of the evidence that he was immune from prosecution under the common law elements of self-defense. Appellant was not at fault in bringing on the difficulty. Appellant was preoccupied with his decision to end his relationship with Angie. He had no interaction with Milledge on the day of the shooting until Milledge, unbeknownst to Appellant, walked out after Appellant and aggressively struck the rear of his vehicle. This caused Appellant renewed fear of Milledge after Milledge’s threat against Appellant about a month prior coupled with Appellant’s knowledge of Milledge’s reputation for violence. Appellant’s decision to return to the pool room was not unlawful or intended to start a conflict with Milledge. Rather, it was Appellant’s best option under the circumstances to end his eight month relationship with Angie. Appellant strongly disagrees that he was somehow at fault in bringing on the difficulty by merely parking in a parking lot where he had a right to be.

The state alleged Appellant’s text message, “I’m gonna kill that B’Boy,” was literal. However, Appellant’s text messages when read as a whole indicate he was seeking help from Joe Mims and Sergeant Mathis to assist in avoiding any conflict with both Angie and Milledge. It is telling that when Appellant arrived at the pool room, he remained in his car and did not seek a

conflict. Rather, it was Milledge who came outside and confronted Appellant. The surveillance footage is consistent with Appellant's account that Milledge aired his personal grievances against Appellant with increasing animosity.

The state argued Milledge told Appellant to leave early in the encounter and therefore Appellant was at fault in bringing on the difficulty when he refused to leave. While it was disputed whether Milledge asked Appellant to leave early on, even if true, Appellant's failure to instantly do so does not make him at fault in bringing on the difficulty. Appellant testified that as Milledge's aggression continued to escalate, he wanted to leave which was corroborated by his headlights turning on when he started his car as seen in the surveillance footage. However, Appellant believed using his hands to operate the vehicle and taking his eyes off of Milledge even for an instant would expose him to further harm. Appellant was not required to retreat "if by doing so he would increase his danger of being killed or suffering serious bodily injury." See State v. Fuller, 297 S.C. 440, 444, 377 S.E.2d 328, 331 (1989).

Further, it is apparent from Appellant's testimony and the surveillance footage that Appellant actually was in imminent danger of losing his life or sustaining serious bodily injury. The footage shows Milledge brandishing and threatening Appellant with a gun during the confrontation. Milledge's act of lifting his shirt to show Appellant the black object concealed on his waistband is almost universally recognized as a signal that one is armed. When Appellant fired the fatal shots, Milledge, who again Appellant knew was armed, was charging at Appellant. Accordingly, Appellant actually was in imminent danger and the circumstances were such as would warrant a man of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. However, even if Appellant was not in actual danger, based on Milledge's words and actions coupled with Milledge's prior threat and his

reputation for violence, it was reasonable for Appellant to believe he was in such imminent danger and a reasonable man of ordinary firmness and courage would have entertained the same belief.

Under the common law principles, Appellant was entitled to step out of his car and strike the fatal blow in order to prevent Milledge from “getting the drop on him,” and even if Milledge did not appear to have a gun raised in the moment Appellant shot, Appellant was permitted to judge Milledge’s actions more harshly based on his prior threat and reputation. See State v. Starnes, 340 S.C. 312, 531 S.E.2d 907 (2000); State v. Day, 341 S.C. 410, 535 S.E.2d 431 (2000); State v. Rash, 182 S.C. 42, 188 S.E.2d 435 (1936).

The above analysis proves that Appellant was entitled to immunity pursuant to the common law principles of self-defense. However, for purposes of argument, even if Appellant’s claim failed in one or more respects, he was still entitled to immunity pursuant to § 16-11-440(A) and § 16-11-440(C). Section 16-11-440(A) is applicable in this case and provides the Act’s strongest protections:

A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:

- (1) against whom the deadly force is used **is in the process of unlawfully and forcefully entering**, or has unlawfully and forcibly entered a dwelling, residence, or **occupied vehicle**, or if he removes **or is attempting to remove another person against his will from** the dwelling, residence, or **occupied vehicle**; and
- (2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.

