STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FLORENCE COUNTY
D. Craig Brown, Circuit Court Judge

Appellate Case No. 2014-001391

THE STATE, ...RESPONDENT

v.

DAMON ELLIS MOODY .....APPELLANT.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Appellant was indicted on April 3, 2014 by the grand jury for Florence County for three counts of pointing and/or presenting a firearm. He was represented by Rose Mary Parham, Esq. On June 16, 2014, Appellant proceeded to trial by jury. Appellant was found guilty of two charges and acquitted of the third. He was sentenced by the Honorable D. Craig Brown to 5 years imprisonment, suspended to 45 days in prison and probation for two years, concurrent. Appellant timely filed a notice of appeal and subsequently submitted a Brief. This Brief of Respondent follows.

STATEMENT OF FACTS

On June 13, 2013, Jermaine and Jermichael Wright were invited guests at a pool party hosted at the home of Tabitha Durant in Florence County, South Carolina. See e.g. R. 376. Regan Mott is Jermichael Wright's fiancé. R. 400. Tabitha Durant is Ms. Mott's mother. Id. In addition to adults Jermaine Wright, Jermichael Wright, Regan Mott, and Tabitha Durant, children Tyquan, Tyree, Bryant, Reid and Ontario were also in attendance at the pool party. R. 374 – 377. The children ranged in age from four to fifteen. R. 406; 422.

Ms. Durant's family owns the land her trailer is situated on, and she allows Appellant to live in a trailer on that same land. R. 377; 403; 453. Appellant is married to Tabitha Durant's daughter, Rabin. R. 377; 412. During the pool party, Jermichael Wright's dog was running around Ms. Durant's backyard. R. 392; 412. Appellant admits that the situation on June 13 began because he shot a .22 caliber handgun into the ground several times in an apparent attempt to scare away Jermichael Wright's dog from Appellant's dog kennels. Appellant also admitted that he pointed a gun at both Jermaine and Jermichael Wright. Jermaine and Jermichael, along with other party guests, testified that Appellant was angry and they did nothing to cause Appellant to point a gun at them. Appellant asserts that he felt threatened and pointed the gun in self-defense.

Specifically, Jermaine Wright testified that he and his brother, along with a number of children, attended a pool party at Ms. Durant's home. R. 405 - 406. Jermaine testified that he had never met Appellant before. Id. In fact, the first time Jermaine saw Appellant, Appellant was shooting a gun into the ground while standing on the porch of his home. R. 407. Appellant yelled to Jermichael to get his dog or the next round is going in the dog's head. Jermichael asked Appellant not to speak to him like that. R. 413.

Jermichael and Jermaine were on Ms. Durant's porch preparing a grill. R. 406. Jermichael had his dog with him at the party and the dog was running around Durant's yard. Jermichael and Jermaine wore swim trunks. R. 406 - 407. After shooting several rounds, Appellant went inside his home but came back outside and began walking toward Jermaine and Jermichael. R. 407-408. Jermaine testified that he and Jermichael were still standing on Ms. Durant's back porch preparing the grill for cooking when Appellant walked onto Ms. Durant's porch, "got up in my brother's face, and he was like, what you going to do?" R. 408. Jermaine testified that Appellant then got in Jermaine's face and that he and Appellant then started "chest bumping," on the porch at first but later off of the porch and a few feet beside Durant's pool. R. 409; 414. Jermaine testified that Appellant said "I got something for y'all, I got something for y'all, and then that's when [Appellant] walked back inside his house," and he and Jermichael returned to Durant's porch. R. 409. Jermaine then saw Appellant then come back out of his house for a second time with a leash. Appellant retrieved his trained attack dog, Sniper, from his kennel and began walking toward Jermaine and Jermichael. R. 409; 415- 416. After walking toward Jermaine and Jermichael, Jermaine testified that Appellant pulled a gun out of his pocket "and started pointing it at us." R. 410; 414 - 416. The gun had a red laser pointer and Jermaine could see the laser as it landed on them. R. 409 - 411. Jermaine testified that he and Jermichael were on the porch at the time and a few of the children were in the pool. Durant's porch is sex feet from the pool. R. 409 – 410. Jermaine testified that he pulled Jermichael into Durant's house and was trying to get everyone inside. R. 410. Jermaine stated that he never threatened Appellant and that Jermichael called 911 from inside Durant's home while Appellant stood outside the door of the home. R. 411.

Jermichael Wright provided similar testimony. Jermichael, a basketball coach and had practice the morning of June 13, 2013. R. 492-493. One of Jermichael's young players told him they wanted to go swimming, and he knew that his fiancé's mother had a pool, so he asked his fiancé to call her mother and see if they could gather there for a cookout. R. 493. After getting permission from Ms. Durant to bring the children to the pool, Jermichael bought some food and went to Ms. Durant's home where he was an invited guest. R. 492 –493; 497.

Jermichael testified that while the women were preparing the meats to be grilled, he and Jermaine were cleaning the grill on Durant's porch and the children were in the pool. R. 493; 499 - 500. He wore swim trunks. R. 497. At the same time Jermichael's dog, Sire, was running around Ms. Durant's yard. R. 494. Appellant also let two of his dogs out and Appellant's dogs were running around with Sire. R. 497. While Jermaine and Jermichael cleaned the grill, Jermichael testified that he heard and saw Appellant shoot five or six times from the back door of his trailer. R. 493 – 494. Jermichael said Sire ran away from Appellant and the shots and Appellant yelled "get your dog, the next one's going in his f-ing head." R. 498; 507. Jermichael then responded "don't talk to me like that in front of my family." R. 498. Appellant walked back inside his home. R. 498.

Jermichael testified that Appellant then "comes immediately back out." R. 500. While Jermaine and Jermichael were standing on Ms. Durant's porch, Appellant walked up and "said what you going to do and basically gets in my [Jermichael's] face." R. 500. "And once he gets in my face, my brother put his hand, like, in-between us and he was like you need to get out of my brother's face." R. 500. Jermichael then testified that Appellant got in Jermaine's face "close enough to kiss" and the two of them started

"chest bumping like rams." Id. The chest bumping occurred initially on Ms. Durant's porch near the grill but continued off of the porch and around a portion of Ms. Durant's pool. R. 500. Jermichael testified, "[T]he next thing you know, he was like, all right, I got something for y'all, y'all wait right here." R. 500-501. Jermichael testified that Appellant then went into his trailer.

Jermichael stated that he and Jermaine then went back to Ms. Durant's porch when Appellant reappeared from his home with a leash thrown over his shoulder. R. 501. Appellant walked to the kennel and his trained attack dog. Id. Jermichael knew Appellant's dogs and knew that Sniper was the one that Appellant showed in videos of his training. R. 501; 503. "So he goes and gets Sniper, and once he gets Sniper, I'm like what you going to do with the dog, and next thing you know, he just pulls out—he fumbles in his pocket and pulls out the black gun that I saw with the laser on it and puts it on me and my brother" as Appellant approached them. R. 500 – 503. Jermichael testified that Appellant never asked him to take Sire in and had never complained to him about Sire. R. 502. Jermichael escaped inside Durant's home and called 911 while Appellant paced outside with the gun. R. 503 – 505. Jermichael stated he never threatened Appellant or made a move. He simply ran away. R. 505.

Tabitha Durant corroborated the majority of both Wright brothers' testimony. Ms. Durant testified that she had a number of guests at her home for a pool party on June 13, 2013, including the victims and their dogs, and a number of children. R. 454-455. Ms. Durant testified that she focused on the children that were in the pool that day. R. 454. She testified that as she was watching the children, she heard gunfire. Id. She said that when she looked at Appellant's trailer "its Mr. Moody firing a gun into the ground." Id.

