STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Appeal from Chesterfield County
Honorable Roger E. Henderson, Circuit Court Judge
Honorable Paul M. Burch, Circuit Court Judge
Appellate Case No. 2016-000779



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THE STATE,

Respondent,

vs.

GARY MOORE,

Appellant.

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# INITIAL BRIEF OF RESPONDENT

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ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

WILLIAM B. ROGERS, JR.
Solicitor, Fourth Judicial Circuit

Post Office Box 616
Bennettsville, SC 29512
(843) 479-6516

ATTORNEYS FOR RESPONDENT

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II.

The trial judge properly denied Appellant's directed verdict motion because substantial evidence was presented during trial tending to both prove Appellant's guilt for attempted murder and disprove self-defense beyond a reasonable doubt.

III.

The trial judge committed no error by presenting supplemental instructions in response to the jury's note because those instructions accurately and properly explained the law applicable to Appellant's case and served to clarify the confusion demonstrated by the note. However, even assuming the trial judge's supplemental instructions were somehow erroneous, any error resulting from those instructions was entirely harmless as the trial judge's response to the jury's note merely clarified proof of premeditation was unnecessary for a defendant to be convicted of attempted murder, which was an unquestionably accurate statement of law.

## STATEMENT OF THE CASE

In July of 2015, Appellant Gary Moore was arrested after he stabbed a man multiple times at a convenience store. In December of 2015, the Chesterfield County Grand Jury indicted Appellant for one count of attempted murder. Prior to trial, Appellant sought immunity from prosecution pursuant to the South Carolina Protection of Persons and Property Act. On February 17, 2016, a pre-trial hearing was conducted in the Chesterfield County Court of General Sessions with the Honorable Roger E. Henderson, circuit court judge, presiding. On the following day, Judge Henderson denied Appellant's request for immunity from prosecution. Thereafter, on April 5, 2016, a jury trial was commenced in the Chesterfield County Court of General Sessions with the Honorable Paul M. Burch, circuit court judge, presiding. At the conclusion of trial, the jury convicted Appellant as indicted. Following the verdict, Judge Burch delayed sentencing until a pre-sentence investigation report could be prepared. Subsequently, on April 11, 2016, a sentencing hearing was held in the Chesterfield County Court of General Sessions with Judge Burch again presiding. During the hearing, Judge Burch sentenced Appellant to an eighteen-year term of imprisonment for attempted murder. Appellant then filed a timely notice of appeal.

## STATEMENT OF FACTS

On the afternoon of July 14, 2015, the fifty-six-year-old victim, Charles Wallace ("Victim"), drove his truck to McCormick's Grill, a convenience store and gas station located in Jefferson, South Carolina, and went inside to get something to eat. (Trl. Tr. pp. 37-38; p. 92). At some point after he arrived, Appellant Gary Moore, who was thirty-four years old at the time, arrived at the store and also went inside. (Im. Hrg. Tr. p. 44; Trl. Tr. p. 38). Shortly after that, the two men engaged in a physical altercation, and Appellant stabbed Victim four times with a knife that had a five-inch-long blade. (Im. Hrg. Tr. pp. 61-63; Trl. Tr. pp. 39-44; pp. 127-128). As a result of the stabbing, Victim was seriously injured, suffered a punctured lung, and was hospitalized for multiple days after being transported to a hospital by helicopter, and Appellant was placed under arrest for his actions inside the store. (Im. Hrg. Tr. pp. 102-103; Trl. Tr. pp. 45-46; p. 102; pp. 118-120).

Subsequent to his arrest, Appellant was indicted for attempted murder and sought immunity from prosecution pursuant to the South Carolina Protection of Persons and Property Act. (Im. Hrg. Tr. pp. 5-6; Trl. Tr. p. 6; Indictment). During the ensuing immunity hearing, competing accounts of the incident were presented to the circuit court judge along with a recording of the incident taken from the store's surveillance footage. (Im. Hrg. Tr. p. 5; pp. 8-111). After considering all the evidence and testimony presented, the circuit court judge denied Appellant's immunity claim. (Im. Rul. Tr. 4). Thereafter, Appellant proceeded forward to trial, his case was submitted to a jury, and the jury ultimately convicted him of the charged offense. (Trl. Tr. p. 6; p. 225; p. 231). Subsequently, the trial judge sentenced Appellant to an eighteen-year term of imprisonment. (Sent. Tr. p. 6).

## ARGUMENT

I.

**The circuit court judge did not abuse his discretion in determining Appellant failed to meet his burden of establishing by a preponderance of the evidence he was entitled to immunity from prosecution pursuant to the South Carolina Protection of Persons and Property Act because the circuit court judge's conclusion it was not reasonably necessary for Appellant to stab his victim multiple times following an altercation brought about by a simple slap was supported by the evidence and testimony presented during the immunity hearing.**

Appellant contends the circuit court judge erred by finding he failed to meet his burden of establishing entitlement to immunity from prosecution pursuant to the South Carolina Protection of Persons and Property Act ("the Act"). In support of that contention, Appellant—relying on his own view of the evidence—maintains the circuit court judge's ruling was without evidentiary support because the evidence and testimony presented during the immunity hearing allegedly proved all the elements of self-defense. Significantly, while Appellant's testimony could have supported a finding he acted in self-defense and was entitled to immunity from prosecution **if** accepted as more persuasive than the contradictory evidence presented during the hearing, the circuit court judge was **not** required to—and did not—accept Appellant's testimony as true or more persuasive. Instead, the circuit court judge properly weighed and considered all the conflicting evidence and testimony presented, which included a recording of the incident, and concluded it was not reasonably necessary for Appellant to believe he needed to use deadly force under the circumstances involved in his case. Based on that conclusion, which was supported by the evidence, Appellant failed to establish all the required elements of self-defense and, thus, was not entitled to immunity from prosecution pursuant to the Act. Accordingly, the circuit court judge properly rejected Appellant's immunity claim, and there is no proper basis upon which to

disturb the circuit court judge's factually-supported ruling on appeal. The circuit court judge's immunity ruling and Appellant's conviction should be affirmed

## RELEVANT FACTS

Prior to Appellant's trial, defense counsel asserted Appellant was entitled to immunity pursuant to the Act. (Im. Hrg. Tr. pp. 5-6). Based on that assertion, the trial judge conducted a pre-trial hearing on the matter and allowed the parties to present testimony and evidence as to the events giving rise to Appellant's attempted murder charge. (Im. Hrg. Tr. p. 5; pp. 8-111).

During the course of the hearing, Appellant testified on his own behalf, acknowledged he entered the convenience store on the date of the incident, and claimed he was walking down one of the store's aisles to get a soda when he heard Victim make a threatening statement from behind.[1] (Im. Hrg. Tr. pp. 9-12). In response, Appellant asserted he turned around, saw Victim blocking his only escape route along with another individual, and tried to go around Victim. (Im. Hrg. Tr. pp. 12-13; p. 38). At that point, Appellant stated Victim slapped him in the side of the face, he attempted to push Victim away, and Victim pulled him to the ground by his hair. (Im. Hrg. Tr. p. 13). After that, Appellant claimed the other individual began choking him while he was on top of Victim on the ground, he began to pass out from being choked, and he responded by pulling out his knife and stabbing at the men in order to get them off him. (Im. Hrg. Tr. pp. 13-16; p. 18; pp. 39-40). Once Victim had been stabbed, Appellant asserted he broke free, left the store, called 911, waited for law enforcement officers to arrive, and reported he was the victim of an attack by several people. (Im. Hrg. Tr. pp. 29-30). Appellant claimed he was then handcuffed, taken to jail, and had his injuries, which included swelling and hair loss, photographed there. (Im. Hrg. Tr. pp. 30-31; p. 35). Appellant further alleged he believed he

[1] Specifically, Appellant alternately alleged Victim stated he had warned him he was going to kill him and he had told him he was going to catch him somewhere. (Im. Hrg. Tr. pp. 10-12).

was going to be killed during the incident, and he supported that claim by referencing two prior incidents in which Victim allegedly tried to attack him.[2] (Im. Hrg. Tr. pp. 19-23).

