THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of General Sessions

The Honorable Diane S. Goodstein, Circuit Court Judge

Appellate Case No. 2012-213026

The State.....Respondent,

v.

Jabari Linnen .....Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUE ON APPEAL

Whether the trial court erred in denying Defendant's Request to Charge Number 4 on the "Protection of Persons and Property Act," S.C. Code § 16-11-410 *et seq.*, providing that a person has no duty to retreat from a vehicle and has the right to use force, including deadly force, when he reasonably believes such force is necessary to prevent the commission of a violent crime, when Appellant presented evidence that he exited his vehicle and fired shots at the alleged victim in the area immediately outside his vehicle, in response to threats of imminent violence and based upon his reasonable belief that the alleged victim was reaching for a weapon immediately prior to the shooting, such that he had no duty to retreat?

STATEMENT OF THE CASE

Appellant was indicted by the Beaufort County grand jury on one count of attempted murder and one count of possession of a firearm during the commission of a violent crime. Indictment pp. 1-2, 4-5. On September 18, 2012, Appellant proceeded to a jury trial before the Honorable Diane S. Goodstein. Tr. 1. Jim Brown represented Appellant and Sean P. Thornton represented the State. *Id.*

At the conclusion of the trial on September 21, 2012, the jury found Appellant not guilty of attempted murder, guilty of the lesser-included offense of assault and battery of a high and aggravated nature, and guilty of possession of a firearm during the commission of a violent crime. Tr. 658, ln. 22—p. 659, ln. 10. Judge Goodstein sentenced Appellant to twenty years imprisonment for the aggravated assault and battery of a high and aggravated nature charge and five years concurrent for the weapon charge. Tr. 685, ln. 21—p. 686, ln. 4.

This appeal follows.

RELEVANT FACTS

A. The Alleged Crime

On April 21, 2011, Appellant was riding down Luther Warren Drive on St. Helena Island in the passenger seat of his own vehicle. Tr. 344, ln. 23—p. 346, ln. 2. Appellant's friend, King David Williams, was driving because Appellant's license was under suspension. *Id.*; Tr. 520, lns. 4-10. Appellant's pregnant girlfriend, Desiree Blanding, was in the backseat of the car. Tr. 518, lns. 23-25. Appellant and Williams were driving Blanding home from school when they approached a stop sign on the corner of Luther Warren and Seaside Road. Tr. 548, lns. 2-6. They observed the alleged victim, Kenneth Treyvon Nichols, near a large oak tree at the corner. Tr. 346, lns. 9-19; 548, lns. 2-13.

Appellant presented testimony that Appellant and Nichols had been "beefing" since high school. Tr. 383, lns. 5-17; 384, lns. 2-6. Nichols, who was unemployed, often sat at the oak tree, and Nichols routinely made threatening comments to Appellant as Appellant drove by the tree. Tr. 362, lns. 18-22; Tr. 526, lns. 15-23. On previous occasions, Nichols threw glass bottles into the street as Appellant's car was approaching the intersection and ran up to Appellant's car and kicked the door as Appellant drove past. Tr. 368, lns.2-9; Tr. 524, ln. 19—p. 525, ln. 24. Appellant presented testimony that Nichols had a reputation in the community for fighting and violence. Tr. 372, lns. 12-18; Tr. 523, lns. 3-19. In addition to his reputation, Appellant presented evidence that Nichols had been arrested for several incidents of violence in the months and years prior to the shooting, including battery of his grandfather and assault of his grandmother and mother. Tr. 311, ln. 3—p. 312, ln. 11. Appellant was aware of Nichols' reputation for violence and Nichols' frequent interactions with police. Tr. 522, ln. 21—p. 523, ln. 16; 530, lns. 19-24.

As Appellant and Williams drove by Nichols on April 21, 2011, Nichols directed threatening words towards Appellant. Tr. 365, ln. 6—p. 366, ln. 13; Tr. 337, lns. 3-5. Williams testified that he believed Nichols wanted to fight Appellant. Tr. 365, ln. 6—p. 366, ln. 13. Williams further testified that Nichols is physically much bigger than Appellant. Tr. 370, lns. 10-14. Appellant testified that he was afraid of Nichols. Tr. 530, lns. 9-18.