Ms. Durant then testified that Appellant then "walked towards my patio, Jermaine and Jermichael Wright were on the back patio, and there was a confrontation." R. 455. Ms. Durant testified that she did not recall every word that was said because her attention was directed to the children in the pool, but she did testify that **Appellant came to her home and her porch and started a confrontation with her guests Jermaine and Jermichael**. R. 455.

Ms. Durant testified that Appellant came out of his home with the pistol in his hand. R. 456. Ms. Durant recalled that Appellant got his dog from the kennel and was walking it around her house. Id. Ms. Durant then testified that Appellant walked toward the pool and told Ontario M., a child that was attending the party that day, that "I will shoot you like I'm going to shoot your cousins." Id. Appellant proceeded around the left side of the pool and Durant told Appellant to go home. R. 456. She testified that she called SLED to advise that Jermichael was known to carry a gun. R. 459.

Ontario M. testified that he was fourteen years old when the events occurred on June 13, 2013. R. 468. Ontario recalled Jermichael's dog running around the yard and that Appellant let two of his dogs out and they were also running around the yard. Appellant "comes back outside and fires gun shots into the ground to the right of his porch" and Jermichael's dog ran away from Appellant and back to them. R. 469. Ontario testified Appellant "says something to Jermichael," and Jermichael responded "don't talk to me like that in front of my family." R. 469. Appellant then went back inside his home. Id. Ontario then saw Appellant come back out of his home and approach Jermaine and Jermichael on the back porch of Ms. Durant's home. R. 470. Ontario observed Appellant, Jermaine and Jermichael start "chest bumping" on the porch and later on the side of

Durant's pool, and he saw Appellant go back to his house after promising to have "something for ya'll." R. 471. Ontario recalled Appellant coming back outside within a few minutes, getting a dog out of the kennel and walking toward the pool. R. 471. Ontario then saw Appellant pull a gun out of his pocket and point it towards Jermichael and Jermaine. R. 471.

Ontario was outside at the pool during this entire episode. R. 471. When Appellant came around to speak with Ms. Durant, Ontario recalled that Appellant pointed the gun at him and said "I'll leave you dead like one of your cousins." R. 472. After pacing around outside with the gun, Ontario remembers Appellant leaving Ms. Durant's home. R. 473.

Regan Mott confirmed the pool party with the children, including her young son, that Jermichael's dog was running around the yard and that all of the dogs were barking. R. 376 – 377. She stated that the dogs were in her mother's yard that joins Appellant's yard and was not aware of prior problems with Jermichael's dog. R. 403. Regan testified that she observed Appellant shooting into the ground from his porch while Jermichael and Jermaine were preparing the grill and prior to the "chest bumping" that occurred beside Durant's grill. R. 379; 383; 397. She said that Jermichael's dog was five feet away and ran away from Appellant when Appellant fired the rounds. R. 379, 396. While she could not hear what was going on initially, Regan testified that she did go outside to check on her child who was in the pool after Appellant stopped shooting into the ground. R. 381. Ms. Mott then saw Appellant on her mother's porch and heard Appellant say "something to the effect of –I have—I got something—all right I got something for y'all." R 381. Ms. Mott testified that she saw Appellant walk back into his house and

"[h]e returned later with a dog on a black leash and another gun." R. 381 - 382. She stated that Appellant's gun was out when Appellant reached Durant's porch this time. R. 399. Ms. Mott saw Appellant point the gun at Jermichael and could not say for sure where on Jermichael's body the laser dot landed, but she "could see the laser on him because he was moving at the time so it wasn't steady in one spot." R. 382. Regan then testified that Jermichael came inside and called 911 and that she and a number of the party guests then stayed inside while Appellant was "pacing back in front of mom's back porch." R. 384. She acknowledged that Jermichael owns a gun but stated that he does not carry it with him unless they are leaving on an overnight trip. R. 402.

Tyree P. testified that he was a guest at Ms. Durant's house for a pool party on June 13, 2013, when he was eleven years old. R. 420 - 421. He wore basketball shorts and Jermichael Wright wore swim trunks. R. 422. Tyree testified that Jermichael's dog was running all throughout the yard, when Appellant "just came out and start shooting and said next time this bullet's going in your dog's f-ing head." R. 424. Tyree was in the pool at the time and Jermaine and Jermichael were on Durant's porch cleaning the grill. R. 422. Tyree the stated that Appellant came over and started "bumping and shoving and talking" with Jermaine and Jermichael on Durant's porch. R. 425. Appellant went back in his house and Tyree thought everything was over. R. 426. Tyree went inside. R. 426. Tyree testified that he then saw Appellant come back with a different gun with a laser sight, and he saw Appellant shine it when he came back over toward Ms. Durant's house. R. 426-427. Appellant also shined the laser from the gun on the glass door to Ms. Durant's home with Regan and some children inside. R. 427-428.

Tyquan P. testified that he was fourteen years old when he attended the pool party in question. R. 430. Tyquan testified that the children were out in the pool when Jermichael's dog ran over to Appellant's dogs and they all started barking. R. 431. Tyquan then said that Appellant "came outside and the he start—he shot at least four times at the dog. The dog ran off, and he said get your f-ing dogs." R. 431; 435. Tyquan recalled that Appellant went in his home but came back out and walked over to where Jermaine and Jermichael were standing on Durant's porch and "[t]hey was pushing and stuff." R. 432; 435. Then Appellant told Jermaine and Jermichael, "I got something for you." R. 436. Appellant "went back in (his) house, came out with the gun that had a laser on it and a dog." R. 432; 434. Tyquan stated that Appellant came to Durant's yard and house. R. 435 – 436. Tyquan testified that he "rushed into the house" after Appellant started shooting, but that he could see Appellant pointing the gun at Jermichael's left shoulder through the window and door. R. 434-435. He stated that Jermaine and Jermichael were trying to pull everyone inside but four of the attendees were left outside. R. 433.

The State also played the 911 call placed by Jermichael on June 13, 2013. R. 319. During the conversation, Jermichael tells the 911 operator about the unfolding events. R. 319-327. Jermichael pleads with the operator to send police because Appellant was "still outside and there's kids around the pool and he got a gun out there with a big dog like he's going to sic the dog on somebody." R. 321. The Florence County Sheriff's Office responded six minutes after the call ended and distributed statement forms. The Sheriff's Office turned the case over to SLED for investigation and resolution. R. 343; 346; 355; 361 – 363; 367; 512 – 520.

Contrary to the State's witnesses, Damon Moody alleged that his actions were in self-defense. Appellant does not deny that he shot at the ground to scare away Mr. Wright's dog, but alleges that Mr. Wright's dog was biting at one of his dogs through his kennel fence. R. 543. Appellant alleges that he has had issues with this same dog in the past, and that he has spoken with Ms. Durant about the dog. R. 546-547. Appellant agrees the Wrights had a right to be on Durant's property and also does not deny that he went onto Ms. Durant's property to confront Jermichael about his dog. R. 547-548; 555. Appellant concedes that during the conversation with Jermichael Wright he was first person to initiate physical contact on Durant's porch and that he came onto the porch where the Wrights had a right to be. R. 550; 585 - 586. Appellant then alleged that Jermichael Wright continued to push him around the pool back toward his home. R. 551. Appellant also conceded that he went back in his home and put a handgun in his pocket in preparation for going back outside. R. 553-554; 587.

