STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Sumter County
Honorable R. Ferrell Cothran, Circuit Court Judge
Appellate Case Tracking No. 2016-001175

The State, Respondent,

vs.

Jermaine Antonio Hodge, Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

The Sumter County Grand Jury indicted Appellant for attempted murder and possession of a weapon during the commission of a violent crime. (Indictments; R.___). On May 25-26, 2016, he proceeded to trial before the Honorable R. Ferrell Cothran and a jury. The jury found him guilty of the lesser included offense of assault and battery of a high and aggravated nature and the possession of a weapon charge. The court sentenced him to fifteen years in prison on ABHAN and five years, concurrent, on the possession charge.

STATEMENT OF FACTS

Appellant and his girlfriend Lyvonnia Copeland spent the day together on April 21, 2015.[1] (T.20; R.___). He was an occasional overnight guest in Ms. Copeland's home, but did not have his own key. (T.24-25; R.___). In the evening, the two began arguing, and Ms. Copeland called her cousin, Lawrence Cooley, to come and talk with Appellant because Appellant was "getting on nerves." (T.21; R.___). He arrived in about twenty to twenty-five minutes from her call. (T.22; R.___). Ms. Copeland did not see what happened after Mr. Cooley (the victim) arrived, but he told her he had been stabbed. (T.22-23; R.___). Ms. Copeland also did not know where Appellant was once she got outside. (T.23; R.___).

Appellant claimed he lived with Ms. Copeland, but admitted he did not have a key to the house. (T.32; R.___). He indicated Ms. Copeland got upset with him about a girl at his place of employment and that "she started arguing with [Appellant] for no reason right." (T.34; R.___). According to Appellant, Ms. Copeland called her cousin, the victim, and told Appellant the victim was "going to come over here and beat your ass." (T.35; R.___). Instead of leaving, Appellant took a knife from the kitchen and put it in his pants pockets and then waited outside for twenty minutes for the victim to arrive. (T.35-36; 44; R.___).

Appellant stated when the victim arrived he got out of the car and pushed Appellant and said something to the effect of "what the f is going on." (T.38; R.___). Appellant described the first push as a "little shove." (T.40; R.___). Appellant told the victim not to do it again. (T.40; R.___). According to Appellant, the victim then pushed him again. The push was harder this time, but it did not cause Appellant to fall to the ground. (T.41; R.___). Appellant "just responded" to the second push by stabbing the victim. (T.41; 48; R.___).

[1] At the time of trial, the two were no longer in a relationship. (T.25; R.___).

After stabbing the victim, Appellant fled the scene. (T.49; R.___). He went to his Aunt's house but acknowledged he never called the police. (T.49-50; R.___). For over two weeks, Appellant avoided arrest, including leaving through the back of a home when police arrived looking for him. (T.51; R.___).

The trial court considered Appellant's immunity request and the testimony presented at the pre-trial immunity hearing. The court found both Appellant and the victim were invited guests on the property. (T.57; R.___). He finds the victim is not on Ms. Copeland's property unlawfully and is not breaking into the home or doing anything unlawful. (T.57; R.___). The court concluded Appellant was not reasonably in fear of his life or great bodily injury because his testimony was only that he was shoved twice. He held a reasonable person would not believe that their life was in danger or that deadly force was warranted. (T.58; R.___). "Simply shoving somebody to the point that they knock him down doesn't put, and reasonable person believes that their life was in danger or sever [sic] injury at that point. It just hadn't gotten there." (T.59; R.___). As a result, the court denied Appellant's request for directed verdict/immunity. (T.59; R.___).

ARGUMENT

I. The trial court did not err in denying Appellant's motion for immunity as the facts and circumstances did not support immunity under the Protection of Persons and Property Act and there is evidence to support the trial court's decision.