In addition, Victim was called to the witness stand by defense counsel and testified about the details of the incident. (Im. Hrg. Tr. pp. 49-68). During his testimony, Victim candidly acknowledged he slapped Appellant, whom he stated he wanted to give an "ass whipping," with an open hand at the convenience store on the date of the incident but explained he did so because Appellant began making derogatory comments as soon as he entered the store.[3] [4] (Im. Hrg. Tr. pp. 54-55; p. 57; p. 59; pp. 61-62). Subsequent to the slap, Victim stated Appellant engaged him in a fight, they began "tussling," and he pulled Appellant to the ground during the altercation. (Im. Hrg. Tr. pp. 61-65). After that, Victim indicated a young man came over to break up the fight, everyone stood back up, and Appellant stabbed him multiple times while the fight was ending. (Im. Hrg. Tr. pp. 62-68).

Following the presentation of that testimony, the solicitor called Steven Hooks, who was the individual who intervened when the fight broke out, to the witness stand. (Im. Hrg. Tr. pp. 70-113). During his testimony, Hooks recounted he saw Appellant and Victim "tussling" on the

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[2] Regarding the first of the past incidents, Appellant alleged Victim attempted to attack him with an axe handle and damaged his vehicle at his fiancée's mother's house. (Im. Hrg. Tr. pp. 19-22). Regarding the second of the past incidents, Appellant claimed Victim moved towards him in an aggressive manner at a magistrate's court proceeding but was stopped by a law enforcement officer. (Im. Hrg. Tr. p. 23).

[3] Similar to Appellant's testimony, Victim acknowledged he damaged Appellant's vehicle and attempted to "knock [Appellant's] brains out" with an axe handle at Appellant's fiancée's mother's house, but he explained he only did so **after** Appellant first brandished a stick. (Im. Hrg. Tr. pp. 50-52). Furthermore, regarding the other past incident involving the two, Victim acknowledged he approached Appellant during a magistrate's court proceeding and was restrained by an officer. (Im. Hrg. Tr. p. 53).

[4] During his testimony, Victim indicated Appellant knew he was inside of the store prior to the incident because his truck was parked outside. (Im. Hrg. Tr. p. 60).

floor of the convenience store on the date of the incident, he grabbed Appellant by the shoulder to separate the men, he pulled Appellant up and stopped the fight, and Appellant then left the store. (Im. Hrg. Tr. pp. 70-78; pp. 80-83). Once Appellant was gone, Hooks indicated he helped Victim to the bathroom because Victim had been cut, and he noticed he had also received a small "nick" during the skirmish. (Im. Hrg. Tr. 71; p. 76; p. 82).

Likewise, Melissa Ann Griffin, an employee at the convenience store, recounted Victim was in the store on the date of the incident when Appellant entered, the two made eye contact, and then "it was just on." (Im. Hrg. Tr. pp. 86-87). At that point, she stated the two began fighting and went to the floor, she threatened to call 911 to encourage the men to stop fighting, and Hooks intervened and separated the men. (Im. Hrg. Tr. pp. 87-90). After that, Griffin asserted Appellant exited the store, held the store's door closed from the outside, and shouted to Victim he got what he deserved. (Im. Hrg. Tr. pp. 89-90).

Beyond that testimony, Sergeant Tim Hutchinson and Investigator Greg Burns of the Chesterfield County Sheriff's Office testified about their responses to the incident. (Im. Hrg. Tr. pp. 92-93; pp. 105-106). During his testimony, Sergeant Hutchinson stated he encountered Appellant in the store's parking lot after responding to the scene of the stabbing and Appellant immediately claimed to be a victim. (Im. Hrg. Tr. pp. 92-96). Sergeant Hutchinson further testified he found Victim inside the store with stab wounds to his back and stomach, and he indicated Victim was ultimately transported to a hospital by helicopter due to the severity of his injuries. (Im. Hrg. Tr. pp. 98-103). Meanwhile, Investigator Burns testified he responded to the store after the stabbing and used his cellular phone to record the surveillance footage of the incident due to the fact it could not be downloaded from the store's surveillance equipment, and

a recording of the footage was admitted into evidence and played for the circuit court judge.[5] (Im. Hrg. Tr. pp. 106-111).

Following the presentation of that testimony and evidence, defense counsel argued Appellant was entitled to immunity pursuant to the Act because he had a right to be in the store where the stabbing occurred, was not involved in any unlawful activity when Victim started the altercation by slapping him, did nothing to bring about the altercation, and was defending himself by stabbing Victim. (Im. Hrg. Tr. pp. 114-116). In support of that argument, defense counsel noted there were prior difficulties between the two and claimed it was necessary for Appellant to use deadly force during the incident. (Im. Hrg. Tr. pp. 115-116). In rebuttal, the solicitor asserted Appellant's case involved a quintessential jury question based on the fact multiple accounts of the incident had been presented. (Im. Hrg. Tr. pp. 116-117). Furthermore, the solicitor contended Appellant's use of deadly force was not reasonable under the circumstances despite the fact Victim admittedly engaged in improper conduct and noted Appellant continued to assault Victim even after Hooks intervened in the altercation. (Im. Hrg. Tr. p. 118; p. 120).

After considering the arguments of counsel, the circuit court judge took the matter under advisement. (Im. Hrg. Tr. pp. 120-121). Thereafter, upon considering the matter overnight and reviewing the recording of the incident, the circuit court judge denied Appellant's request for immunity. (Im. Rul. Tr. 4). In denying the request, the circuit court judge found Victim's act of

[5] In the recording of the incident, Victim appears to approach Appellant shortly after Appellant entered the convenience store and slap at him with his hand. (State's Ex. # 13 (Recording of Incident)). Immediately after that, Appellant appears to tackle Victim to the ground, and the two men then appear to briefly struggle with one another on the ground before Hooks intervenes. (State's Ex. # 13). After intervening, Hooks does not appear to choke Appellant by the neck at any point and, instead, appears to pull at Appellant's arm to separate the men. (State's Ex. # 13). Thereafter, the men appear to get to their feet, and Appellant then appears to strike at Victim and Hooks several times before running out of the store. (State's Ex. # 13).

slapping Appellant at the outset of the altercation was not of a nature such that Appellant should have believed he needed to take action to prevent death or great bodily injury and further determined Appellant became the aggressor after he was slapped. (Im. Rul. Tr. p. 4). Additionally, based on his view of the evidence, the circuit court judge found Hooks did not appear to choke Appellant during the incident and, instead, appeared to be merely trying to separate Appellant from Victim. (Im. Rul. Tr. p. 4). Based on those findings, the circuit court judge concluded Appellant's case should be presented to jury as it involved a "quintessential jury question." (Im. Rul. Tr. p. 4).