After dropping Blanding off, Appellant and Williams approached the corner where Nichols was sitting a second time, from the opposite direction. Tr. 548, lns. 17-21. As Appellant's car came to a stop at the stop sign, Appellant and Williams testified that Nichols aggressively approached Appellant's vehicle, and began cursing at Appellant and calling him names. Tr. 301, lns. 3-6; 307, lns. 11-22; 549, lns. 3-4. More specifically, Appellant testified that Nichols repeatedly stated, '[t]his is my hood, nigga. What the fuck you doing around here? This ain't your turf." Tr. 548, ln. 18—p. 549, ln. 2. When he reached Appellant's car, Nichols threw a soda can into Appellant's car, striking Appellant. Tr. 301, lns. 7-11; 347, ln. 10—p. 348, ln. 9; Tr. 335, ln. 14—p. 336, ln. 15; Tr. 549, lns. 3-10. Williams testified that Nichols then told Appellant, "get out of the car, pussy." Tr. 383, 18-23.

Appellant exited his vehicle and began to circle the car, intending to speak to Nichols and to confront him regarding throwing the soda can in his car and to ask him why he continued to harass him and his girlfriend's family when they drove or walked by that corner. Tr. 348, ln. 2—349, ln. 20; 549, lns. 8-15; Tr. 554, ln. 22—p. 555, ln. 2. Appellant remained very close to the vehicle. Tr. 349, lns. 1-15. In response, Nichols quickly approached Appellant where they met immediately outside the vehicle on the driver's side and continued to argue. Tr. 363, ln. 19—p. 365, ln. 5; 388, lns. 7-13. Nichols was hostile

and motioning with his arms. *Id.*; 303, lns. 7-13. Nichols was wearing baggy sweat pants with his hands near his waist. Tr. 372, ln. 19—p. 373, ln. 5.

As he approached Appellant at the car, Nichols made the statement, "[y]o, sup nigga, so you ready to die, nigga?" Tr. 549, lns. 16-24. Appellant saw Nichols reach inside the waist of his pants, presumably for a weapon. Tr. 563, ln. 3—p. 565, ln. 2. In fear for his life, Appellant removed a handgun from his waist behind his back and began to shoot Nichols. Tr. 549, ln, 20—p. 550, ln. 18; 552, lns. 17-22; 574, lns. 12-20. Nichols was shot several times in the thigh, arm, and torso. Tr. 306, lns. 19-20. Appellant turned himself in the following day.

A Beaufort County grand jury indicted Appellant on one count of attempted murder and one count of possession of a firearm during the commission of a violent crime. Indictment pp. 1, 3.

B. Appellant's Requested Jury Instruction

The case proceeded to jury trial on September 18-21, 2012. Following closing arguments by counsel, the Court instructed the jury panel on the law of the case, including common law self-defense. Although requested by Appellant's trial counsel as Defendant's Request to Charge Number 4, the Court refused to instruct the jury of the effect of the "Protection of Persons and Property Act," S.C. Code § 16-11-410 *et seq.*, on Appellant's duty to retreat following an attack in an occupied vehicle.[1] *See* Court's Exhibit 2.

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[1] Appellant's Request to Charge 4, titled "Right to Stand Your Ground," reads: "The Castle Doctrine, which recognizes that a person's home is his castle has been extended to include an occupied vehicle. Residents and visitors of South Carolina have the right to remain unmolested and safe within their vehicles. A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be has no duty to retreat and has the right to stand his ground and meet force with force, including

Appellant's counsel timely objected to the Court's refusal to instruct the jury on Request to Charge Number 4. Tr. 646, ln. 24—p. 647, ln. 10. The Court overruled the objection and the application of the Castle Doctrine to the facts of the case, stating:

> ... [L]et me just say that I do not believe that the Castle Doctrine, with regards to the vehicle, applies to these facts. Given the dictates of the Castle Doctrine, give the facts of this matter that there was the Coke can that was thrown, and then this gentleman chose to get out of his car while on the public way, get out of the car, walk around the car, and walk towards the alleged victim and begin shooting. I don't believe that this is what is contemplated by the Castle Doctrine. We will know one day, because it is a developing theory, so we will know.

Tr. 647, ln. 25—p. 648, ln. 9.

C. Appellant's Conviction

Following jury instructions, the jury deliberated for nearly three hours before reaching a verdict of not guilty of attempted murder, guilty of the lesser-included offense of assault and battery of a high and aggravated nature, and guilty of possession of a firearm during the commission of a violent crime. Tr. 658, ln. 22—p. 659, ln. 10. The court sentenced Appellant to twenty years imprisonment for the assault and battery of a high and aggravated nature charge and five years for the possession of a firearm during the commission of a violent crime charge, to run concurrently. Tr. 685, ln. 21—p. 686, ln. 4.

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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 crime." *See* Court's Exhibit 2.