Appellant testified that he put the gun in his pocket because he had "just been threatened to be knocked out, [he had] just been assaulted by these individuals on [his] property, and [he] was pushed around" but admitted he did not call 911 for assistance. Instead, he went back outside. R. 554; 589. Appellant testified that he had seen Jermichael Wright "[o]n numerous occasions" with a gun. R. 554. Appellant testified that he walked outside his home to his dog Sniper and put a leash and collar on him. R. 555. Appellant then heard one of the Wright brothers say "What are you going to do with that dog?" R. 556. Appellant then alleged that one of the Wright brothers then said "If you bring that dog over here, I'm going to put a bullet in your fucking head and I'm going to put a bullet in your dog's head." R. 556. Appellant then alleged that one of the Wright

brothers "made a motion to behind him." R. 556; 589 - 590. Appellant alleges he then "drew down [his] gun and [he] yelled, 'Hands, hands, hands, hands.'" R. 556. He admitted Jermichael wore shorts, that he did not see Jermichael with a gun, that there was no physical attack or intrusion into his home, and that he was on Durant's porch which was seventy-five to eighty-five feet from his home when this happened. R. 590-592; 595.

Appellant testified that he went around the back deck to talk to Ms. Durant, with the gun still in one hand and the dog in the other. R. 558-559. Appellant denied pointing the gun at Ontario McClellan, and instead alleged that Mr. McClellan was laughing and giggling about the matter. R. 260. "I turned to him and I –and I asked him, you know, why are you laughing? This is not a joking matter. Your cousin could have been hurt today." R. 560.

In August of 2013 the Twelfth Circuit Solicitor's office requested that the Attorney General's Office handle this case because Appellant was an off-duty Francis Marion University police officer. R. 255 – 256.

Prior to trial, the trial court heard argument on a number of pretrial motions including a motion to dismiss the case pursuant to the Protection of Persons and Property Act. After the State presented the 911 tape along with testimony from Jermichael Wright, Jermaine Wright, Ontario McClellan, Tabitha Durant, and the responding officers, Appellant's counsel presented Appellant's testimony. Appellant's counsel then admitted "[Appellant] doesn't deny pointing the gun at them. He does not deny that the gun had a laser on it. He doesn't deny any of that. The question is why he did it and who's telling the truth about why he did it." R. 238. The State argued that Appellant brought the difficulty on himself, and therefore, was disqualified from the statutory immunity. R.

243. The trial court found that the victims were social guests of Ms. Durant, and each had a right to be where they were. R. 245. The trial court further found that "based upon the testimony that's been elicited from the stand from all parties, the Court does not believe that the defendant was without fault in bringing on the difficulty" and denied Appellant's motion to dismiss. R. 246.

Appellant also sought to introduce charges that were brought against a State's witness and one of the victims in this case.[1] In particular, Appellant's counsel argued that she should be allowed to cross-examine Jermichael Wright about an assault charge brought in magistrate's court that occurred between this incident and the date of trial. R. 251. She also argued that she should be allowed to cross-examine Tabitha Durant regarding charges for breach of trust and conspiracy which were dismissed before the date of trial, and a breach of peace charge against her husband that was also dropped. R. 254. Appellant's counsel argued that these charges show a bias in favor of the State, and reflect Durant's character for untruthfulness. Id. The trial court declined to allow Appellant's counsel to cross-examine Ms. Durant and Mr. Wright about these alleged crimes. R. 259-260. The trial court found the criminal allegations against both Mr. Wright and Ms. Durant occurred after the individuals reported the event with which

[1] Appellant seemingly asserts that the State improperly withheld evidence in this case about these charges despite motions pursuant to Brady and Giglio filed by the defense. See Appellant's Brief at 11. The trial court did not rule on the motion, but rather required the Attorney General to be sure and check with the various law enforcement agencies to ensure that all information has be turned over to the defense. R. 267-268. To the extent that Appellant seeks to argue that there were Brady and Giglio violations in this case, those issues have been abandoned on appeal. See Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.").

Appellant was charged and after giving statements to officers about the matter and, as such, were not relevant. Id.

After all testimony was presented, Appellant's counsel argued self-defense to the jury and the judge charged the jury on the law of self-defense. R. 619-622. Appellant sought a jury charge for defense of habitation, but the trial court found that there was no evidence of trespass presented that would justify the charge. R. 646-647. The jury deliberated and returned a guilty verdict as to victims Jermaine and Jermichael Wright and a not guilty verdict as to victim Ontario McClellan. R. 669.

ARGUMENTS
I.

The trial court properly limited Appellant's cross-examination of Jermichael Wright about an alleged assault charge which occurred after the events giving rise to Appellant's conviction and which was dismissed by other authorities prior to Appellant's trial.

The offense in this case occurred on June 13, 2013. R. p. 315- 316. In pretrial argument, counsel for Appellant stated that Jermichael Wright was arrested on October 30, 2013, by Florence County Sheriff's Office for assault and battery but indicated the charge had been dismissed and expunged. R. p. 227–228; 251-253. The Assistant Attorney General prosecuting the case stated that he ran "raps," that the "raps" indicated no criminal record, that he provided the information to Appellant's counsel, that he was not previously aware of any subsequent charges involving Wright, and did not provide pretrial intervention to anyone. R. p.228. The Assistant Attorney General stated Jermichael Wright's magistrate's court charge for assault and battery was nolle prossed and thereafter expunged by the magistrate. R. p. 228. The Assistant Attorney General argued the charge which occurred subsequent to the incident on trial was not proper for cross-examination pursuant to Rule 609, SCRE. R. p. 229. Relying on Carroll v. State, 916 S.W.2d 494 (Tex. Crim. App. 1996) and Delaware v. Van Arsdall, 475 U.S. 308 (1974), Appellant argued that the trial court's refusal to allow cross-examination of Jermichael Wright regarding an alleged arrest for assault and battery and alleged subsequent dismissal of the charge violated Appellant's rights under the Confrontation Clause in that it constituted evidence of the witness' bias based upon favorable,

preferential treatment from the State. R. 229. The trial court declined to allow cross-examination, finding that the authority Appellant relied upon was inapplicable, that the subsequent alleged acts Appellant wished to divulge to the jury occurred several months after the charges against Appellant, that the testimony offered by Wright was consistent with Wright's statement to officers when the incident occurred, and that cross-examination about the subsequent alleged act is not admissible. R. pp. 259-260. The record also reflects that SLED became the investigative agency after the initial response by the Florence County Sheriff's Office based upon the relationship between Appellant and the Sheriff's Office. R. pp. 336; 342 – 343; 346- 347; 362; 367 – 368; 513 – 519. The record further reflects that Appellant did not renew his request or proffer any evidence respecting the matter when Wright was called as a witness at trial. R. pp. 490-491; 521- 524; 610.

Appellant asserts on appeal that the trial court erred in prohibiting his cross-examination in this regard. The State disagrees and submits Appellant's argument is without merit.

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). Appellate courts are bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 453, 527 S.E.2d 105, 111 (2000). In reviewing findings on admissibility of evidence, appellate courts are limited to determining whether the trial judge abused his or her discretion, and whether that abuse of discretion has prejudiced the defendant. State v. Scott, 405 S.C. 489, 748 S.E.2d 236 (Ct. App. 2013). "Appellate courts recognize that the trial judge has considerable latitude [in the admissibility of evidence] and will not disturb

such rulings absent a prejudicial abuse of discretion." Id. at 497, 748 S.E.2d at 241. "As a general rule, a trial court's ruling on the proper scope of cross-examination will not be disturbed on appeal." State v. Dial, 405 S.C. 247, 256, 746 S.E.2d 495, 499 (Ct. App. 2013). In criminal cases, appellate courts do not reevaluate the facts based on their view of the evidence, but merely determine whether the trial judge's ruling is supported by any evidence. Wilson, at 6, 545 S.E.2d at 829; State v. Mattison, 352 S.C. 577, 575 S.E.2d 852 (Ct. App. 2003).