(emphasis added). Appellant testified that Milledge demanded Appellant get out of his car and fight and pulled on his door handle in an effort to get Appellant out of the vehicle. Appellant described how Milledge became increasingly frustrated that Appellant would not get out of the car, which was

corroborated by Milledge's actions as seen in the surveillance footage demonstrating his escalating aggression, including his act of brandishing a gun. Appellant testified that it was his belief Milledge intended to forcibly remove him from the car as Milledge came toward him "with steam" immediately prior to Appellant making the decision to shoot. This is also corroborated by the surveillance footage which shows Milledge approaching Appellant's vehicle with aggression immediately before Appellant fired. These facts fall squarely within subsection (A) of the Act, which states, even in the absence of an obvious attack, that the act of attempting to remove an individual against his will from his vehicle creates a presumption of reasonable fear of imminent death or great bodily injury such that the individual can use deadly force against his assailant. Appellant proved by a preponderance of the evidence that he was entitled to immunity pursuant to § 16-11-440(A).

Although Appellant proved by a preponderance of the evidence that he was entitled to immunity pursuant to the common law principles of self-defense and § 16-11-440(A), Appellant also proved he was entitled to immunity pursuant to § 16-11-440(C), which states:

A person who is not engaged in an unlawful activity and who is attacked in another place where he has the right to be, including, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground **and meet force with force, including deadly force**, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60.

(emphasis added). This portion of the Act specifically does away with any common law duty to retreat so long as an individual can prove he was attacked while acting lawfully in a place he had a right to be. There has been no claim by the state that Appellant was acting unlawfully at the time of his fatal encounter with Milledge, and Appellant was in a place where he had a right to be as he was sitting in his car in the parking lot of the pool room. Factually consistent with findings of immunity in cases like State v. Douglas, 411 S.C. 307, 768 S.E.2d 232 (Ct. App.

2014), and State v. Jones, 416 S.C. 283, 786 S.E.2d 132 (2016), Appellant had a right to use deadly force in the face of an attack by an intoxicated Milledge, who was determined to fight and was armed with a gun. Appellant's use of a gun to combat the threat of an armed attack by Milledge was a proper "force for force" response to end the assault and prevent death or great bodily injury to himself. Appellant had no duty to retreat pursuant to the Act. Accordingly, Appellant proved by a preponderance of the evidence that he was entitled to immunity pursuant to § 16-11-440(C).

Respectfully, this Court should grant rehearing, hold the trial court abused its discretion by denying Appellant immunity, and reverse Appellant's conviction.

Evidence of Suicide Attempt

Appellant also argued on appeal that the trial court abused its discretion by admitting evidence that Appellant allegedly attempted suicide in the moments before he was taken into custody since, pursuant to State v. Cartwright, 425 S.C. 81, 819 S.E.2d 756 (2018), the state failed to prove an unmistakable nexus existed by clear and convincing evidence linking the suicide attempt to a guilty conscious derivative of the offenses for which Appellant was being tried, and since any probative value of the evidence was substantially outweighed by the danger of unfair prejudice pursuant to Rule 403, SCRE.

This Court held the trial court did not abuse its discretion by admitting the attempted suicide evidence. The Court determined that while "there is no testimony that conclusively established why Jones [Appellant] shot himself, his own actions and statements demonstrate 'an unmistakable nexus exists by clear and convincing evidence linking the suicide attempt to a guilty conscience derivative of' the offenses for which Jones was on trial." This Court reasoned that if Appellant believed he acted in self-defense in shooting Milledge, "there was no need for

him to flee the scene with his weapons and ammunition, hunker down, and engage law enforcement in a shootout.” The Court also emphasized that there was no evidence to suggest Appellant was suicidal on the day he killed Milledge or that Appellant had made any statements suggesting he was suicidal before his shootout with law enforcement. Finally, this Court held the trial court did not abuse its discretion by finding the probative value of Appellant’s suicide attempt and statements was not substantially outweighed by the danger of unfair prejudice.

For the reasons that follow, Appellant respectfully requests this Court grant rehearing and hold the trial court abused its discretion by admitting evidence of Appellant’s alleged suicide attempt.