ARGUMENT

The judge erred by refusing to instruct Appellant's Request to Charge Number 4 on the "Protection of Persons and Property Act," S.C. Code § 16-11-410 *et seq.* ("the Statute"), because the request was a correct statement of law and was supported by facts in evidence. The Statute was intended to extend the common-law Castle Doctrine to occupied vehicles and thus provide citizens with the ability to protect themselves with deadly force and avoid the need for retreat when attacked in their vehicles. Appellant presented evidence that he was attacked by the alleged victim while inside his vehicle, exited the vehicle to confront him without violence, and began to shoot only after the alleged victim threatened Appellant's life and appeared to be reaching for a weapon in the area immediately outside Appellant's vehicle. Under these circumstances, Appellant was entitled to a jury instruction consistent with the Statute, as Appellant was attacked inside his vehicle and confronted the threat in a protectable area outside his vehicle. Thus, Appellant was entitled to the presumption of reasonable fear of imminent danger absolving him of the duty to retreat.

A. The Trial Court Commits Error by Failing to Give a Requested Charge on a Correct Statement of Law that is Raised by the Evidence.

The trial court is required to charge the correct law applicable to the case. *State v. Rayfield*, 369 S.C. 106, 119, 631 S.E.2d 244, 251 (2006); *State v. Mattison*, 388 S.C. 469, 478-79, 350 S.C. 252, 261, 565 S.E.2d 298, 302 (2002). When a party requests the trial court charge a correct and applicable principle of law, the court must charge it. *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011). When reviewing a challenge to the court's refusal to use the specific language in a request to charge, the appellate court

must consider the charge as a whole in evaluating whether the trial court charged the correct law applicable to the case. *Id.* at 549, 713 S.E.2d at 603.

The law to be charged to the jury is determined by the evidence presented at trial. *State v. Gaines*, 380 S.C. 23, 31, 667 S.E.2d 728, 732 (2008). The trial court has a duty to give a requested instruction that is supported by the evidence and correctly states the law applicable to the issues. *State v. Peer*, 320 S.C. 546, 553, 466 S.E.2d 375, 380 (Ct. App. 1996). If there is any evidence to support a jury charge, the trial judge should give a requested charge on the matter. *State v. Burriss*, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999).

The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand constitutes an error of law. *State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 167 (2007); *see also State v. Peay*, 321 S.C. 405, 410, 468 S.E.2d 669, 672 (Ct. App. 1996) (holding that the refusal by the Court to charge the requested charge was an abuse of discretion in that it was error to omit applicable statutory law for the circumstances raised by evidence). On review of a jury charge, an appellate court considers the charge as a whole in view of the evidence and issues presented at trial. *Welch v. Epstein*, 342 S.C. 311, 536 S.E.2d 408, 425 (Ct. App. 2000).

B. Appellant Was Entitled to a Jury Charge on the Protection of Persons and Property Act as it Applied to His Duty to Retreat Before Using Force.

Appellant's counsel properly requested a jury charge on the Protection of Persons and Property Act because Appellant presented evidence that he was attacked inside his vehicle and used force in self-defense in an protectable area immediately outside the vehicle.

Under the common law of self-defense, a defendant is required to retreat if he has "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 [the] particular instance." *State v. Wiggins*, 330 S.C. 538, 545, 500 S.E.2d 489, 493 (1998). Unless the incident occurs in the accused's home or business or on the curtilage thereof, the accused generally has a duty to retreat. *Id.* at 548 n. 15, 500 S.E.2d at 494 n. 15.

By enacting the Protection of Persons and Property Act, the General Assembly intended "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 § 16-11-420(A). More specifically, the Statute provides 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 § 16-11-420(E). Therefore, the Statute expressly modifies the common law of self-defense by absolving a defendant from the duty to retreat before using force when attacked in an occupied vehicle.

Appellant's Request to Charge 4 correctly stated the law under the Statute as it applied to the duty to retreat from an occupied vehicle, and Appellant was entitled to that charge. *See* Court's Exhibit 2, Request to Charge 4. Appellant was threatened and attacked by Nichols while in the passenger seat of his own, occupied vehicle. Appellant presented evidence that Nichols approached Appellant's vehicle and forcefully entered the vehicle by throwing a soda can inside, striking the Appellant. Appellant was not at fault at bringing about this confrontation; the attack occurred while Appellant's vehicle was stopped at a stop sign at a place he had a legal right to be. Appellant presented

testimony that he peaceably exited his vehicle in order to repel the attack by Nichols, and the shooting occurred immediately outside Appellant's vehicle only after Nichols threatened Appellant's life, aggressively approached Appellant, and appeared to be reaching inside his pants for a weapon.