"A defendant demonstrates a Confrontation Clause violation when he is prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias . . . from which jurors . . . could draw inferences relating to the reliability of the witness." State v. Gracely, 399 S.C. 363, 372, 731 S.E.2d 880, 884 (2012). "The right to meaningful cross-examination of an adverse witness is included in the defendant's Sixth Amendment right to confront his accusers. This does not mean, however, that trial courts conducting criminal trials lose their usual discretion to limit the scope of cross-examination. On the contrary, 'trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, witness' safety, or interrogation that is repetitive or only marginally relevant." State v. Aleskey, 343 S.C. 20, 33, 538 S.E.2d 248, 255 (2000), citing Delaware v. Van Arsdall, 475 U.S. 673 (1986); State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994); State v. Lynn, 277 S.C. 222, 284 S.E.2d 786 (1981); see also State v. Pradubsri, 403 S.C. 270, 743 S.E.2d 98 (Ct. App. 2013); State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001); State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002).

"Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." Rule 608(c), SCRE. However, "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than a conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence." Rule 608(b), SCRE (emphasis added). In the discretion of the court, specific instances may be inquired into on cross-examination if the specific instances concern "the witness' character for truthfulness or untruthfulness." Id.

Appellant argues that the Florence County Sherriff's office arrested Jermichael Wright in October 2013 after he allegedly assaulted a man and that he was erroneously prohibited from inquiring into the matter. Appellant's counsel creatively frames her argument as one pertaining to Mr. Wright's bias toward the State for favorable treatment regarding the alleged assault charge. However, Appellant fails to demonstrate any tangible link between disposition of the charge that arose subsequent and unrelated to Appellant and which was disposed of through dismissal prior to Appellant's trial and Wright's later testimony in this case. In fact, during trial Appellant's counsel admitted that her argument with regards to Mr. Wright's assault charge was actually one about whether Mr. Wright was the first aggressor. See R. 253 ("there's an issue in this case as to who the aggressor is"). Under Rule 609, introducing Mr. Wright's criminal background for that purpose would be improper because he was not convicted. See Rule 609, SCRE. See also State v. Joseph, 328 S.C. 352, 491 S.E.2d 275 (Ct. App. 1997) ("Thus it may well be that conduct ultimately resulting in successful completion of the PTI program and expungement of the record should not be used to impeach a witness.").

With regards to Appellant's bias argument, Appellant presents no evidence whatsoever that established that any testimony provided by Jermichael Wright in Appellant's case would in any way benefit him in the assault case. Neither the law enforcement agency with responsibility for the case nor the prosecuting entity was the same for the two matters so any connection is speculative. State v. Dial, 405 S.C. at 246, 746 S.E.2d at 500. Appellant failed to present anything more specific for the trial court's consideration other than it appears the magistrate's level offense arose after Appellant's incident and was dismissed by the magistrate before Appellant's trial. It is unknown how or why the charge was dismissed. Where Appellant fails to present any evidence and merely speculates as to Wright's bias or motivation for testifying, a trial court does not abuse its discretion in limiting the cross-examination. See State v. Dial, 405 S.C. 247, 256, 746 S.E.2d 495, 500 (Ct. App. 2013). See also State v. Aleksey, 343 S.C. 20, 34, 538 S.E.2d 248, 255 (2000) (finding that dismissed drug charges are not admissible as prior bad acts under Rule 609, "[n]or are the dismissed indictments evidence of 'bias, prejudice or any motive to misrepresent' under Rule 608(c)). The trial court correctly determined that the matter did not have a legitimate tendency to show bias on the part to Wright in favor of SLED or the Attorney General's Office as neither entity was involved in the subsequent assault matter. The incident occurred after Appellant's arrest, does not relate to Appellant or bias in favor of anyone, and does not otherwise relate to credibility. See State v. Burgess, 393 S.C. 396, 712 S.E.2d 1 (Ct. App. 2012) (stating that while incidents documented in law enforcement officer's employment records might show the officer was hot-tempered, the trial court properly denied cross-examination about the matters because they did not show bias or otherwise relate to credibility where the

incidents occurred after the defendant's arrest and did not relate to the defendant or the manner of the defendant's apprehension).

Appellant relies upon State v. Jones as support. 243 S.C. 562, 571, 541 S.E.2d 813, 818 (2001) (finding that cross-examination regarding dismissed indictments was proper when "appellant sought to explore past dealings between Brown and the office prosecuting the current charges"). In that case, a co-defendant testified and defense counsel sought to "show his knowledge of the system and the ways it could be manipulated, and to show bias and motive in his trial testimony. Id. at 570, 541 S.E.2d at 817. The co-defendant's criminal history showed twelve arrests in Lexington County, many of which were dismissed or reduced because of the co-defendant's cooperation. Id. at 569, 541 S.E.2d at 816. Our Supreme Court held that the trial court erred in not allowing for meaningful cross-examination because "appellant sought to explore past dealings between Brown and the office prosecuting the current charge to expose Brown's bias and prejudice in the current case." Id. at 570, 541 S.E.2d at 817.

However, Appellant fails to recognize that the South Carolina Supreme Court placed significant weight on the number of negotiations the witness in Jones made with the "office prosecuting the charges." Id. ("Appellant's attorney pointed out that he intended to emphasize the past deals Brown had made with the *Lexington County Solicitor's office*, the same office that would decide Brown's fate in this current case."). In this case, the Twelfth Circuit solicitor's office requested that the Attorney General take over this prosecution early in the investigation. Appellant's reliance upon Jones is therefore inapposite because Mr. Wright never made a deal with the Attorney General's

office for anything. R. 255-256. Therefore, the trial court properly declined to allow Appellant to cross-examine Mr. Wright about his alleged criminal history.

Moreover, no prejudice is shown and any error in the exclusion of the evidence is harmless. See Delaware v. Van Arsdall, 475 U. S. at 684 (stating that "the constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to Chapman, harmless-error analysis"); see also State v. Whatley, 407 S.C. 460, 468 – 69, 756 S.E.2d 393, 397 (Ct. App. 2014)(stating that a violation of the Confrontation Clause is subject to a harmless error analysis and whether error is harmless depends on a number of factors, including the importance of the witnesses' testimony in the State's case, whether the testimony is cumulative, the presence of corroborating or contradictory testimony of the witness on significant points, the extent of cross-examination conducted by the defendant, and the strength of the State's case.); State v. McEachern, 399 S.C. 125, 731 S.E.2d 604 (Ct. App. 2012)(stating that a violation of the Confrontation Clause is subject to harmless error analysis). The prosecution in this case presented fourteen witnesses, including three victims and other eye-witnesses. These witnesses who were present at the scene corroborated Jermichael Wright's testimony. As such, Jermichael's testimony was cumulative to and corroborated by other witnesses as set forth in the Respondent's Statement of Facts herein. State v.Gracely, 399 S.C. 363, 731 S.E.2d 880 (2012). Appellant was not otherwise restricted in his cross-examination and thoroughly examined all of the witnesses present at the scene, including Jermichael Wright, regarding the incident and statements given contemporaneous with the incident. Moreover, through Appellant's admissions at trial, it is uncontested that Appellant charged onto the porch of

Ms. Durant, confronted Ms. Durant's invited guests on Ms. Durant's porch, and initiated the physical altercation that occurred with the guests initially on Ms. Durant's porch and, later, around the skirt of Ms. Durant's swimming pool. It is also uncontested that Appellant thereafter retreated into his home where he retrieved a pistol and his trained attack dog and returned to Ms. Durant's porch a few minutes later where he pulled the pistol from his pocket and pointed it with a laser beam at the victims. This testimony alone supports the charge. Considering the overwhelming evidence of guilt and the failure to make a specific offer of proof, the trial judge's ruling, if error, harmless and not prejudicial." State v. McFarland, 279 S.C. 327, 331, 306 S.E.2d 611, 613 (1983).