Appellant contends the circuit court erred in denying his motion for immunity under the Protection of Persons and Property Act (the Act), and specifically, Section 16-11-450(A) of the South Carolina Code. The circuit court correctly found Appellant failed to establish by a preponderance of the evidence that he was reasonably in fear of sustaining serious bodily injury or for his life. Further, as the circuit court noted, this case presents "a quintessential jury question" regarding Appellant's entitlement to self-defense based on the conflicting testimony presented during the immunity hearing. As a result, the circuit court did not abuse its discretion in denying Appellant's motion for pre-trial immunity.

The question of whether a defendant is entitled to immunity under the Act must be decided prior to trial if either party moves for a determination regarding the Act's application to a defendant's case. State v. Duncan, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011). "[W]hen a party raises the question of statutory immunity prior to trial, the proper standard for the circuit court to use in determining immunity under the Act is a preponderance of the evidence." Id. at 411, 709 S.E.2d at 665. The South Carolina Supreme Court clarified consideration of immunity under the Act does not require a trial court to accept a defendant's version of the underlying facts. State v. Curry, 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013).

In an appeal from a circuit court judge's pre-trial determination regarding a claim of statutory immunity, the appellate court reviews the circuit court judge's ruling for an abuse of discretion. Curry, 406 S.C. at 370, 752 S.E.2d at 266. "An abuse of discretion occurs when the

trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007). The abuse of discretion standard does not allow the evidence to be reweighed or allow for a reassessment of the trial court's assessment of witness credibility or lack thereof. Cf. State v. Mitchell, 382 S.C. 1, 675 S.E.2d 435 (2009) (equating the "any evidence" standard of review in criminal cases to the abuse of discretion standard of review and emphasizing that, under this standard, the appellate court "does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence").

Pursuant to the Act:

> 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, unless the person against whom deadly force was used is a law enforcement officer acting in the performance of his official duties and he identifies himself in accordance with applicable law or the person using deadly force knows or reasonably should have known that the person is a law enforcement officer.

S.C. Code Ann. § 16-11-450(A) (Supp. 2014). The Act addresses the presumption of fear by establishing:

> (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 ...; 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 occupied vehicle including, but not limited to, an owner, lessee, or titleholder;
>
> . . . .

S.C. Code Ann. § 16–11–440 (Supp. 2014).

Subsection (A) does not apply in the instant case because the victim was not in the process of unlawfully and forcefully entering the residence, already unlawfully or forcefully entered the residence, or acting in a manner in which it was reasonable to believe an unlawful and forceful entry was occurring. Additionally, as the trial court found and is supported by the testimony of Ms. Copeland, both the victim and Appellant were invited guests at the property so the victim had a right to be at the residence—the same right as Appellant.[2] As a result, Subsection (B) prevents application of the presumption of fear in this case. See Curry, 406 S.C. at 370, 752 S.E.2d at 266 (finding "the presumption of subsection (A) does not apply if the victim has an equal right to be in the dwelling or residence" and concluding "[b]ecause Collins was a social guest and rightfully in the apartment, subsection (A) is inapplicable to Appellant"). Curry is controlling and so the presumption applicable under Subsection (A) is not applicable.

The Act further provides:

> A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including, . . ., 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.

[2] Appellant maintained at the hearing he lived with Ms. Copeland; however, she disagreed and indicated he stayed there two or three times a week, and she considered him a guest in her home. (T.18; 24; 32; R.___). Significantly, both Appellant and Ms. Copeland indicated Appellant did not have a key to the residence. (T. 18; 25; 32; R.___). The trial court specifically found both the victim and Appellant were "two invited guests." (T.57; R.___).

S.C. Code Ann. § 16-11-440(C) (Supp. 2014) (emphasis added).

In analyzing the interplay between sections 16-11-440(C) and 16-11-450, the South Carolina Supreme Court explained: "Consistent with the Castle Doctrine and the text of the Act, a valid case of self-defense must exist, and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity. This includes all elements of self-defense, save the duty to retreat." Curry, 406 S.C. at 371, 752 S.E.2d at 266. The Court further articulated: "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.