Although the trial court properly instructed the jury on the law of self-defense,[2] the court refused Appellant's requested charge on the additional protections afforded those attacked in occupied vehicles provided by the Statute, on the grounds that Appellant exited the vehicle before the shooting at issue occurred. *See* Tr. 647, ln. 25—p. 648, ln. 9. However, both the common law Castle Doctrine and the language of the Statute itself suggest that Appellant was within the intended scope of the law when he exited his vehicle to confront Nichols' threat. Appellant submits that occupied vehicles have a protectable curtilage within which there is no duty to retreat once the allege victim has forcibly entered the defendant's property, just as for dwellings and places of business.

In *Wiggins*, the Court noted, with respect to the common law of self-defense when protecting one's place of business, that, "consistent with this 'curtilage rule,' the absence of a duty to retreat on one's place of business applies to the business parking lot." *Wiggins*, 330 S.C. at 548 n. 15, 500 S.E.2d at 494 n. 15. (*citing Brooks*, 252 S.C. 504, 167 S.E.2d 307 (holding that if business proprietor was exercising good faith attempt to eject and was assaulted, he would have no duty to retreat, thus holding that self-defense

[2] The trial court instructed the jury on the common law duty to retreat prior to engaging self-defense: "And the final element of self-defense is that the defendant had no other possible way to avoid the danger of death or serious bodily injury than to act as the defendant did in this particular instance. By this, I mean the defendant need not retreat in order to avoid the need for deadly force if it is not possible or did not reasonably appear possible to retreat without danger of being killed or suffering serious bodily injury." Tr. 642, lns. 5-12.

applied to a shooting occurring in a parking lot outside the defendant's tavern)). In that case, the defendant presented evidence that he shot and killed the alleged victim in the parking lot outside his motel in self-defense after the alleged victim refused to leave and threatened the defendant with a gun. The Court agreed with Wiggins that he had no duty to retreat under these circumstances, as the protectable curtilage of the motel extended to its parking lot. *Id.*

Similarly, in this case, Appellant presented testimony that he was attempting in good faith to repel Nichols from further attacking him inside his own vehicle, and he did so by exiting the vehicle, circling to the side where Nichols was standing, and attempting to speak with Nichols. Appellant only fired shots at Nichols when Nichols aggressively approached Appellant and his vehicle, threatened Appellant's life, and appeared to be reaching for a weapon. Appellant had no more apparent ability to retreat from the area immediately outside his vehicle than he would have had inside his vehicle, and thus, like in *Wiggins*, Appellant should not have a duty to retreat before using force to meeting the alleged victim's threat.

Appellant concedes that this situation arguably differs from *Wiggins* in that the confrontation occurred not in a business parking lot, but in the public roadway immediately outside Appellant's vehicle.[3] However, Appellant respectfully submits that

[3] Appellant notes that the Court has not expressly ruled on the issue of whether a public area can constitute the curtilage of a protected area, but leaves open the instant question of whether a Castle Doctrine instruction is appropriate under such circumstances. *See State v. Dickey*, 394 S.C. 491, 716 S.E.2d 97 (2011) ("We do not think it necessary to determine whether curtilage can extend to a public sidewalk, because we find the State failed to disprove beyond a reasonable doubt that Petitioner had no other probable means of avoiding the danger.").

the absence of the defendant's duty to retreat in *Wiggins* when attacked attempting in good faith to repel the alleged victim from the parking lot immediately outside his place of business is analogous to this case, in which Appellant exited his vehicle in a good faith attempt to repel Nichols from further attack. While Appellant still must satisfy the additional elements of self-defense, the common law duty to retreat is equally inapplicable to the area immediately outside Appellant's vehicle as it is to the area immediately outside the defendant's place of business in *Wiggins*, such that an instruction on the Castle Doctrine is warranted. In both scenarios, the defendant's right to defend his property would be diminished if the obligation to retreat turned on whether he was physically inside his vehicle or place of business, when the threat to his property could be equally serious both inside and immediately outside the protected area.

Indeed, the trial court's ruling on Appellant's requested instruction suggests an interpretation of the Statute which would provide that the Statute never applies when a defendant exits his vehicle in order to repel an attack. Under such an interpretation, a defendant is only entitled to an instruction when the defendant uses self-defense to prevent attack when physically inside his vehicle. However, the plain language of the Statute suggests that Appellant need not have been physically inside his vehicle at the time of his act of self-defense in order to be absolved of the duty to retreat, so long as he was responding to a forceful intrusion into the vehicle.