II.

The trial court properly limited the cross-examination of Tabitha Durant about charges which occurred after the events giving rise to Appellant's conviction and which were dismissed by other authorities prior to Appellant's trial.

Appellant argues that the trial court's refusal to allow cross-examination of the Tabitha Durant regarding a post-incident arrest for breach of trust and conspiracy on December 16, 2013, violated Appellant's rights under the Confrontation Clause. R. p. 254- 259; 269- 273. The State disagrees and submits Appellant's argument is without merit.

Appellant asserts that he should have had the opportunity to cross-examine Ms. Durant about her charges pursuant to Rules 608(b) and 608(c), SCRE. Under Rule 608(b), specific instances of conduct may, "if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness." Under Rule 608(c), "[b]ias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence adduced." As with the admission of any testimony, a trial judge's ruling concerning the scope of cross-examination should not be disturbed absent an abuse of discretion. State v. Lynn, 277 S.C. 222, 284 S.E.2d 786 (1981).

Testimony was elicited by Appellant from Ms. Durant on cross-examination during the pretrial immunity hearing respecting possible criminal charges. R. p. 172. Ms. Durant denied that she filed a false insurance claim, stating that the insurance is in her husband's name. R. p. 172. She conceded she was initially charged with breach of trust with fraudulent intent but that charge was dismissed and a conspiracy charge was

substituted. R. p. 173. She stated that she turned herself in in December 2013, and completed a pretrial intervention (PTI) program in February 2014 before Appellant's trial on June 16 – 19, 2014, to resolve the conspiracy charge. She stated that the records for both can be expunged. R. pp. 173; 174; 269-270;. She also stated that she had never been in trouble before or participated in pretrial intervention prior to the conspiracy charge. R. 176. The trial court, during pretrial rulings, declined to allow the matter to be explored by Appellant on cross-examination. When Durant testified at trial, Appellant did not renew her request or make an additional proffer. R. pp. 433-452.

Appellant makes a conclusory statement that Ms. Durant's charges, not her conduct, had a bearing on her character for truthfulness. The conduct leading to the charge occurred after the incident with Appellant and after Durant provided a statement to officers about the incident involving Appellant. It appears this later matter related to actions by Ms. Durant's husband. In December 2013, Ms. Durant notified officers, and on February 3, 2014, it appears the breach of trust charge was dismissed and a conspiracy charge was substituted because her husband "told [her] what he had done." R. 173. Ms. Durant entered into a PTI program with the Twelfth Circuit Solicitor's office in February 2014, and her charges were dismissed following her successful completion of the program before Appellant's case was called for trial.[2]

[2] Appellant argued before the trial court that the Attorney General's office intentionally waited until after Ms. Durant's PTI was complete before calling this case for trial. She argued "it is so much worse, in my opinion, to get pre-trial and a dismissal than for those charges to be pending. If those charges are pending, then its arguably not preferential treatment." R. 254. The Attorney General responded by notifying the court that originally, the case was to be tried in May, 2014, but Appellant's attorney filed "a motion for continuance based on a federal conflict in which she complains that it's too soon to be called." R. 258. Furthermore, the fact that Ms. Durant's charges were already dismissed prior to her testimony is further evidence that her testimony was not influenced by the

Ms. Durant's charge for criminal conspiracy does not fall within a category of misconduct which is "clearly probative of truthfulness or untruthfulness" such as forgery, bribery, false pretenses, and embezzlement." See notes to Rule 608, SCRE. While the underlying facts pertaining to Ms. Durant's charge for conspiracy have a significant impact on Ms. Durant's husband's character for truthfulness or untruthfulness, it has very little probative value when it comes to Ms. Durant. No evidence was presented that Ms. Durant was an active participant in any insurance matter. Instead, Ms. Durant testified that she was arrested because of her husband told her what he had done and about which Durant was forthcoming with authorities. This alleged specific instance of misconduct is not "clearly probative" of anything about Ms. Durant's character for truthfulness.

Furthermore, as recognized by the trial court, the events leading up to Ms. Durant's arrest occurred after her initial statement to police about the incident involving Appellant. While the rule does not specifically require the court to limit cross-examination to acts that occurred before the incident underlying the prosecution, the trial court found that the probative value of Ms. Durant's criminal charges was extremely low given that "the Court has heard nothing, nor is there any evidence before this Court, that [Ms. Durant's] testimony [during the pre-trial hearing] was in any essence any different than what [her] statements were to law enforcement in June of 2013." R. 260.

The discussion by this Court in State v. Joseph is instructive. 328 S.C. 352, 491 S.E.2d 275 (Ct. App. 1997). In Joseph, this Court highlighted the difficulty with allowing cross-examination of the underlying acts related to a dismissal under the PTI statute.

Twelfth Circuit Solicitor's decision to offer her PTI. Contrary to Appellant's assertion, once a charge is dismissed, there is nothing a solicitor can do if the witness decides not to testify or to change their testimony.

"[U]pon successful completion of the PTI program, it is as if the arrest never occurred." Id. at 359, 491 S.E.2d at 278. This Court recognized that the PTI statute does not give that same protection to the conduct giving rise to the arrest, however, the PTI Act's expungement and confidentiality provisions "reflect a legislative policy decision that, under certain circumstances, the interests of justice require that an offender be given a fresh start, free from the stigma of a criminal conviction. Id. at 359, 491 S.E.2d at 279. The Court then recognized that "[t]o protect the arrest but not the conduct from inquiry for impeachment purposes may be inconsistent with the policies underlying the Act." Id. at 359-60, 491 S.E.2d at 279. The Court, however, declined to decide whether the conduct underlying a charge dismissed pursuant to the PTI statute is protected under the Act because it was not properly preserved. The State asserts that the conduct giving rise to Ms. Durant's conspiracy charge should be protected by the Act, and the trial court properly declined to allow cross-examination on that issue.

With regard to Rule 608(c), Appellant again argues that Ms. Durant's favorable treatment by the State was proper impeachment as it showed bias toward the State as well as a bias against Appellant. However, Ms. Durant's breach of trust charge arose after and was dismissed months before Appellant's trial, her criminal conspiracy charge was disposed of through pretrial intervention, also prior to trial, and, as noted above, her statements did not change between the date of the incident and the date of trial.

Like Mr. Wright, Ms. Durant was charged, and her case was handled by the Twelfth Circuit Solicitor, not the Attorney General's Office. It also appears that the conspiracy matter was investigated by the Florence County Sheriff's Office and not SLED. Moreover, Ms. Durant's charges were already dismissed prior to her testimony

against Appellant. There was absolutely no way in which any bias would favor the Attorney General's Office or SLED so as to influence Ms. Durant's testimony at Appellant's trial. Instead, Appellant simply resorts to mere speculation that Ms. Durant's testimony, which did not change from the time she witnessed the events, through her arrest, to the day of trial, was the product of bias based upon the State's influence over her conspiracy charge. The trial court properly limited the cross-examination of Ms. Durant where no evidence was presented in the pretrial hearing to establish any probative value to that line of questioning.