As a result, in addition to establishing application of section 16-11-440(C), Appellant must also the elements of self-defense:

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

State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984) (emphasis added). The fourth element of self-defense—the duty to retreat—is excused under the Act if the defendant can establish entitlement to its consideration under Subsection (C).

The circuit court in the instant case did not abuse his discretion in denying Appellant's motion for immunity. Initially, this case is similar to the case of State v. Manning, 418 S.C. 38,

791 S.E.2d 148 (2016). In Manning, the victim who was an invited guest and the defendant got into a physical and verbal argument. The victim originally pulled a weapon on the defendant, who was able to take the weapon from the victim. Id. at 41, 791 S.E.2d at 149. The defendant then fired when the victim approached him, shooting the victim in the head. At the hearing, the State maintained because the victim was unarmed at the time of the shooting, the defendant was not reasonably in fear of great bodily injury or death at that time. In affirming the denial of immunity, the South Carolina Supreme Court explained: "the victim was unarmed at the time she was shot, meaning we cannot say that the trial judge abused his discretion in denying Respondent immunity under subsection (C)." Id. at 45, 791 S.E.2d at 151.

In this case, the victim pushed Appellant twice. At that time, Appellant was armed with a knife he had retrieved right before the victim arrived and the victim was not. This fact is not in controversy. (T.49; R.___). In Manning, the Supreme Court held the trial court did not abuse its discretion in denying immunity when one party was armed, and the other was not, regardless of the other facts presented. The instant case does not present the same level of apprehension experienced by the defendant in Manning, who disarmed his girlfriend of the gun originally pointed at him. In this case, the victim merely pushed Appellant twice, even based on Appellant's own testimony. (T.48; R.___). Here, the victim was never armed, never drew or presented a weapon, never threatened Appellant with a weapon. The only party armed in this altercation was Appellant, and he never used the knife as a deterrent, but instead immediately stabbed the victim without warning. The trial court correctly determined Appellant was not reasonably in fear of his life or serious bodily injury at the time of the shooting, especially in light of the fact he was the only person wielding a weapon. As a result, the circuit court did not err in denying Appellant's motion for immunity.

Additionally, the objective evidence presented in this case does not establish Appellant's fear of imminent harm was reasonable. Appellant acknowledged he knew the victim and that they had never had "bad blood" or "any beef" between them. (T.43-44; R.___). The two had no prior history of difficulties the day of the incident or at any point in their past.

This case is clearly distinguishable from State v. Douglas, 411 S.C. 307, 768 S.E.2d 232 (Ct. App. 2014) and State v. Jones, 416 S.C. 283, 786 S.E.2d 132 (2016), in which the appellate courts found the evidence supported a determination the defendants were entitled to immunity under the Act. In Douglas, the victim taunted the defendant by refusing to give him back a bottle of prescription medicine. When the defendant yelled at the victim, the victim "snapped." The victim grabbed the defendant and threw him up against the refrigerator, causing Douglas to hit his head. Douglas, 411 S.C. at 313, 768 S.E.2d at 236. The victim held him there until the defendant felt his knees buckle underneath him. When the victim released the defendant, Douglas fell on the floor and hit his head again. The victim then got on top of the defendant and struck him in the eye. Douglas told the victim several times to leave him alone and to leave his house, but the victim refused. After biting the defendant in the leg, the victim went into the dining room and started laughing. The victim advanced on Douglas and "looked like a man possessed." The defendant was "terrified" and fired a shot killing the victim. Id. at 314, 768 S.E.2d at 236. The circuit court in Douglas found by a preponderance of the evidence that (1) the defendant reasonably believed shooting the victim was necessary to prevent great bodily injury to himself, and (2) Douglas acted in self-defense. This Court explained: "The evidence supports these findings. [Douglas] presented several photographs showing severe bruising on [his] upper arms, a black eye, a scraped knee, and several marks on his legs and chest." Id. at 319, 768 S.E.2d at 239.