## ANALYSIS

Under the mandates of the Act, any person who uses deadly force in a manner permitted by the provisions of the Act is immune from criminal prosecution for the use of deadly force.[6] S.C. Code Ann. § 16-11-450(A). The intent of the legislature in implementing the Act was to "codify the common law Castle Doctrine" and "to extend the doctrine to include an occupied vehicle and the person's place of business." S.C. Code Ann. § 16-11-420(A). In carrying out that intention, the legislature instructed:

> 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 or 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

[6] Specifically, Section 16-11-450(A) reads: "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[.]" S.C. Code Ann. § 16-11-450(A).

> (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.

S.C. Code Ann. § 16-11-440(A). Additionally, the legislature further instructed:

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

S.C. Code Ann. § 16-11-440(C).

Pursuant to the Act, the burden is on the defendant to establish his entitlement to immunity by a preponderance of the evidence, which is accomplished by demonstrating the existence of all the elements of self-defense aside from the duty to the retreat. See State v. Jones, 416 S.C. 283, 301, 786 S.E.2d 132, 141 (2016) (recognizing "the defendant must demonstrate the elements of self-defense, save the duty to retreat, by a preponderance of the evidence" in order to establish entitlement to a grant of immunity pursuant to Section 16-11-440(C)). However, if the statutory presumptions of Section 16-11-440(A) are applicable to the case, "there is no requirement that the defendant prove he believed he was in imminent danger of losing his life or sustaining serious bodily injury[.]" Id.

Regarding self-defense, the following four elements must be present in order for that particular defense to be established in South Carolina:

> 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. Curry, 406 S.C. 364, 371, n. 4, 752 S.E.2d 263, 266 (2013) (quoting State v. Davis, 282 S.C. 45, 317 S.E.2d 452 (1984)). Thus, in cases involving claims of immunity, the first three elements must be established by the defendant, including the elements regarding the reasonableness and necessity of the defendant's actions. Jones, 416 S.C. at 301, 786 S.E.2d at 141; see State v. Osborne, 202 S.C. 473, 478, 25 S.E.2d 561, 563 (1943) ("The defense of self-defense is based upon necessity[.]"); State v. Harvey, 110 S.C. 274, 277, 96 S.E. 399, 400 (1918) (instructing a person may not employ deadly force in self-defense unless there is a reasonable necessity to kill even if the other elements of self-defense are present).

During proceedings regarding an immunity claim, 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 applicability to a defendant's case. State v. Duncan, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011). In resolving such a claim, "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. Stated plainly, a preponderance of the evidence means evidence which convinces of its truth and is more convincing than the evidence to the contrary. State v. Scott, 420 S.C. 108, 113, 800 S.E.2d 793, 796 (Ct. App. 2017); see BLACK'S LAW DICTIONARY 1301 (9th ed. 2009) (defining "preponderance of the evidence" as "[t]he greater weight of the evidence, not necessarily established by the greatest number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and

impartial mind to one side of the issue rather than the other").

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. State v. Douglas, 411 S.C. 307, 316, 768 S.E.2d 232, 237 (Ct. App. 2015); see Curry, 406 S.C. at 370, 752 S.E.2d at 266 ("[T]his court reviews [a claim of immunity under the Act] under an abuse of discretion standard of review."). An abuse of discretion occurs when the circuit court judge's conclusions lack evidentiary support or are controlled by an error of law. State v. Elders, 386 S.C. 474, 480, 688 S.E.2d 857, 861 (Ct. App. 2010); see also Reed v. Becka, 333 S.C. 676, 684, 511 S.E.2d 396, 400 (Ct. App. 1999) ("In appeals of pretrial rulings, this Court is 'bound by fact findings in response to motions preliminary to trial when the findings are supported by the evidence and not clearly wrong or controlled by error of law.' " (citation omitted)). Critically, if **any** evidence supports the circuit court judge's immunity determination, an appellate court must affirm that determination. Curry, 406 S.C. at 372, 752 S.E.2d at 267; see Douglas, 411 S.C. at 316, 768 S.E.2d at 237 ("[T]he abuse of discretion standard of review does not allow this court to reweigh the evidence or second-guess the trial court's assessment of witness credibility.").

In the case sub judice, the circuit court judge was presented with competing claims of what precipitated and led to the stabbing through the evidence and testimony introduced during the immunity hearing. In one version of events presented by Appellant, Appellant was threatened and attacked in an unprovoked manner by an aggressive assailant who had attempted to unjustifiably assault him with an axe handle in the past, was on the cusp of being choked into unconsciousness by another assailant who joined in the attack without provocation or an apparent reason to do so, was in fear for his life, and had no choice but to stab at Victim and the

other assailant with his knife in order to save himself from impending death or serious bodily injury. If accepted as true, such a version of events could have entitled Appellant to immunity from prosecution as the use of deadly force under those circumstances could have constituted a legitimate act of self-defense. However, in another version of the events presented through other testimony and evidence, Appellant entered the convenience store knowing a man with whom he was mutually engaged in an ongoing feud was inside, directed insulting comments at that man immediately upon entering the store, willingly engaged in a "tussle" with the man in response to a simple slap to the head, and stabbed the man as the fight was being broken up and at a time when nothing was being done to place him in jeopardy of suffering death or great bodily injury.[7] Significantly, if that competing version of events—which was supported by the testimony of the witnesses other than Appellant and by the recording of the incident—was accepted as true, Appellant would not have been entitled to immunity as he was not at risk of death or great bodily injury when he employed deadly force upon Victim. See S.C. Code Ann. § 16-11-440(C) (permitting a person who is attacked in another place he has a right to be to stand his ground and meet force with force so long as he **reasonably** believed the use of deadly force was necessary to prevent death or great bodily injury or to prevent the commission of a violent crime); see also United States v. Black, 692 F.2d 314, 318 (4th Cir. 1982) ("[T]he quantum of force which one may use in self-defense is proportional to the threat which he reasonably apprehends."); cf. Harvey, 110 S.C. at 277, 96 S.E. at 400 ("Tillman Harvey might have been without fault in provoking the difficulty, and still there might have been no necessity to kill. . . . While a man may take life in defense of himself or another, yet the slayer, or the person in whose behalf the

[7] For purpose of the Act, "great bodily injury" means "bodily injury which creates 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." S.C. Code Ann. § 16-11-430(2).

slayer strikes, must not only be without fault in provoking the difficulty, but there must be a necessity to kill.").