Appellant further argues that Ms. Durant was biased against him because Appellant recorded Ms. Durant and produced that recording to police, eventually leading to Ms. Durant's arrest.[3] The trial court ruled Appellant could cross-examine Ms. Durant about the recorded conversations if the State elicited testimony about Ms. Durant's interactions with Appellant after the date of her arrest, since presumably that is the date on which the alleged bias would have begun. R. 371-372. The State ultimately did not do so.

The trial court properly declined to allow Appellant to cross-examine Ms. Durant about bias against Appellant with regards to statements she made before the alleged recording occurred. Accepting Appellant's counsel's argument that Ms. Durant harbored a bias against Appellant, that bias could not have arisen until Ms. Durant found out that Appellant allegedly recorded her and turned that information over to the police. While

[3] It is important to note that no testimony was ever presented to corroborate Appellant's claim. Instead, Appellant's trial counsel simply notified the court that "[i]t's come to my attention—and I didn't know this until yesterday—that when Tabitha Durant was charged with insurance fraud, the way the way that the police officers learned about the insurance fraud is because my client recorded a conversation—two conversations with her wherein she admitted it." R. 269-270.

there is no indication in the record as to when or if Ms. Durant ever was aware of Appellant's recordings, the earliest that she would have been aware of their existence is after her arrest in October 2013. Therefore, the statements Ms. Durant gave to SLED following the incident in June were not tainted by any alleged bias. Since the trial court found that Ms. Durant's testimony was consistent with her statement to police the day of the incident, the trial court properly restricted counsel's cross-examination of the witness because there was no evidence that Ms. Durant's testimony was the product of bias.

Finally, even if the trial court improperly limited Appellant's right to cross-examine Ms. Durant regarding the circumstances surrounding her arrest, the trial court's ruling resulted in harmless error because the thrust of Ms. Durant's testimony was in regard to the pointing and presenting charge respecting victim Ontario, and Appellant was acquitted of that charge. R. 669.

A finding of error in limiting cross examination does not require reversal. State v. Pradubsri, 403 S.C. 270, 280, 743 S.E.2d 98, 104 (Ct. App. 2013). "An error is not reversible unless it is material and prejudicial to the substantial rights of the appellant." Id. (quoting State v. Lee-Grigg, 374 S.C. 388, 414, 649 S.E.2d 41, 55 (Ct. App. 2007)). "A violation of the confrontation clause is not *per se* reversible but is subject to a harmless error analysis." State v. Clark, 315 S.C. 478, 481, 445 S.E.2d 633, 634 (1994).

> Whether such an error is harmless in a particular case depends upon a host of factors. . . . The factors include the importance of the witness' testimony in the prosecutor's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986).

Ms. Durant testified that she witnessed Appellant shooting into the ground. She then testified that she witnessed Appellant come onto her porch and begin "chest bumping" and arguing with her guests, Jermaine and Jermichael Wright. She did not witness Appellant point the gun at Jermaine and Jermichael, but that she saw Appellant point the gun at Ontario. R. 465. All of Ms. Durant's testimony is cumulative to or corroborates the testimony of other witnesses present at the scene. Further, Ms. Durant was subjected to extensive cross-examination by Appellant. Given the circumstances surrounding Ms. Durant's testimony, any error in limiting cross-examination was harmless.

III.

The trial court properly limited the cross-examination of Tabitha Durant about alleged mental health matters where Appellant failed to establish that Ms. Durant's mental health impacted her ability to comprehend and correctly relate the truth.

Appellant argues that the trial court's refusal to allow cross-examination of Tabitha Durant about her voluntary admission to a mental health treatment facility following the events giving rise to Appellant's conviction was in error. The State disagrees and submits Appellant's argument is without merit.

Over objection from the State, Durant was questioned during the pretrial immunity hearing about commitments to mental institutions in the year following the incident which gave rise to Appellant's charges. R. p. 171. The trial court allowed the inquiry for purposes of the pretrial immunity hearing. Appellant elicited testimony indicating that Durant was admitted to a mental institution in September and again in November for medication after this incident and due to the stress of the matter. R. p. 171. Durant testified that Appellant is the father of her grandson and that she has not been able to see her grandson since the incident. R. p. 177. Relying on United States v. Smith, 77 F.3d 511 (C.A.D.C. 1996), Appellant moved to cross-examine Durant during trial about the matter arguing that mental impairment was relevant to Durant's credibility and ability to remember the events in question. R. p. 263 – 264. The Assistant Attorney General objected to cross-examination on the grounds it was not probative of veracity, was not relevant, and was not shown to be related to Durant's competency as a witness. R. p. 263. The trial court found that Durant's mental health matters were not shown to be relevant to Appellant's case. The trial court found that Durant's testimony was largely

consistent with the testimony provided by other witnesses presented during the immunity hearing and nothing elicited from Durant established that Durant's mental health matters were related to her credibility based upon the trial court's ability to observe Durant during her testimony. R. p. 265 - 267.

Appellant is correct that some courts have held that a defendant generally has "'the right to attempt to challenge [a witness's] credibility with competent or relevant evidence of any mental defect or treatment *at a time probatively related to the time period about which he was attempting to testify.*'" U.S. v. Jimenez, 256 F.3d 330, 343 (5th Cir. 2001) (emphasis added) (quoting U.S. v. Partin, 493 F.2d 750, 763 (5th Cir. 1974)).[4] However, Appellant fails to continue the Fifth Circuit's analysis respecting the admissibility of testimony regarding a witness's mental state. "To be relevant, the mental health records must evince an 'impairment' of the witness's 'ability to comprehend, know, and correctly relate the truth.'" Id. Furthermore, for witnesses whose mental health history does not rise to the level of schizophrenia or psychosis, "courts are permitted greater latitude in excluding records and limiting cross-examination." Id. Moreover, in the authority relied upon by Appellant, United States v. Lopez, 611 F.2d 44 (4th Cir. 1979), the court notes that:

> One's psychiatric history is an area of great personal privacy which can only be invaded in cross-examination when required in the interests of justice. This is so because cross-examination of an

[4] It is noteworthy that Appellant did not rely upon the cases cited in his brief during argument to Judge Brown. Instead, Appellant relied upon U.S. v. Smith, 77 F.3d 511 (D.C. Cir. 1996). The trial court correctly recognized, however, that Smith does not stand for the proposition that a witness' mental health is always relevant on cross-examination. Instead, the D.C. Circuit held that "evidence regarding mental illness is relevant only when it may reasonably cast doubt on the ability or willingness of a witness to tell the truth." Id. at 516.

> adverse witness on matters of such personal privacy, if of minimal probative value, is manifestly unfair and unnecessarily demeaning of the witness. Moreover, such cross-examination will generally introduce into the case a collateral issue, leading to a large amount of testimony substantially extraneous to the essential facts and issues of the controversy being tried.

611 F.2d at 45.

Appellant's counsel questioned Ms. Durant regarding her mental health history during the pretrial immunity hearing. During that hearing, Appellant's counsel asked "in the past year have you been committed to a mental institution." R. 171. Ms. Durant testified that she had been admitted twice, once in September and once in November of 2013. Id. Ms. Durant further testified that she was admitted for a week each time, and that she was admitted "due to the stress of all of this." Id. It was upon this foundation that Appellant sought to discredit Ms. Durant's recollection of the events on June 13, 2013.