In Jones, the defendant and the victim were involved in a physical altercation over a cell phone that the victim purchased and gave to the defendant. According to the defendant, the victim began pushing her and punching her as she began to leave their apartment. The defendant stated that, while she was outside the apartment, the victim pulled her hair and attempted to force her back inside. During this confrontation, some of the defendant's hair weave was removed from her head as the victim dragged her down the street. Jones, 416 S.C. at 287, 786 S.E.2d at 134. The defendant claimed the victim continued to try and force her back into the apartment. After she threw the phone on the ground, the defendant was able to flee the apartment Id. at 288, 786 S.E.2d at 134.

The defendant reentered the apartment when she believed things had cooled down to collect her things. The victim started yelling and pushing the defendant again telling her to get out. The victim then grabbed her, asked her if she was mad, and began shaking her while telling her "It's over. It's your fault." Id. at 288, 786 S.E.2d at 135. The Court found the defendant believed the victim was getting ready to hit her again, so she "grabbed the knife out of [her] shirt and stabbed him" one time in the chest. Id.

In the instant case, there is no prior altercation between the parties and not reason justifying Appellant's alleged belief he was in fear for his life. The victim in this case arrived after being called by his cousin, Appellant's girlfriend at the time. According to Appellant's version of events, after his Ms. Copeland called the victim to come over and allegedly "beat [his] ass,[3]" Appellant retrieved the knife from the kitchen[4] and just waited outside on the front porch.

[3] Ms. Copeland testified she called the victim to come and talk with Appellant because she and Appellant were having an argument. (T.20-21; R.__).

[4] Appellant testified he grabbed the knife "like about a minute before [the victim] came" and that he did not know why he grabbed the knife. He stated: "No reason at all. Just got it for no reason. I didn't intend to do nothing with it really." (T.44; R.___). His own testimony clearly indicates he did not obtain the knife out of fear of the victim or because he needed it for protection like the testimony in Jones established.

(T.35; 44; R.___). The victim arrived, got out of his car, stated: "what the f is going on" and pushed Appellant. (T.38; R.___). Appellant described it as a "little shove." (T.40; R.___). He testified he told the victim not to do it again, but the victim pushed him "hard" that time. (T.40-41; R.___). Appellant stated he "almost fell" as a result of the push. It was after this push that Appellant pulled out the knife from his pocket and stabbed the victim. (T.48; R.___).

After he stabbed him, Appellant did not remain at the scene. Instead, he fled the scene and then further evaded police while they were looking for him. (T.49-51; R.___). On one incident, when the police arrived he went out the back because he knew they were there for him. (T.51; R.___). Over two weeks later, officers finally caught Appellant to arrest him. (T.51; R.___).

The evidence in this case supports the trial court's determination Appellant failed to demonstrate he was in reasonable fear for his life or of serious bodily injury at the time he stabbed the victim. Instead, the evidence indicates Appellant did not fear the victim, harbored no reason to believe the victim would significantly harm him, suffered no injury at all from the two pushes from the victim, and then fled the scene and evaded arrest. The trial court's denial of Appellant's motion for immunity should be affirmed because there is evidence to support the finding Appellant failed to establish the requisite elements of self-defense because he could not have reasonably feared for his life or feared he would suffer serious bodily injury at the time of the stabbing.

At a minimum, the testimony and evidence presented in this case "presents a quintessential jury question" and supports the trial court's decision to deny Appellant's motion for immunity. This case presents a question for the jury to resolve based on its view of the evidence and credibility of the witnesses and the court did not err in allowing the case to go

forward to trial when presented with conflicting testimony surrounding the events of the stabbing. See Curry, 406 S.C. at 372, 752 S.E.2d at 267. As a result, this Court should affirm the trial court's decision to deny immunity.

II. The trial court did not err in allowing the jury to view a single photograph of the wound inflicted by Appellant on the victim, nor did the court err in allowing the jury to see the scar resulting from Appellant's stabbing of the victim.