The Statute imposes a presumption in which the defendant need not retreat under the following circumstances: (1) when the alleged victim was "in the process of

unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling, residence, or occupied vehicle; (2) the defendant "removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle"; or (3) the defendant "knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred." S.C. Code § 16-11-440(A). This language suggests that the duty to retreat is absolved both when the alleged victim is actively attempting to enter an occupied vehicle, as well as when the entry has already occurred. This is consistent with the Statute's express purpose to codify the common law Castle Doctrine's protection of persons who use force to expel attackers from being required to retreat in circumstances when, as in *Wiggins*, the alleged victim entered the protected area but was in an area in its immediate vicinity at the time of the attack.

Both the Statute's express language, as well as its express purpose to codify the common law Castle Doctrine, suggest that the evidence presented by Appellant brings him within the scope of the Statute so as to warrant the requested charge. Because Appellant took steps in self-defense after being attacked inside his own vehicle, he falls within the language providing a presumption of fear absolving the duty to retreat, regardless of whether he exited the vehicle to address that threat.

Finally, because penal statutes are construed against the State and in favor of the defendant, *see Hair v. State*, 305 S.C. 77, 406 S.E.2d 332 (1991), any doubt concerning the application of the Statute to Appellant should have been resolved in favor of giving the requested charge. As such, the trial court's refusal to charge the jury on Appellant's Request to Charge 4 was in error.

C. The Trial Court's Error in Refusing Appellant's Request to Charge Was Material, Prejudicial, and Not Harmless.

The State may argue that if the trial court's refusal to charge the jury on the Statute was in error, it was harmless error. "An error is not reversible unless it is material and prejudicial to the substantial rights of the appellant." *Visual Graphics Leasing Corp., Inc. v. Lucia*, 311 S.C. 383, 389, 429 S.E.2d 839, 841 (Ct. App. 1993). Error is harmless where it did not contribute to the verdict obtained. *State v. Pagan*, 369 S.C. 212, 212, 631 S.E.2d 262, 267 (2006) (citation omitted). No definite rule of law governs finding an error harmless; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. *State v. Gillian*, 360 S.C. 433, 454-55, 602 S.E.2d 62, 73 (Ct. App. 2004) (*citing State v. Reeves*, 301 S.C. 191, 391 S.E.2d 241 (1990)); *State v. Mitchell*, 286 S.C. 572, 336 S.E.2d 150 (1985); *State v. Curry*, 380 S.C. 674, 636 S.E.2d 649 (Ct. App. 2006).

In this case, the trial court's refusal to give the requested instruction on the Protection of Persons and Property Act was material and prejudicial because the State's primary argument against self-defense was that the Appellant exited his vehicle before the shooting occurred and did not retreat. Indeed, the State's closing statement began:

> When Jabari got up and testified, he didn't testify that he told King David to drive off either, did he? Now, why didn't he? Because he wanted to go harm him. Why else would you get out of a car with a gun that you're not even supposed to have?

Tr. 611, lns. 10-14. Throughout the closing argument, the State made similar statements in arguing that Appellant is not entitled to self-defense because he exited the vehicle before shooting Nichols. *See* Tr. 611-619. The State essentially argued that Appellant's

exit of the vehicle was fatal to his self-defense claim and particularly to his duty to retreat, and the jury's verdict suggests that the jury accepted the same.

However, had the jury been instructed on the Protection of Persons of Property Act, it could have considered whether Nichols' attack of Appellant while Appellant was in the vehicle, coupled with his death threat and apparent reach for a weapon when Appellant exited the vehicle, absolved Appellant of his duty to retreat and supported his claim of self-defense. Pursuant to the court's instruction on common law self-defense, the jury had to determine the reasonableness of Appellant's fear of imminent danger before he was entitled to the use of force, but the Castle Doctrine, as codified by the Statute, provides Appellant with a presumption of reasonableness because the attack occurred in his vehicle.

The trial court's refusal to give Appellant's requested instruction surely affected the jury's analysis of Appellant's duty to retreat and denied Appellant the right to have the jury hear the potential effect of the Statute on Appellant's claim of self-defense. As there was no material factual dispute that Appellant shot Nichols in response to his threatening statements and attack while in his vehicle, the duty to retreat element of self-defense alone was likely determinative of this case. Therefore, the trial court's error in refusing the instruction is not harmless, and Appellant should be granted a new trial with the benefit of Appellant's requested instruction.

CONCLUSION

For the reasons stated herein and in any oral argument on this matter, Appellant Jabari Linnen respectfully requests a new trial.

This 2nd day of January, 2014.

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