When presented with the various versions of events recounted during the immunity hearing along with the recording of the incident, the circuit court judge concluded Appellant failed to meet his burden of establishing his use of deadly force was reasonably necessary under the circumstances in light of the fact Appellant was merely slapped by his victim and then willingly became an aggressive participant in an altercation between the two.[8] In light of the recording of the incident and the testimony establishing Appellant employed deadly force against Victim at the end of an otherwise weaponless confrontation in which nothing was being done to Appellant to place him at risk of suffering death or great bodily injury, the circuit court judge's conclusion was fully supported by the evidence. Cf. State v. Lee, 274 S.C. 372, 375, 264 S.E.2d 418, 419 (1980) (finding no error where "[w]e cannot say that [the trial judge's] finding that the defendant was capable of standing trial was without evidentiary support or against the preponderance of the evidence[.]"). As a result, the circuit court judge did not abuse his discretion by denying Appellant's immunity claim and determining the issues raised by the competing evidence in Appellant's case could be best resolved by a jury. See Reed, 333 S.C. at 684, 511 S.E.2d at 400 (instructing appellate courts are bound by a circuit court judge's fact findings on a pre-trial matter when the findings are supported by the evidence and not clearly

[8] Specifically, the circuit court judge ruled: "The evidence is as I viewed it is that the slap which was admitted by [Victim] was not of the nature that [Appellant] should have believed he was going to have to take action to prevent death or great bodily injury. As a matter fact, my review of the tape once the slap occurred, [Appellant] appeared to become the aggressor in the situation. The individual who he said was choking him did not appear to be choking him but rather was having quite a struggle to pull [Appellant] off of [Victim]. Because of the way I had viewed the evidence, I certainly find that this is a matter that should be submitted to the jury. And as pointed out by the solicitor yesterday this is a quintessential jury question based on my view of the evidence." (Im. Rul. Tr. p. 4).

wrong or controlled by error of law); cf. State v. Weik, 356 S.C. 76, 80-81, 587 S.E.2d 683, 685 (2002) (finding the trial judge's competency determination was supported by the evidence even though conflicting evidence was presented).

In arguing to the contrary, Appellant largely focuses his appellate argument on his own testimony while insisting he actually was in danger of great bodily harm or death in light of his claims of being choked during the altercation with Victim. Importantly though, the circuit court judge was not required to blindly accept Appellant's self-serving testimony or to view the testimony solely in a light most favorable to Appellant in determining whether Appellant had met his burden of proof by a preponderance of the evidence. See Curry, 406 S.C. at 371, 752 S.E.2d at 266 (finding the General Assembly did not intend for a circuit court judge considering an immunity issue to be limited to accepting the accused's version of the underlying facts). Instead, the circuit court judge was fully permitted to consider and evaluate all the evidence in determining whether Appellant met his burden, and his determination Appellant failed to do so was fully supported by what was before him. See Duncan, 392 S.C. at 411, 709 S.E.2d at 665 ("[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."); see also State v. Asbury, 328 S.C. 187, 193, 493 S.E.2d 349, 352 (1997) ("In criminal cases, appellate courts are bound by fact findings in response to preliminary motions where there has been conflicting testimony or where the findings are supported by the evidence and not clearly wrong or controlled by an error of law."). For all the foregoing reasons, the circuit court judge's immunity ruling and Appellant's conviction should be affirmed.

II.

**The trial judge properly denied Appellant's directed verdict motion because substantial evidence was presented during trial tending to both prove Appellant's guilt for attempted murder and disprove self-defense beyond a reasonable doubt.**

Appellant contends the trial judge erred in denying his motion for a directed verdict. In support of that contention, Appellant—relying on his own view of the evidence—maintains the State failed to disprove self-defense beyond a reasonable doubt because the evidence allegedly established each and every element of self-defense. Contrary to Appellant's contention, the evidence and testimony presented during trial tended to establish Appellant attempted to kill Victim with malice aforethought while also establishing Appellant was not acting in self-defense when he repeatedly stabbed Victim. Because the evidence and testimony presented established Appellant's guilt for all the required elements of attempted murder and did not uncontrovertibly establish the existence of self-defense as a matter of law, the trial judge was required to deny the directed verdict motion and submit Appellant's case to the jury to allow for the proper resolution of the issues raised by the evidence. Therefore, the trial judge committed no error in denying Appellant's directed verdict motion. Appellant's conviction should be affirmed.

## RELEVANT FACTS

During trial, Victim testified before the jury about the altercation he had with Appellant at the convenience store. (Trl. Tr. pp. 37-75). Regarding that altercation, Victim stated he went to the store on the date of the incident, parked his truck out front, and went inside to get some food. (Trl. Tr. pp. 38-39). Shortly after that, Victim indicated Appellant entered the store, immediately began "running his mouth" and "cussing" at him, and appeared to want to fight based on the words he was using. (Trl. Tr. p. 38; pp. 54-55; p. 58; p. 67; p. 75). In response, Victim stated he approached Appellant, grabbed him, and slapped him as Appellant continued to

"talk trash." (Trl. Tr. p. 39; p. 41; p. 54; p. 60; p. 64). At that point, Victim indicated the two began struggling and "tussling" with one another, they both fell to the floor, and they continued to fight with one another on the floor until a "[y]oung man" came over to break up the fight. (Trl. Tr. p. 39; pp. 41-43; p. 61; pp. 64-65). After the young man intervened, Victim stated Appellant pulled out a knife and stabbed him four times in the back and side.[9] (Trl. Tr. p. 39; pp. 42-44; p. 49; pp. 65-67). Following the stabbing, Victim indicated Appellant fled from the store while he was transported to an out-of-state hospital due to his injuries. (Trl. Tr. p. 45). He further noted he suffered a punctured lung, underwent surgery, and had to remain in the hospital for four to five days as a result of the stabbing.[10] (Trl. Tr. pp. 45-46). As his testimony continued, Victim specifically noted he would not have done anything on the date of the incident if Appellant had not said anything to him upon entering the store. (Trl. Tr. p. 67). Furthermore, Victim candidly admitted he would have shot Appellant "when he stabbed [him]" if he had possessed a gun at that time.[11] (Trl. Tr. p. 73).

In addition to that testimony, several of the people present inside the store on the date of the incident testified about what they observed. (Trl. Tr. pp. 76-85; pp. 87-89; pp. 108-115). Specifically, Griffin stated Appellant came into the store on the date of the incident while Victim

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[9] During his testimony, Victim acknowledged he had a pocket knife in his pocket while at the convenience store, but he indicated he never removed it from his pocket or brandished it at any point during the incident. (Trl. Tr. p. 42; p. 74).

[10] Later on during trial, Justin Threatt, one of the paramedics who responded to the store after the stabbing, testified Victim's injuries required advanced life support and noted Victim appeared to be going into shock before he was transported to a hospital by helicopter. (Trl. Tr. pp. 116-120).

[11] As part of his testimony, Victim discussed an incident involving Appellant that occurred approximately fifteen months before the stabbing, asserted Appellant was the instigator of that particular episode between the two, and candidly acknowledged he smashed Appellant's vehicle's windshield with an axe handle during the course of their prior dispute. (Trl. Tr. pp. 46-48; p. 69). However, he specifically contended he only armed himself during that earlier incident after Appellant first brandished a weapon. (Trl. Tr. p. 47; p. 69).

was inside, the two looked at one another, Appellant started going down an aisle before turning around and coming back up, the men began fighting with each other, they fell to the floor together, Hooks intervened to stop the fight, the men stood up, Appellant exited the store, and then Appellant told Victim, who was bleeding profusely, he got what he deserved. (Trl. Tr. pp. 77-81; p. 84). Additionally, Marie Kay Deese, another employee of the store, indicated she saw Appellant and Victim fighting with one another on the floor, Hooks intervened and grabbed Appellant by the arm, Appellant was pulled up from the floor, Hooks exclaimed he had been cut, Appellant went out the door with a knife in his hand, Victim appeared to be bleeding profusely, and she helped Victim to the bathroom to tend to his wounds until help arrived. (Trl. Tr. pp. 87-89). Furthermore, Hooks recounted he saw Appellant and Victim on the floor engaged in what appeared to be a mutual bear hug, he grabbed Appellant in an effort to separate the men, he pulled Appellant off Victim, and he then helped Victim to the bathroom after Appellant fled from the store. (Trl. Tr. pp. 109-112; p. 115). Hooks further recounted he saw no injuries to Appellant but Victim was suffering from four stab wounds after the fight. (Trl. Tr. pp. 110-112).