The trial court properly restricted Appellant's ability to cross-examine Ms. Durant regarding her admissions to healthcare facilities because those admissions were in no way relevant to Ms. Durant's ability to perceive the events on June 13, 2013, and to truthfully recount those events in court in June 2014. In Ms. Durant's own words, she went to those facilities in September and November because of the stress accompanying the events of June 2013. There was no evidence presented that Ms. Durant was mentally ill the day of the event, or the day of trial. The trial court's limitation on Appellant's cross-examination was reasonable. Nothing was presented by Appellant to establish that Durant's mental health prevented her from perceiving the events, recalling the events, and communicating intelligently and truthfully about the incident relating to Appellant. In this case, Durant had personal knowledge of the matter, and effectively communicated

that knowledge in a cogent manner. Appellant failed to establish any link between the Durant's mental health and her ability to properly serve as a witness. Therefore, the trial court was within its discretion in limiting the irrelevant cross-examination; however, error, if any, was harmless. [5] See State v. Turner, 373 S.C. 121, 644 S.E.2d 693 (2007) (stating the trial court's limitation on cross-examination about victim's schizophrenia diagnosis and types of medication was proper because the matters were irrelevant to the victim's ability to truthfully recall the events).

[5] The State again asserts that if the trial court improperly limited Ms. Durant's cross-examination, that error was harmless in light of the factors discussed previously.

IV.

The trial court properly denied Appellant's request to dismiss the case pursuant to the Protection of Persons and Property Act when Appellant failed to establish that he was entitled to immunity under the provisions of the Act.

Appellant argues that the trial court erred when it declined to find that he was entitled to immunity pursuant to the Protection of Persons and Property Act (the Act because he was defending himself on his property. See S.C. Code Ann. § 16-11-410 et seq. (Supp. 2014). The State disagrees and submits the trial court properly concluded Appellant was not entitled to immunity under the provisions of the Act.

As noted by our supreme court in State v. Duncan, our General Assembly intended to codify the common law Castle Doctrine which recognizes that "a person's home is his castle" and determined that it is proper for law-abiding citizens to protect themselves from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves or others. Duncan at 407, 709 S.E. 2d at 64; see also Section 16-11-450 (Supp. 2014). A claim of immunity under the Act requires a pretrial determination using "a preponderance of the evidence standard which our appellate courts review under an abuse of discretion standard of review." State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013) citing State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011).

"Section 16-11-450 provides immunity from prosecution *if* a person is found justified in using deadly force under the Act." Id. at 371, 752 S.E.2d at 266. "While the Act may be considered 'offensive' in the sense that the immunity operates as a bar to prosecution, such immunity is predicated on an accused demonstrating the elements of

self-defense to the satisfaction of the trial court by the preponderance of the evidence." Id. at 372, 752 S.E.2d at 267.[6] Section 16-11-440 of the Protection of Persons and Property Act provides in pertinent part that:

> (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.
>
> (B) The presumption provided in subsection A does not apply if the person:
>
> (1) **against whom the deadly force is used has the right to be in or is a lawful resident of the dwelling, residence** . . . or ;
>
> *******
>
> (2) who uses deadly force **is engaged in an unlawful activity** or is using the dwelling . . . to further an unlawful activity . . .
>
> *******
>
> (C) A person who is **not engaged in an unlawful activity** and who is attacked in another place where he as a right to

[6] The four elements required to establish self-defense include (1)the defendant must be without fault in bringing on the difficulty; (2) 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 danger; (3) a reasonably prudent man of ordinary firmness and courage would have entertained the same belief, and if the defendant actually was in such danger, the circumstances were such as would warrant a man of ordinary prudence to strike the fatal blow in order to save his life; and (4) the defendant had no other probably means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did. Id. at 266 FN 4, 752 S.E.2d at 267 FN 4.

> 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). Additionally, the immunity provision offered by Appellant in support of his motion provides:

> A person who uses deadly force as permitted by the provisions of this article or another applicable provision of law is justified in using deadly force and is immune from criminal prosecution and civil action for the use of deadly force . . . .

Section 16-11-450 (A) (Supp. 2014). "Section 16-11-440 (A), the main thrust of the Act, provides a presumption of reasonable fear of imminent peril of death or great bodily injury to a person who uses deadly force if he is attacked by or attempting to remove another from a dwelling, residence, or occupied vehicle. However, the presumption does not apply if the victim has an equal right to be in the dwelling or residence." S.C. Code § 16-11-440(B)." State v. Curry, at 370, 752 S.E.2d at 266.

In applying the provisions of the Act, it is clear the trial court properly declined to grant immunity. First, the Act applies only to the **use** of deadly force. See § 16-11-440. In this case, Appellant merely presented and pointed a deadly weapon but did not shoot or otherwise **use** it. Appellant attempts to extend the immunity provision of the Act to circumstances contrary to its express purpose.

Second, the trial court properly ruled that the presumption contained in § 16-11-440 (A) is inapplicable. Appellant admitted in his testimony at trial that no person was in the process of unlawfully and forcefully entering or had entered his dwelling, residence or occupied vehicle and that he was not attempting to remove another person against that

person's will from his dwelling, residence, or occupied vehicle. He also conceded that the victims were Ms. Durant's social guests and were rightfully at her home.

Section 16-11-440(C) (Supp. 2014), does not apply again, because it is uncontroverted that the victims invited social guests of Ms. Durant and had a right to be on her porch, around her pool, and in her residence. Our supreme court, in State v. Curry, ruled that, in such instances, the traditional self-defense analysis the controls the application of § 16-11-440(C), particularly where the individuals are visitors or guests in the home of another and the victims are not intruders. Our supreme court's decision in Curry controls the analysis in this case. In Curry, Collins, a social guest of Curry's, got into a fight at Curry's mother's apartment after a night of drinking. Witnesses testified that Curry went upstairs after a scuffle, retrieved a gun and shot Collins in the back. Curry testified that he had the gun in his pocket during the scuffle and only shot Collins because he believed Collins was lunging toward him. Our supreme court held that "Appellant's claim of self-defense presents a quintessential jury question, which, most assuredly, is not a situation warranting immunity from prosecution." Id. at 372, 752 S.E.2d at 267.

Similar to Curry, the testimony presented during the pretrial immunity hearing reveals the victims were invited guests in Durant's home. The record shows that the victims were not and had not unlawfully or forcibly entered Appellant's home. Instead, Appellant engaged in successive and unlawful attacks upon the victims on the porch attached to Ms. Durant's home. Appellant unlawfully and forcibly entered the porch and was the sole aggressor who, first, initiated physical contact with the victims after which he retreated to into his home only to return a few minutes later with a trained attack dog

and a gun. Appellant again returned to Ms. Durant's porch where the victims continued to stand as Ms. Durant's guests and pointed his gun at the victims. It is uncontroverted that Appellant persisted in bringing about the difficulty. The trial court correctly concluded that Appellant was not without fault in bringing about the difficulty and refused to grant immunity for Appellant's aggressive actions. "[T]he [Castle Doctrine] rule is predicated on the absence of aggression or fault on [the defendant's] part in bringing on the difficulty; the doctrine is for defensive, not offensive purposes." Id. at 372, 752 S.E.2d at 267, citing State v. Grantham, 224 S.C. 41, 45, 77 S.E.2d 291, 292 (1953). Appellant's claim is simply not supported by the evidence and was properly denied.

V.

The trial court properly declined to charge the jury on the law regarding the defense of habitation where the evidence presented at trial did not support the charge.