Suicide attempt evidence “is fraught with the potential for extreme prejudice” and “the admission of such evidence should be approached with the utmost caution.” Id. Consequently, before admitting such evidence, the “trial court shall determine whether the State has proven that: (1) a jury could reasonably find that a suicide attempt occurred; (2) the defendant was aware of the occurrence of the alleged crimes at the time of the suicide attempt; and (3) an unmistakable nexus exists by clear and convincing evidence linking the suicide attempt to a guilty conscience derivative of the offense for which the defendant is on trial.” Id. at 92, 819 S.E.2d at 761-62. “Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established.” In re Dickey, 395 S.C. 336, 354, 718 S.E.2d 739, 748 (2011) (internal citation omitted). “If the trial court concludes that the three factors have been established, the evidence is relevant and may be admitted, subject to a Rule 403, SCRE analysis. The suicide attempt evidence may be admitted only when all three factors have been met, and the evidence survives a Rule 403 analysis.” Id. at

92, 819 S.E.2d at 762. In light of this “rigorous framework,” suicide attempt evidence “will rarely be admitted.” Id. at 93, 819 S.E.2d at 762.

In Cartwright, the appellant was charged with molesting his daughter and two stepdaughters. While he was detained prior to trial, Cartwright attempted to commit suicide. Id. at 89, 819 S.E.2d at 760. During his testimony, Cartwright offered the following explanation as to why he attempted suicide: “I turned myself in. I’d been there for 30 days. I couldn’t get a bond. I was charged with the most heinous crimes that somebody could ever think about being charged with . . . I’m in my cell with all these things on my mind, and then the daughter that I loved . . . hates me so much because I had her husband . . . locked up . . . and she held a grudge against me, and they come and served me ten warrants . . . At that time I didn’t feel I wanted to live anymore.” Id. While noting the “case presents a close question,” our Supreme Court held evidence of Cartwright’s suicide attempt was admissible. Id. at 93, 819 S.E.2d at 762. The Court emphasized that prison staff found Cartwright hanging in his cell on the same day Cartwright was served with additional warrants and that Cartwright admitted he attempted suicide after he became aware of the new charges. Id. The record also showed that Cartwright had previously threatened to commit suicide if his daughter or stepdaughters “told anyone about the sexual abuse.” Id. The Court held the “fact that Cartwright acted on his threat and attempted suicide enhances the probative value of the evidence.” Id. The Court concluded evidence of Cartwright’s suicide attempt was relevant, that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, and thus properly admitted. Id.

In this case, the state failed to establish “an unmistakable nexus exists by clear and convincing evidence linking” Appellant’s suicide attempt to a guilty conscience derivative of the offenses for which Appellant was on trial, the alleged murder of Milledge and attempted murder

of Captain Florida. Appellant attempted to commit suicide after being followed by and ultimately fired upon by law enforcement. Such actions by law enforcement suggested they did not believe Appellant acted in self-defense when he shot Milledge and further indicated Appellant faced imminent incarceration at best and death by law enforcement at worst.

Appellant's suicide attempt is not evidence of a guilty conscience from having to defend himself against Milledge or law enforcement. First, Appellant's encounter with law enforcement served as a break in the causal chain between Appellant shooting Milledge in self-defense and his suicide attempt where almost an hour passed between when Appellant shot Milledge and when he attempted suicide, particularly where Appellant did not attempt suicide during that hour. Second, Appellant testified at the pretrial immunity hearing that he shot Milledge out of necessity and not out of malice which is incongruous with a guilty conscience. Appellant freely testified that he shot Milledge in self-defense and only shot at law enforcement after he was shot and wounded by Captain Florida. Appellant's ability to testify about shooting Milledge and at law enforcement and his justification for doing so is contradictory to a guilty mind. Accordingly, the state failed to establish an "unmistakable nexus" linking Appellant's suicide attempt to a guilty conscience derivative of the offenses for which Appellant was tried.