Beyond the testimony of those witnesses, several of the law enforcement officers who responded after the stabbing testified about the information they discovered during the course of the investigation into the incident. (Trl. Tr. pp. 91-107; pp. 121-141; pp. 149-181). Regarding that information, Sergeant Hutchinson noted he encountered Appellant in the parking lot of the convenience store after the stabbing, Appellant was identified as the stabber by someone inside the store, and Appellant had no signs of apparent injury or bleeding at that time. (Trl. Tr. pp. 93-94; pp. 106-107). Additionally, Investigator Burns confirmed he interviewed Appellant after the incident and recounted Appellant claimed he entered the store and spoke with several people inside, he went down an aisle, he was confronted from behind by Victim, he felt he needed to

leave, he wound up on the floor fighting with Victim, his hair was pulled out during the fight, he felt like Victim was "attempting to hurt" him, and he ultimately stabbed Victim multiple times. (Trl. Tr. pp. 160-161). Likewise, the officers discussed the physical evidence collected after the stabbing, noted the knife Appellant used to stab Victim had a roughly five-inch-long blade, and confirmed Victim's shirt had a total of eight cuts to it subsequent to the stabbing. (Trl. Tr. pp. 121-128; pp. 152-153; p. 155). Finally, the recording of the incident was admitted into evidence and played for the jury. (Trl. Tr. pp. 125-126; p. 149; pp. 156-158; p. 168; pp. 170-171).

Following the presentation of that testimony and evidence, defense counsel moved for a directed verdict while asserting the State had failed to both prove all the elements of attempted murder and disprove self-defense. (Trl. Tr. p. 187). In rebuttal, the solicitor argued no evidence of self-defense was presented during trial. (Trl. Tr. p. 187). Furthermore, the solicitor asserted the evidence presented in regard to attempted murder was sufficient to warrant submission of the case to the jury. (Trl. Tr. p. 188).

After considering the arguments of the counsel, the trial judge denied the directed verdict motion. (Trl. Tr. p. 188). In doing so, the trial judge instructed:

> Well, certainly with the evidence that's been presented I really believe this is for the jury decision. I'd be abusing my discretion if I stepped in this matter, you know, from what is before the Court. Certainly, I'll entertain the appropriate charges when the time comes. I don't have any choice in this. I'll just have to deny the motion.

(Trl. Tr. p. 188). Thereafter, Appellant's case was submitted to the jury, and the jury ultimately convicted Appellant of attempted murder. (Trl. Tr. p. 225; p. 231).

## ANALYSIS

When presented with a motion for a directed verdict, the trial judge is concerned with the existence or non-existence of evidence and not its weight. State v. Long, 325 S.C. 59, 62, 480

S.E.2d 62, 63 (1997). The trial judge should deny a directed verdict motion and submit the case to the jury if there is any substantial evidence reasonably tending to prove the guilt of the accused or from which guilt may be fairly or logically deduced. State v. Robinson, 310 S.C. 535, 538, 426 S.E.2d 317, 319 (1992); see State v. Littlejohn, 228 S.C. 324, 329, 89 S.E.2d 924, 926 (1955) ("[O]n a motion for direction of verdict, the trial judge is concerned with the existence or non-existence of evidence, not with its weight; and, although he should not refuse to grant the motion where the evidence merely raises a suspicion that the accused is guilty, it is his duty to submit the case to the jury if there be any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced."); see also Crawford v. United States, 375 F.2d 332, 334 (D.C. Cir. 1967) ("The jury question of whether there was proof of guilt beyond a reasonable doubt presents a stricter or higher standard than the trial court's consideration of whether there is sufficient evidence to allow the jury to find guilt beyond a reasonable doubt, and it rests in the unreviewable ratiocinations of twelve reasonable persons whose deliberations are protected by the highest security.").

On appeal from the denial of a directed verdict, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the State. State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). If there is **any** direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must affirm the trial judge's ruling. State v. Cherry, 361 S.C. 588, 593-594, 606 S.E.2d 475, 478 (2004). The appellate court may only reverse the trial judge's denial of a directed verdict motion if there is no evidence supporting the trial judge's ruling. State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002). "[U]nless there is a total failure of evidence tending to establish the charge laid in the indictment, the trial judge's ruling upon a motion for a directed verdict must stand

absent an error of law." State v. Nix, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (Ct. App. 1986); see also Crawford, 375 F.2d at 334 ("It is not the function of appellate judges to weigh the evidence and decide that if they had doubts other reasonable persons were compelled to have the same doubts. If that were the test the jury of twelve would be relegated to the very low grade function of secondary fact finders.").

When a defendant raises a claim of self-defense, the State is required to disprove self-defense beyond a reasonable doubt. State v. Dickey, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011); see State v. Wiggins, 330 S.C. 538, 544, 500 S.E.2d 489, 492-493 (1998) ("[C]urrent law requires the State to disprove self-defense, once raised by the defendant, beyond a reasonable doubt."). The State's burden of disproving self-defense is satisfied when the State disproves any one of the elements of self-defense by proof beyond a reasonable doubt. State v. Bixby, 388 S.C. 528, 554, 698 S.E.2d 572, 586 (2010). In making a determination as to whether the State met its burden of disproving self-defense, an appellate court should apply the traditional standard of review applied when reviewing the denial of any other directed verdict motion and affirm if there is any direct or substantial circumstantial evidence viewed in a light most favorable to the State reasonably tending to prove the guilt of the accused or from which guilt could be fairly or logically deduced. See State v. Butler, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014) (applying the traditional directed verdict standard of review when considering whether Butler was entitled to a directed verdict based on a claim of self-defense); see also State v. Strickland, 389 S.C. 210, 214, 697 S.E.2d 681, 683 (Ct. App. 2010) ("[U]nless it can be said as a matter of law that self-defense was established, it was not error for the trial court to submit the case to the jury.").

Four elements must be present to establish the defense of self-defense. State v. Bryant, 336 S.C. 340, 344, 520 S.E.2d 319, 321 (1999). Those required elements are: (1) the defendant

must be without fault in bringing on the difficulty; (2) the defendant must either have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury or have actually been in imminent danger; (3) if the defense is based on the belief of imminent danger, the belief must have been the same as one that would have been entertained by a reasonably prudent person of ordinary firmness and courage in the same situation; if the defendant was in actual imminent danger, the circumstances must have been such that would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to prevent serious bodily injury or loss of life; and (4) there was no other probable manner of avoiding the danger than to act as the defendant did in the situation. State v. Goodson, 312 S.C. 278, 280, 440 S.E.2d 370, 372 (1994). "It is an axiomatic principle of law that the defense has not been established if any one element is disproven." Bixby, 388 S.C. at 554, 698 S.E.2d at 586.