Appellant maintains the trial court erred in viewing a photograph of the wound suffered by the victim, State's Exhibit 5, and allowing the victim to raise his shirt to demonstrate the scar left by the stabbing. The photo and the scar are definitely probative in this case, especially in light of the defense's request and the trial court's subsequent charge of the lesser included offenses of assault and battery of a high and aggravated nature (ABHAN) and assault and battery in the first degree (A&B first). (T.226-235; R.___). Further, the single photograph and single viewing of the scar did not create an undue tendency to suggest a decision on an improper basis.

"The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court." State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) (emphasis added). Further, "[t]his Court reviews 403 rulings pursuant to the abuse of discretion standard, and gives great deference to the trial judge's decision." State v. Myers, 359 S.C. 40, 48, 596 S.E.2d 488, 492 (2004); see also State v. Adams, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003) ("A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances.") (emphasis added).

"The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court." State v. Holder, 382 S.C. 278, 290, 676 S.E.2d 690, 697 (2009) (quoting State v. Nance, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996)). "A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice." State v. Kelley, 319 S.C. 173, 177, 460 S.E.2d 368, 370 (1995) (emphasis added). Admitting photographs which serve to corroborate

testimony is not an abuse of discretion. State v. Martucci, 380 S.C. 232, 250, 669 S.E.2d 598, 607 (Ct. App. 2008).

Photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions. State v. Brazell, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997). "To constitute unfair prejudice, the photographs must create 'an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.'" State v. Jackson, 364 S.C. 329, 334, 613 S.E.2d 374, 376 (2005) (quoting State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991)).

The jury was presented the task of determining whether the actions of Appellant satisfied the elements of attempted murder, ABHAN, or A&B first. Section 16-3-29 explains: "A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder." S.C. Code Ann. § 16-3-29 (Supp. 2015). Section 16-3-600 includes the offenses of ABHAN and A&B first:

> (B)(1) A person commits the offense of assault and battery of a high and aggravated nature if the person unlawfully injures another person, and:
>
> (a) great bodily injury to another person results; or
>
> (b) the act is accomplished by means likely to produce death or great bodily injury.
>
> (C)(1) A person commits the offense of assault and battery in the first degree if the person unlawfully:
>
> . . .
>
> (b) offers or attempts to injure another person with the present ability to do so, and the act:
>
> (i) is accomplished by means likely to produce death or great bodily injury . . . .

S.C. Code Ann. § 16-3-600 (Supp. 2015). The statute further defines "great bodily injury" which is a required finding for either ABHAN or A&B first: "'Great bodily injury' means bodily injury

which causes a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of a bodily member or organ." Id.

In order to convict Appellant of either ABHAN or A&B first, the jury had to find either Appellant injured the victim and great bodily injury resulted or he offered and attempted to cause great bodily injury. As a result, the jury was required to demonstrate the stabbing either: caused a substantial risk of death; caused serious, permanent disfigurement; or caused protracted loss or impairment.

The photograph in this case, depicting the wound, its location, and its seriousness was certainly probative in this case. The photograph of the wound provided visual evidence to the jury demonstrating the substantial risk of death faced by the victim as a result of the stabbing. (State's Exhibit 5). It also provided the jury with an understanding of the severity of the wound so they could determine whether serious, permanent disfigurement would likely occur.

The photograph served to corroborate the testimony regarding the wound and its seriousness. The State did not offer extensive medical testimony regarding the wound and its seriousness. The victim explained the stab wound went through his stomach and small intestines requiring surgery and hospitalization for five days. (T.124; R.___). He indicated State's Exhibit 5, the photograph at issue, was taken pre-operation. (T.126; State's Exhibit 5; R.___).The only testimony came from the victim and needed to be corroborated by the photograph of the actual wound. See Torres, 390 S.C. at 623, 703 S.E.2d at 229 ("It is well settled in this state that '[i]f the photograph serves to corroborate testimony, it is not an abuse of discretion to admit it.'") (citing State v. Nance, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996)).

Additionally, there was minimal prejudice created and no likelihood the single photograph, which was not that gruesome in nature, would result in a decision by the jury on an

emotional or otherwise improper basis. This single photograph[5] is significantly different than the photographs in Collins, which were the autopsy photographs of a young boy eaten alive by dogs. The single photograph of the wound was not admitted to inflame the jury, but instead to detail the stab wound suffered by the victim.