Appellant argues that the trial court erred in failing to charge the jury on the law of defense of habitation. The State disagrees and submits the evidence presented at trial did not support the charge. Appellant was not without fault in bringing on the incident and never claimed that he was in danger of imminent attack on his property or that he was attempting to eject the Wright brothers from his home. The defense of habitation is simply inapplicable to the facts of the case. See State v. Bryant, 391 S.C. 225, 705 S.E.2d 465 (Ct.App. 2010); State v. Sullivan, 345 S.C. 169, 547 S.e.2d 183 (2001); State v. Rye, 375 S.C. 119, 651 S.E.2d 321(2007); State v. Lee, 293 S.C. 536, 362 S.E.2d 24 (1987); State v.Moultrie, 273 S.C. 532, 257 S.E.2d 730 (1979); State v.Bradley, 126 S.C. 528, 120 S.E. 240 (1923). Appellant's argument is without merit.

"The law to be charged to the jury is determined by the evidence presented at trial." State v. Bryant, 391 S.C. 225, 233, 705 S.E.2d 465, 469 (Ct. App. 2010) (citing State v. Gaines, 380 S.C. 23, 31, 667 S.E.2d 728, 732 (2008)). If there is any evidence to support a jury charge, the trial court should give a requested charge on the matter. Id. (citing State v. Burriss, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999)). However, there must be evidence to support all elements of a defense before a charge should be given. State v. W.M.S., 320 S.C. 403, 407, 465 S.E.2d 580, 583 (Ct. App. 1995) (finding that a trial judge did not err in refusing a jury charge when "appellant failed to establish all the elements necessary to receive a charge for this defense"). In reviewing jury charges for

error, our appellate courts must consider the trial court's jury charge as a whole in the context of the evidence and issues presented at trial. State v. Curry, at 373, 752 S.E.2d at 267. "To warrant a reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." Bryant, 391 S.C. at 470, 705 S.E.2d at 233 (citing Gaines, 380 S.C. at 31, 667 S.E.2d at 732)).

"The defense of habitation provides that defending one's home or premises means ending an unwarranted intrusion through use of reasonably necessary means of ejection. One defending himself from imminent attack on his own premises is entitled to a charge of defense of habitation. For the defense of habitation to apply, a defendant need only establish that a trespass has occurred and that his chosen means of ejectment were reasonable under the circumstances." State v. Bryant, 391 S.C. 225, 233, 705 S.E.2d 465, 470 (Ct. App. 2011) (internal citations omitted). "To establish the defense of habitation, the defendant must establish that a trespasser has endeavored to enter his *habitation* in a violent manner or with the intent to commit a felony on him or the habitation itself or in an attempt to commit the misdemeanor of forcible entry." State v. Rye, 375 S.C. 119, 124, 651 S.E.2d 321, 323 (2007) (emphasis added). In other words, "the defense of habitation provides that were one attempts to force himself into another's dwelling, the law permits an owner to use reasonable force to *expel* the *trespasser*." Id. (emphasis added). "Unlike the defense of self-defense, the defense of habitation does not require that a defendant reasonably believe that he or his property was in imminent danger of sustaining serious injury or damage," State v. Bryant, at 234, 705 S.E.2d at 470, and should be charged when the defendant presents evidence that he was defending himself from imminent attack on his premises. State v. Sullivan, 345 S.C. 169, 173, 547 S.E.2d

183, 185 (2001). The law permits a homeowner to employ such force as may be reasonably necessary to expel one who becomes a trespasser. State v. Sparks, 179 S.C. 135, 183 S.E.2d 719 (1936). An "element necessary to both self-defense and defense of habitation is that the defendant must be without fault in bringing about the difficulty. State v. Moultrie, 272 S.C. 532, 534, 257 S.E.2d 730, 731 (1979).

The trial judge correctly declined to charge the jury on defense of habitation, because (1) "there's no evidence in the record that the Wrights were trespassing on anything. They had a right to be where they were" and (2) "[t]he defendant by his own testimony—by his own testimony testified that there was no attempt—no attempt whatsoever by anyone to enter his dwelling." R. 646 – 647.

Appellant argues that "there clearly was an unwarranted intrusion or trespass on [Appellant's] property." Specifically, Appellant alleges that Jermichael Wright's dog was "biting at [Appellant's] dog through the kennel." Appellant also alleges that Jermaine and Jermichael "shoved [Appellant] around the pool and back toward [Appellant's] trailer." Finally, Appellant urges this court to adopt a position that threatening words can constitute a trespass. None of these three arguments advanced by Appellant's counsel constitute a trespass and therefore no evidence has been presented of an element of the defense of habitation.

The definition of trespass includes the "*wrongful entry* on another's property." Black's Law Dictionary (emphasis added). It is uncontroverted that neither Jermaine nor Jermichael entered Appellant's property. It is also uncontroverted that Jermichael and Jermaine were guests of Ms. Durant and were either on Ms. Durant's porch or the around Ms. Durant's pool. Jermichael's dog was permitted to run around Ms. Durant's in the

back yard while its owner was enjoying an afternoon pool party. The evidence reflects that the dog left the area of Appellant's kennel before Appellant twice approached the victims as they stood on Ms. Durant's porch, the last time with gun in hand. Appellant never testified that he was attempting to eject anyone or anything from his property at the time Appellant committed the offense. It strains logic to believe that Appellant would be legally permitted chase down the dog owner to threaten and point a gun at the owner while the owner was a lawful guest on the property of another person , especially after the dog was no longer in the area of Appellant's property.

Appellant alleged that Jermaine and Jermichael pushed him around the pool and back toward his trailer after they got into a shoving match on Ms. Durant's porch. Initially, it is important to note that Appellant concedes that he trespassed on Ms. Durant's property after being asked to leave. He also conceded that he initiated the pushing episode by making the first physical contact. However, Appellant never testified, and could not testify based on the factual circumstances, that the victims were on or entering his property and that he was attempting to eject the victims from his property at the time he pointed a gun at them. Rather, the uncontroverted testimony demonstrates that all of the victims were at Ms. Durant's home, and had every legal right to be where they were. Therefore, the victim's responses to Appellant's assaults do not constitute a trespass under the defense of habitation doctrine. Moreover, and as argued in Respondent's Argument IV herein, Appellant was not without fault in bringing about the difficulty, precluding application of the defense of habitation.

Finally, Appellant asserts that the alleged threatening words by one of the Wright brothers after Appellant's assaults upon them while on Ms. Durant's property constituted

either a trespass or an intrusion. Appellant fails to provide any support for his assertion that threatening words are a sufficient trespass or intrusion to allow for the defense of habitation in this case. Again, Appellant was not at his home, he was not attempting to eject the victims from his property, and was not without fault in bringing on the difficulty. The victims in this case were in a location where they had a right to be and were subject to unwarranted, repeated, aggressive assaults from Appellant. The alleged threatening words by the one of the victims while on property not belonging to Appellant in response to Appellant's attacks are not sufficient to provide evidence of trespass and would extend the law regarding defense of habitation to an absurd level.

Because there was no evidence presented that the victims ever trespassed on Appellant's property, because there was no evidence Appellant was attempting to eject the victims from his property, and because Appellant was not without fault in bringing on the difficulty, the trial court was correct in refusing to charge the jury on the defense of habitation.

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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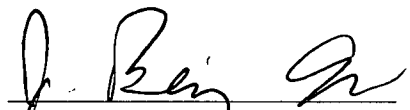
BY: 
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February 18, 2016
Columbia, South Carolina

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FLORENCE COUNTY
D. Craig Brown, Circuit Court Judge

Appellate Case No. 2014-001391

THE STATE,.....RESPONDENT

v.

DAMON MOODY,.....APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies the Final Brief of Respondent complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Final Brief of Respondent* dated February 18, 2016, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certified that all parties required by Rule to be served have been served. This 18th, day of February, 2016.

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