In the case at bar, the evidence and testimony presented during trial—when viewed in a light most favorable to the State as required—tended to prove Appellant's guilt for attempted murder. Specifically, regarding the proof of attempted murder, the evidence and testimony presented established Appellant provoked an altercation with Victim by directing derogatory and insulting language at him upon encountering him at the convenience store, willingly engaged in a physical altercation with Victim, intentionally stabbed Victim multiple times in the abdomen with a knife that had a roughly five-inch-long blade, and then shouted to Victim he got what he deserved after fleeing from the store. The evidence and testimony further established Victim's injuries, which included a punctured lung, were grave, necessitated advanced life support in order to save his life, and resulted in several days of hospitalization. In light of that evidence and testimony, the jury could have concluded Appellant specifically intended to kill Victim and attempted to do so with malice aforethought when he intentionally stabbed Victim repeatedly

with a knife. See S.C. Code Ann. § 16-3-29 ("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."); see also State v. Foust, 325 S.C. 12, 16, n. 4, 479 S.E.2d 50, 52 (1996) ("[E]vidence of the character of the means or instrument used, manner in which it was used, purpose to be accomplished, resulting wounds or injuries, etc., are admissible to show intent with which the assault was committed."); cf. State v. Middleton, 407 S.C. 312, 319, 755 S.E.2d 432, 436 (2014) ("[T]he only conclusion established by the evidence is that [Middleton] was guilty of attempted murder, given the facts that [Middleton] deliberately drove up to the passenger window and shot into the vehicle at least five times[.] . . . In our view, there is no other way to construe the evidence in this case but that [Middleton] was attempting to kill [his victims].").

Likewise, the evidence and testimony presented during trial—when again viewed in a light most favorable to the State as required—tended to disprove Appellant was acting in self-defense when he stabbed Victim. Specifically, regarding that proof, the evidence and testimony presented established Appellant provoked a fight with Victim that Victim would not have otherwise engaged in by directing insulting and derogatory words at him and then subsequently stabbed Victim repeatedly during the course of a confrontation that had solely involved unarmed combat up to that point. The evidence and testimony further established Appellant was not bleeding and did not have any apparent injuries as a result of his fight with Victim, which supported a conclusion Appellant was not at any risk of suffering death or serious bodily injury when he chose to use deadly force against Victim. Under those circumstances, Appellant was not without fault for bringing on the altercation due to the fact it was expressly brought about by his own use of opprobrious language. See Strickland, 389 S.C. at 215, 697 S.E.2d at 684 ("The true rule is that the plea of self-defense is not available to one who uses language so opprobrious

that a reasonable man would expect it to bring on a physical encounter, and which did actually contribute to bringing it on. Additionally, the question of whether the language used was opprobrious enough as to have reasonably been expected to bring on a difficulty is ordinarily a question of fact for the jury." (citations and internal quotations omitted)); see also State v. Council, 129 S.C. 116, 120, 123 S.E. 788, 789 (1924) (instructing a defendant can deprive himself of the right of self-defense through either actions **or** words). Similarly, Appellant was not entitled to use deadly force as no evidence was presented establishing it was reasonably necessary for him to do so in order to protect himself from death or serious bodily injury. See Strickland, 389 S.C. at 214-215, 697 S.E.2d at 683-684 (recognizing, in order for self-defense to be established, the defendant must have been in—or actually believed he was in—imminent danger of dying or sustaining serious bodily injury **and** either the circumstances were such a man of ordinary firmness and courage would use deadly force in order to save himself **or** a reasonably prudent man of ordinary firmness and courage would have entertained the same belief of imminent death or serious bodily injury); see also Black, 692 F.2d at 318 ("One may justifiably use *nondeadly* force against another in self-defense if he reasonably believes that the other is about to inflict unlawful bodily harm (*it need not be death or serious bodily harm*) upon him (and also believes that it is necessary to use such force to prevent it). . . . He may justifiably use *deadly* force against the other in self-defense, however, only if he reasonably believes that the other is about to inflict unlawful death or serious bodily harm upon him (and also that it is necessary to use deadly force to prevent it)." (citation omitted)); cf. United States v. Goodwin, 993 F.2d 1540, __ (4th Cir. 1993) (rejecting Goodwin's contention the evidence was insufficient to support his conviction for assault as "meritless" where "there was ample evidence before the district court that showed Goodwin went beyond the degree of force necessary for his self-

defense"); State v. Walker, 136 Wash. 2d 767, 779, 966 P.2d 883, 889 (Wash. 1998) ("Any reasonable person standing in [Walker]'s shoes would have perceived that only 'an ordinary battery is all that was intended,' in which case the use of deadly force was unjustified." (citation and brackets omitted)).

Because the evidence and testimony presented during trial tended to prove Appellant's guilt for all the elements of attempted murder while also tending to disprove self-defense, the trial judge was required to—and properly did—deny the directed verdict motion raised in Appellant's case. See State v. Hall, 259 S.C. 529, 532, 193 S.E.2d 269, 270 (1972) ("[I]f the testimony presented a factual issue as to whether appellant killed her husband in self-defense, the motions for a directed verdict were properly denied."); cf. Harvey, 110 S.C. at 277, 96 S.E. at 400 (instructing necessity to kill "is a matter for the jury"). In arguing to the contrary, Appellant recounts the evidence and all the inference that could be drawn from it in a manner solely favorable to his own case while maintaining the State failed to disprove any of the elements of self-defense based on his view of the evidence. However, in considering or reviewing a directed verdict motion, the evidence and testimony **must** be viewed in a light most favorable to the State instead of a light most favorable to the defendant. See Long, 325 S.C. at 63, 480 S.E.2d at 63-64 ("While self-defense can be inferred even from the State's version of the evidence, the evidence of self-defense is not conclusive. . . . Accordingly, the trial judge properly refused to direct a verdict in appellant's favor based on self-defense."); see also State v. McGreer, 13 S.C. 464, 466 (1880) (explaining the question of whether self-defense was applicable is dependent on more than just the defendant's own beliefs). When viewed in the appropriate manner, the evidence and testimony in Appellant's case did not uncontrovertibly establish self-defense and, instead, supported a conclusion Appellant was not acting in self-defense when he attempted to kill his

victim. See State v. Jenkins, 222 S.C. 359, 360-361, 72 S.E.2d 829, 829 (1952) ("It is not the function of [the appellate] court to pass upon the weight of the evidence, but only to determine its sufficiency to support the verdict[.]"); see also Butler, 407 S.C. at 382, 755 S.E.2d at 460 ("[T]he evidence in the present case created a jury issue on the issue of self-defense. For example, as the trial court recognized when ruling on the directed verdict motion, [Butler]'s various, inconsistent accounts of how the stabbing occurred created credibility issues and questions of fact to be resolved by the jury."); cf. Dickey, 394 S.C. at 503, 716 S.E.2d at 103 (finding a directed verdict on self-defense was warranted **only** where the evidence of self-defense was "uncontroverted"). Therefore, the trial judge had a duty to submit Appellant's case to the jury to allow for proper resolution of the issues raised by the evidence, and he committed no conceivable error by doing so. See Clark v. State, 396 S.C. 164, 172, 719 S.E.2d 708, 712 (Ct. App. 2011) ("[I]t is the trial court's duty to submit the case to the jury if there is any evidence, either direct or circumstantial, which reasonably tends to prove the guilt of the accused or from which the accused's guilt may be fairly and logically deduced."). Appellant's conviction should be affirmed.

III.