The scar shown when the victim raised his shirt also had significant probative value. It demonstrated the serious, permanent disfigurement suffered as a result of the stab wound and also served to demonstrate exactly on the victim's body where the wound occurred. Both facts were significant in the jury's determination of whether the stabbing had a significant risk of causing death and whether it resulted in disfigurement sufficient to satisfy the elements of ABHAN or A&B first. The victim testified about having received 43 staples to close the wound after surgery. The showing of his scar corroborated this testimony as well as demonstrating a required element of the lesser included offenses requested and received by Appellant's counsel. Accordingly, the trial court did not err in admitting either the single photograph of the victim's stab wound or in having the victim raise his shirt to demonstrate the lasting reminder of Appellant's actions.

[5] It should be noted that the State had two photographs and at trial limited admission to only State's Exhibit 5 further decreasing any prejudice to Appellant.

III. The trial court did not err in finding the closing argument was not improper when the solicitor did not ask the juror's to decide the case based on anything other than the evidence presented and never made a "Golden Rule" type argument.

Appellant contends the trial court erred in overruling Appellant's objection to the State's closing argument. The State's closing argument was proper and was not the type of "Golden Rule" argument frowned upon by the Court. Further, the argument did not suggest to the jury to make its determination based on any factor other than the evidence presented at trial. Finally, Appellant's argument should be deemed abandoned because it is argued in an incredibly conclusive manner.

Argument Abandoned

First, Appellant's issue is addressed in a conclusive manner and as a result should be deemed abandoned by this Court. See, e.g., Brouwer v. Sisters of Charity Providence Hosps., 409 S.C. 514, 520 n.4, 763 S.E.2d 200, 203 n.4 (2014) (refusing to consider an argument in the appellant's brief that was "conclusory" and "not supported by any authority"); State v. Jones, 344 S.C. 48, 58–59, 543 S.E.2d 541, 546 (2001) (stating an argument is deemed abandoned on appeal when conclusory and without supporting authority); First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (noting a claim is deemed abandoned when the appellant fails to support it with arguments or citations to authority). Appellant's one citation involves a case in which the oath presented to the jury was challenged and he references no cases involving closing arguments. The argument is entirely conclusive with no analysis provided. As a result, this Court should deem the issue abandoned and refuse to address the merits.

Merits

Even if this Court considers the argument, the issue is without merit. "In keeping their closing arguments within the record, solicitors additionally must tailor their remarks 'so as not to

appeal to the personal biases of the jury' or 'arouse the jurors' passions or prejudices.'" Tappeiner v. State, 416 S.C. 239, 250, 785 S.E.2d 471, 477 (2016) (quoting Von Dohlen v. State, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004)). Solicitors should avoid comments that ask jurors to place themselves in the victim's—or another party's—shoes, because those types of comments tend to "'completely destroy all sense of impartiality of the jurors.'" Brown v. State, 383 S.C. 506, 515-16, 680 S.E.2d 909, 914 (2009) (quoting State v. Reese, 370 S.C. 31, 38, 633 S.E.2d 898, 901 (2006)). The South Carolina Supreme Court has prohibited "golden rule argument," in which jurors are urged to place themselves in the position of a party, a victim, or a victim's family member and decide the case from that perspective because it causes "jurors to decide a case based on passion and prejudice instead of a reasoned, impartial consideration of evidence presented to them." Von Dohlen, 360 S.C. at 609, 602 S.E.2d at 744.

"A trial court is vested with broad discretion in dealing with the range and propriety of a closing argument." State v. Harris, 382 S.C. 107, 120, 674 S.E.2d 532, 539 (Ct. App. 2009). "An appellate court will not disturb a trial court's ruling regarding a closing argument unless the trial court commits an abuse of discretion." Id. In assessing the propriety of remarks made during the State's closing argument, appellate courts must determine "whether the solicitor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Vaughn v. State, 362 S.C. 163, 169-170, 607 S.E.2d 72, 75 (2004) (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 642 (1974)).