Additionally, any probative value of Appellant's suicide attempt was substantially outweighed by the danger of unfair prejudice. The evidence has no probative value because it does not make it more or less probable that Appellant shot Milledge or at Captain Florida with malice. The only permissible use of suicide attempt evidence pursuant to Cartwright is to prove a guilty conscience where there is evidence of an unmistakable nexus between the suicide attempt and the offenses for which the defendant is on trial. As argued above, no such nexus exists in this case. Accordingly, the evidence has no probative value. However, the evidence was extremely

prejudicial to Appellant. Suicide is considered morally reprehensible in many different religions and cultures. As our Supreme Court recognized in Cartwright, such evidence is “fraught with the potential for extreme prejudice.” 425 S.C. at 91, 819 S.E.2d at 761. There is a reasonable probability that the evidence Appellant attempted suicide may have led the jury to convict Appellant on an improper basis, namely an emotional one. Consequently, it should have been excluded pursuant to Rule 403.

Respectfully, this Court should grant rehearing, hold the trial court abused its discretion by admitting evidence of Appellant’s suicide attempt, and reverse Appellant’s conviction.

Self-Defense Jury Instruction

Appellant also argued on appeal that the trial court abused its discretion by failing to tailor the self-defense instruction to adequately reflect the facts and theories presented by Appellant, specifically that Appellant was not required to wait until his assailant got the drop on him, that he had the right to act under the law of self-preservation and prevent his assailant from getting the drop on him, since the charge was supported by the evidence and was crucial to the jury’s understanding of the law on self-defense.

This Court held the trial “court properly declined to give [Appellant’s] requested charge verbatim and correctly addressed the substance of the law, including the legal tenet that ‘one who acts in self-defense may act on appearances.’” Op. at 52. The Court emphasized that the charge included language instructing the jury that the law does not hold a defendant to a “refined assessment of the danger” and that a defendant may even be mistaken in his perception of the danger. Op. at 52. Finally, this Court concluded the “evidence at trial simply did not support a jury charge instructing that a defendant ‘doesn’t have to wait until his assailant gets the drop on him.’” Op. at 52.

For the reasons that follow, Appellant respectfully requests this Court grant rehearing and hold the trial court abused its discretion by failing to instruct the jury that Appellant was not required to wait until his assailant got the drop on him and that he had the right to act under the law of self-preservation and prevent his assailant from getting the drop on him.

Respectfully, this Court again improperly weighed the evidence and applied an incorrect standard of review in determining the trial court properly denied Appellant's request to charge. See Op. at 52. "When reviewing the circuit court's refusal to deliver a requested jury instruction, appellate courts *must* consider the evidence *in a light most favorable to the defendant*." State v. Williams, 400 S.C. 308, 314, 733 S.E.2d 605, 608-09 (Ct. App. 2012) (citing State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 512-13 (2000)) (emphasis added). "If there is *any* evidence in the record from which it could reasonably be inferred that the defendant acted in self-defense, the defendant is entitled to instructions on the defense, and the [circuit court's] refusal to do so is reversible error." Id. at 314, 733 S.E.2d at 609 (quoting State v. Day, 341 S.C. 410, 416-417, 535 S.E.2d 431, 434 (2000)) (alteration in original) (emphasis added).

This Court stated, "Decedent was not charging at Jones, had no weapon drawn, and was not endangering anyone when Jones chose to get out of his car and shoot the Decedent twice before fleeing the scene." Op. at 52. The Court also determined the footage suggested "Decedent was not attempting to forcibly (or otherwise) enter Jones's vehicle or remove Jones from it and was not pointing—or in possession of—any weapon." Op. at 52. Respectfully, these findings are this Court's perception of the surveillance footage. However, the footage also reasonably supports Appellant's testimony.

Appellant testified that toward the end of the confrontation, Milledge began to walk back toward the front door of the pool room. See State's Exhibit No. 14 (Pool Room Video).

Appellant was hopeful that he was finally going back inside. R. 1157, ll. 20-24. However, Milledge spun on his heels and headed back toward Appellant's car. See State's Exhibit No. 14 (Pool Room Video). After motioning aggressively with his arms and hands for Appellant to leave, Milledge continued to walk aggressively toward Appellant's car. See State's Exhibit No. 14 (Pool Room Video). Appellant reasonably believed Milledge was armed and could not see Milledge's right hand. R. 1162, ll. 7-10. When Milledge began to turn the corner toward Appellant's car, Appellant got out of the car and fired twice striking Milledge. See State's Exhibit No. 14 (Pool Room Video).