**The trial judge committed no error by presenting supplemental instructions in response to the jury's note because those instructions accurately and properly explained the law applicable to Appellant's case and served to clarify the confusion demonstrated by the note. However, even assuming the trial judge's supplemental instructions were somehow erroneous, any error resulting from those instructions was entirely harmless as the trial judge's response to the jury's note merely clarified proof of premeditation was unnecessary for a defendant to be convicted of attempted murder, which was an unquestionably accurate statement of law.**

Appellant contends the trial judge committed reversible error by instructing the jury on premeditation in response to a note submitted by the jury. In support of that contention, Appellant maintains the trial judge's supplemental jury instructions on premeditation were inapplicable to the case, incomplete, and improper. To the contrary, the trial judge's supplemental jury instructions were necessary and proper to clarify the jury's confusion on the issue of premeditation, accurately conveyed the relevant and applicable law to the jury, and provided the jurors with the law necessary for them to be able to properly resolve the issues before them. Under those circumstances, the trial judge's supplemental jury instructions were in no way erroneous. However, even assuming the trial judge somehow erred through his response to the jury's note, any error with the trial judge's supplemental instructions could not have resulted in any actual or articulable prejudice to Appellant as those instructions merely conveyed proof of premeditation was not required to prove the offense for which Appellant was indicted, which was indisputably true. Appellant's conviction should be affirmed.

## RELEVANT FACTS

At the conclusion of the evidentiary phase of trial, the trial judge presented instructions to the jury on the applicable law. (Trl. Tr. pp. 211-223). During his jury charge, the trial judge instructed the jury on the State's burden of proving Appellant's guilt beyond a reasonable doubt, indicated Appellant was presumed innocent of the charged offense, thoroughly explained

reasonable doubt for the jury, identified and discussed the statutory elements of attempted murder, explained criminal intent, and instructed the jury on the defense of self-defense, including in regard to an individual's right to act on appearances. (Trl. Tr. pp. 211-223). Specifically, in instructing the jury on the elements of the charged offense, the trial judge explained:

> I charge you from Section 16-3-29 of the Code of Laws of 1976, as amended as to the charge of attempted murder. A person who with intent to kill, attempts to kill another person with malice aforethought either expressed or implied comm[itted] the offense of attempted murder.
>
> What is malice? Malice is defined in the law of homicide as a term of art. Malice does not necessarily mean intent to kill. It is a technical term importing wickedness and excluding just cause or legal excuse. It is something which springs from wickedness, from depravity, from a depraved spirit, from a heart devoid of social duty, and fatally bent on mischief. The words express or inferred malice do not means different kinds of malice but merely the manner in which the only kind of malice known to law may be shown to exist. Malice may be expressed as where previous threats of vengeance or lying [in] wait or other circumstances so directly that intent to kill was entertained. Malice may be inferred where though no express intent to kill is proved by direct evidence, it may be inferred from the facts and circumstances which are proved. Malice may be inferred from the willful, deliberate and intentional doing of an unlawful act without just cause [or] legal excuse.

(Trl. Tr. pp. 218-219). Notably, although the trial judge directly referenced the term "aforethought" in defining the elements of attempted murder, he did not articulate what that term actually meant through his instructions. (Trl. Tr. pp. 218-219).

After the trial judge finished instructing the jury on the relevant and applicable law, the jurors retired to the jury room and began their deliberations. (Trl. Tr. p. 225). Subsequently, the jury submitted a note to the court posing the following questions: "What is the attempted murder statute? What qualifies a person to be charged with attempted murder? What is the difference

between pre-meditation and intent?" (Trl. Tr. pp. 225-227; Court's Ex. # 1 (Jury Note)). Upon receiving the note, the trial judge called it to the attention of the parties, discussed with them how it should be addressed, and indicated he intended to clarify what he permissibly could for the jury. (Trl. Tr. pp. 225-227). During the discussion, the solicitor opined the jury might have been confused about the difference between aforethought and premeditation in light of the instructions presented, and she proposed instructing the jury on the definition of malice aforethought due to the fact premeditation was not a required element of attempted murder. (Trl. Tr. pp. 225-226). At that point, the trial judge acknowledged he had failed to initially instruct the jury on the meaning of "aforethought" and stated he intended to explain premeditation to clarify the jury's apparent confusion regarding those terms. (Trl. Tr. p. 226). In response, defense counsel objected, asserting: "I think that they should go with the charges you gave to them, that goes with the offense. And I think that's going to change things up a little bit." (Trl. Tr. p. 227).

Thereafter, the jury returned to the courtroom, and the trial judge provided supplemental instructions to the jurors. (Trl. Tr. pp. 227-230). Through those supplemental instructions, the trial judge re-instructed the jury on the statutory language defining attempted murder, again explained malice, and, for the first time, defined the term "aforethought" for the jury. (Trl. Tr. pp. 227-229). Specifically, in defining "aforethought," the trial judge instructed: "Aforethought is the time is when evil is conceived. There is no particular length of time prior to the crime that may be concerned for malice to exist to be malice aforethought." (Trl. Tr. p. 229). The trial judge then re-instructed the jury on criminal intent, explained premeditation was not mentioned in the attempted murder statute, and defined premeditation as to "think out or plan" while again emphasizing the term "premeditation" was not used in the applicable statute. (Trl. Tr. p. 229). Finally, the trial judge indicated he could not answer the jury's remaining question about what

qualified a person to be charged with attempted murder, and the jurors again retired to the jury room. (Trl. Tr. p. 230).

Once the jury left the courtroom, defense counsel objected "to the part . . . giving the jury the definition of premeditation[,]" and the trial judge overruled the objection due to the fact he explained premeditation was not a term used in the attempted murder statute. (Trl. Tr. p. 230). The jury then resumed deliberations and ultimately convicted Appellant of the indicted offense. (Trl. Tr. p. 231).

## ANALYSIS

The purpose of a trial judge's jury instructions is "to enlighten the jury and to aid it in arriving at a correct verdict." State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). When instructing a jury on the law, a trial judge is required to charge only the current and correct law of South Carolina. State v. Taylor, 356 S.C. 227, 231, 589 S.E.2d 1, 2 (2003). In doing so, a trial judge is only required to instruct the jury on the substance of the law and does not have to use any particular verbiage. State v. Burkhart, 350 S.C. 252, 261, 565 S.E.2d 298, 302 (2002). Significantly, a trial judge's jury charge is appropriate if it is substantially correct and adequately covers the law applicable to the case. Foust, 325 S.C. at 16, 479 S.E.2d at 52; see State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 464 (Ct. App. 2003) ("A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law.").

In addition to properly charging the jury on the law through the presentation of appropriate jury instructions, a trial judge should take steps to address any requests from the jury for additional instruction or clarification so long as it is proper and permissible to do so in light of the substance of the requests. See Bollenbach v. United States, 326 U.S. 607, 612-613 (1946)

("When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy."); see also United States v. Smith, 62 F.3d 641, 646 (4th Cir. 1995) ("[I]n responding to a jury's request for clarification on a charge, the [trial] court's duty is simply to respond to the jury's apparent source of confusion fairly and accurately without creating prejudice."). Critically, the issue of whether a trial judge should answer a jury question is dependent on whether the particular question is addressed to a matter applicable to the jury's deliberations. Winkler v. State, 418 S.C. 643, 655, 795 S.E.2d 686, 693 (2016). If the question is actually addressed to an applicable matter, it may be proper for the trial judge to answer the question. Id.; see also Green v. Bolen, 237 S.C. 1, 11, 115 S.E.2d 667, 672 (1960) (explaining a trial judge is required to instruct on the issues raised by the pleadings and evidence).