The State never asked the jury to decide this case based on anything other than the evidence and testimony presented. During the closing argument, the solicitor stated:

> The final thing is the presumption of innocence. . . . . He is presumed innocence [sic] unless and until you the jurors **make a determination that he's guilty beyond a reasonable doubt**. That stays with him. It's like a robe, it's like a nice warm shirt . . . . As

> soon as you get to the jury room and **you start looking at the pictures and weighing the evidence and start weighing the inconsistences of the defendant, you can start taking that robe off. That's what the law says.** You can take off that presumption of innocense [sic]. The shirt of righteousness. And I submit to you that when you go over this evidence you will take it off.

(T.328-329; R.___) (emphasis added). The solicitor is making it clear that the jury is to decide its verdict beyond a reasonable doubt after looking at and weighing the evidence and testimony. He is not telling them to decide the case on anything other than the evidence before the jury. He then states:

> And usually, save it, save, that shirt, that clothe of innocents and when you come back in here with your verdict **which we submit should be based on the evidence**, Attempted Murder, malicious attempt and intent to kill [Lawrence Cooley.] [W]hen you come back in with that verdict, bring the shirt in symbolically. Bring it in symbolically because the only innocent person in this room is Lawrence Cooley. And with your verdict symbolically give him that shirt, that cloak and let it keep him warm.

(T.329; R.___) (emphasis added). Again the solicitor has reminded the jury that their verdict should be based on the evidence.

The State, even in the portion cited by Appellant, never asked that the verdict be issued symbolically as opposed to on the basis of the evidence. The State asked the jury to consider the evidence, remove Appellant's cloak or shirt metaphorically serving as the presumption of innocence, and give that cloak or shirt to the victim after rendering their verdict of guilty. The State did not ask the jury to step into the shoes of the victim, but instead asked the jury to serve its function as fact finder and, ultimately, return a guilty verdict. Additionally, any error is entirely harmless in light of the evidence against Appellant and the fact the comments by the solicitor did not infect the trial with unfairness. In light of the entirety of the closing argument, the trial court did not err in overruling Appellant's objection to a portion of the State's argument.

CONCLUSION

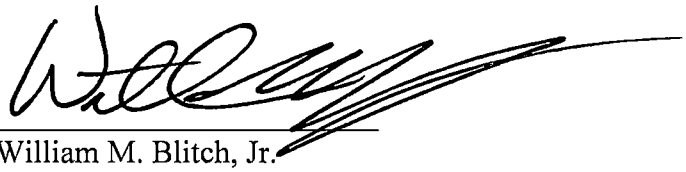
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General
S.C. Bar No. 15608

EARNEST A. FINNEY, III
Solicitor, Third Judicial Circuit

BY: 
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ATTORNEYS FOR RESPONDENT

October 13, 2017

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
OCT 13 2017
SC Court of Appeals

Appeal from Sumter County
Honorable R. Ferrell Cothran, Circuit Court Judge
Appellate Case Tracking No. 2016-001175

The State, Respondent,

vs.

Jermaine Antonio Hodge, Appellant.

PROOF OF SERVICE

I, Anne A. Mueller, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing copies of the same in the United States mail, postage prepaid, addressed to:

Wanda H. Carter, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.
This 13th day of October, 2017.

Anne Mueller

ANNE A. MUELLER
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ALAN WILSON
ATTORNEY GENERAL

October 13, 2017

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OCT 13 2017
SC Court of Appeals

Wanda H. Carter, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211

RE: State v. Jermaine Antonio Hodge
Appellate Case Tracking No. 2016-001175

Dear Ms. Carter:

I am enclosing copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case. If you have any questions, please do not hesitate to contact me.

Sincerely,

William M. Blitch, Jr.
Assistant Attorney General
S.C. Bar No. 15608

Enclosures

cc: Honorable Jenny A. Kitchings (original and one enclosed)
Victim Services