As seen, before waiting for Milledge to "get the drop on him," Appellant shot him in self-defense. Consequently, in the light most favorable to Appellant, there was evidence to support the requested instruction. As our Supreme Court stated in State v. Day, "A self-defense charge is erroneous where the trial court fails to charge on elements of the defense which were applicable to the issues raised by the defendant." Day, 341 S.C. 410, 418, 535 S.E.2d 431, 435 (2000) (citing State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989)).

Additionally, unlike this Court held, the instruction on a defendant's right to act on appearances did not adequately cover the law. The right to act on appearances charge was supported by Appellant's testimony that he reasonably believed Milledge was armed after Milledge earlier displayed a gun and lifted his shirt to display a firearm on his waistband, particularly given the state's theory that Milledge was merely displaying a cell phone. The instruction the trial court refused to charge, that a defendant does not have to wait until his assailant gets the drop on him, was supported by Appellant's testimony and the surveillance footage which showed Milledge charging back toward the driver's side of Appellant's car where Appellant was located. It was crucial for the jury to understand that Appellant did not have to

wait until Milledge drew a firearm or began to pull Appellant out of the car, before Appellant acted in self-defense.

Since the trial court failed to charge an important element of self-defense relevant to Appellant's account of what occurred, respectfully, this Court should grant rehearing, hold the trial court abused his discretion by failing to properly tailor the self-defense instruction, and reverse Appellant's conviction.

Based on the foregoing, Appellant respectfully requests this Court rehear his case pursuant to Rule 221(a), SCACR, due to the significant legal and factual points overlooked and/or misapprehended by this Court in affirming Appellant's conviction and sentence.

Respectfully Submitted,



Lara M. Caudy
Senior Appellate Defender

ATTORNEY FOR APPELLANT

This 25th day of June, 2026.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Edgefield County

Honorable Walton J. McLeod, IV, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

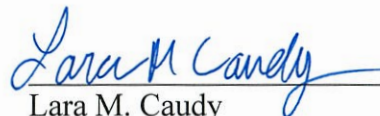
BARRY WAYNE JONES,

APPELLANT

APPELLATE CASE NO. 2022-000046

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above referenced case has been served upon R. Brandon Larrabee, Esquire, at his primary email address listed in the Attorney Information System (AIS), this 25th day of June, 2026.



Lara M. Caudy
Senior Appellate Defender

ATTORNEY FOR APPELLANT

The South Carolina Court of Appeals

The State, Respondent,

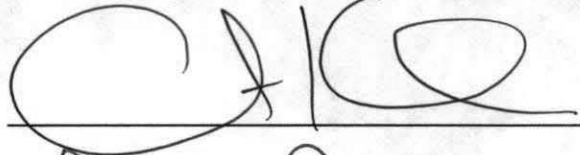
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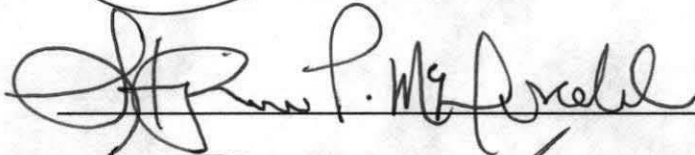
Barry Wayne Jones, Appellant.

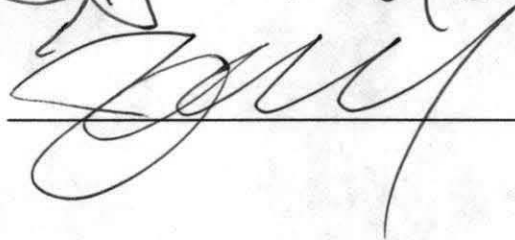
Appellate Case No. 2022-000046

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 J.

 J.

 J.

Columbia, South Carolina

cc:

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The Honorable Walton J. McLeod, IV

FILED
Aug 24 2026