On appeal, an appellate court reviewing a trial judge's jury charge must view the charge as a whole and in light of the evidence and issues from trial. State v. Simmons, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009); see Todd v. State, 355 S.C. 396, 402, 585 S.E.2d 305, 308 (2003) ("[J]ury charges should be examined in their entirety and not in isolation in analyzing whether the defendant's due process rights have been violated."). When reviewing a jury charge, the appropriate test involves determining what a reasonable juror would have understood the charge to mean. Sheppard v. State, 357 S.C. 646, 664, 594 S.E.2d 462, 474 (2004). So long as the jury instructions presented are substantially correct and cover the applicable law, reversal is not warranted. See State v. Ezell, 321 S.C. 421, 425, 468 S.E.2d 679, 681 (Ct. App. 1996) ("A jury charge which is substantially correct and covers the law does not require reversal."); see also State v. Rye, 375 S.C. 119, 123, 651 S.E.2d 321, 323 (2007) ("A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied."). Moreover, an appellate court will only reverse a trial judge's decision regarding jury

instructions when that decision constitutes an abuse of discretion resulting in actual prejudice. See Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000) ("An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion."); Rauch v. Zayas, 284 S.C. 594, 597, 327 S.E.2d 377, 378 (Ct. App. 1985) ("[A]n alleged error in a portion of the charge must be prejudicial to the appellant to warrant a new trial."); see also State v. King, 367 S.C. 131, 136, 623 S.E.2d 865, 867 (Ct. App. 2005) ("Error without prejudice does not warrant reversal.").

In Appellant's case, the trial judge correctly identified the elements of attempted murder through his initial jury instructions but wholly failed to define "aforethought" after explaining malice aforethought was a required element of the crime. Thereafter, the jury submitted a note inquiring about the attempted murder statute and the difference between premeditation and intent. To that point, the trial judge had not mentioned premeditation through his instructions and, instead, had only stated the malice required to prove the charged offense had to be "aforethought," which is a term our Supreme Court has historically explained can be construed as connoting premeditation. See State v. Milam, 88 S.C. 127, 131, 70 S.E. 447, 449 (1911) (recognizing "there may be and probably is" a distinction that can be drawn between "malice" and "malice aforethought" and indicating the phrase "malice aforethought" can convey "more the idea of premeditation and design"). However, while the term "aforethought" can convey premeditation and evidence of premeditation can constitute proof of malice aforethought, actual premeditation is not required in order to establish the "malice aforethought" element of attempted murder. See State v. Wilds, 355 S.C. 269, 277, 584 S.E.2d 138, 142 (Ct. App. 2003) ("Although malice must be aforethought, there is no requirement that it must exist for any appreciable length of time before the commission of the act. It may be conceived at the very

moment the assault occurs."). Therefore, based on the trial judge's potentially-misleading failure to explain the term "aforethought" during his initial jury instructions coupled with the jury's note demonstrating confusion in regard to premeditation, it was necessary for the trial judge to define the terms "aforethought" and "premeditation" and re-identify the required elements of the charged offense in order to clarify the issues and enable the jury to properly reach a verdict in Appellant's case. See Bollenbach, 326 U.S. at 614 ("A charge should not be misleading."). Significantly, the trial judge did just that when he presented supplemental instructions that properly defined malice aforethought, explained what premeditation was, and clarified premeditation was not a required element of attempted murder, and, thus, those instructions were entirely proper as they correctly conveyed and clarified the law applicable to Appellant's case. See Sheppard, 357 S.C. at 665, 594 S.E.2d at 472-473 (recognizing a jury charge is correct if it correctly defines the relevant and applicable law when read as a whole); see also Smith, 62 F.3d at 646 (recognizing a trial judge's duty in responding to a jury note is merely to fairly and accurately respond to the jury's source of confusion without creating prejudice).

In arguing to contrary, Appellant contends the trial judge committed reversible error with his supplemental instructions because the law regarding premeditation was allegedly not applicable to the case at bar and the trial judge's explanation of premeditation was allegedly incomplete and somehow improper. Regarding Appellant's first contention, one of the issues before the jury was whether Appellant acted with malice aforethought when he stabbed Victim. As the "malice aforethought" element of attempted murder can be established—but does not necessarily have to be established—by proof of premeditation, the issue of premeditation was, in fact, relevant to the resolution of Appellant's case. See Milam, 88 S.C. at 131, 70 S.E. at 449 (explaining "malice aforethought" could convey premeditation on part of the defendant); see also

Winkler, 418 S.C. at 655, 795 S.E.2d at 693 ("[W]hether the trial court should have answered the question depended on whether the point of law about which the jury asked was applicable to the jury's deliberations."). Likewise, regarding Appellant's second contention, the trial judge explained premeditation meant thinking out or planning, which constituted an accurate explanation of the term. See State v. Smith, 352 S.C. 133, 137, 572 S.E.2d 473, 475 (Ct. App. 2002) ("Premeditation connotes 'willful deliberation and planning' or 'conscious consideration' preceding a particular act." (citations omitted)). Because the trial judge's definition of premeditation was substantively correct, his supplemental instructions were proper, and the potential availability of an alternate way to define the term using different or more thorough language did not render the trial judge's supplemental instructions improper, particularly in light of the fact the trial judge was never asked to define premeditation in any other manner during trial. See State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) ("The substance of the law is what must be charged to the jury, not any particular verbiage."); see also State v. Rutledge, 261 S.C. 44, 52, 198 S.E.2d 250, 253 (1973) ("At least in the absence of a request therefor, the court did not err in failing to give more specific instructions of the tenor now insisted upon.").

However, even if Appellant was somehow correct and the trial judge's supplemental instructions regarding premeditation were erroneous in some manner, any error resulting from those instructions nonetheless could not have resulted in any prejudice to Appellant. Critically, through his supplemental instructions regarding premeditation, the trial judge simply defined the word "premeditation" for the jury in an accurate manner while simultaneously explaining premeditation was not referenced as an element in the attempted murder statute. Cf. Smith, 62 F.3d at 646 (finding no error resulted from the supplemental instructions given by the trial judge

in response to a jury question because the instructions constituted "a fair and accurate statement of law" and the defendant "was not legally entitled to anything more"). As both his definition of the term and his clarification premeditation was not an element of the charged offense were unquestionably accurate, the only impact the trial judge's supplemental instructions could have had on the jurors would have been to clarify to them it was unnecessary for the State to prove a defendant thought out or planned a criminal act in advance in order for the defendant to be convicted of attempted murder, which was indisputably correct. See Milam, 88 S.C. at 131, 70 S.E. at 449 ("[T]he word 'aforethought' is usually understood to refer rather to the time when the evil intent is conceived. The authorities agree that it need not exist for any appreciable period of time before the commission of the act,—indeed, it may be conceived at the very moment the fatal blow is given."); see also Sheppard, 357 S.C. at 665, 594 S.E.2d at 472-473 ("A jury charge is correct if it contains the correct definition of the law when read as a whole."); State v. Smith, 230 S.C. 164, 168, 94 S.E.2d 886, 887 (1956) ("The burden is upon the appellant to satisfy [the appellate] court that there has been **prejudicial** error." (emphasis added)). Under those circumstances, the trial judge's supplemental jury instructions were entirely proper and could in no way justify a reversal of Appellant's conviction. See Thomasko v. Poole, 349 S.C. 7, 17, 561 S.E.2d 597, 602 (2002) ("It is well established that an appellant seeking reversal of a decision by the trial court must show both error and prejudice."). Appellant's conviction should be affirmed.

## 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

MARK R. FARTHING
Assistant Attorney General

WILLIAM B. ROGERS, JR.
Solicitor, Fourth Judicial Circuit

BY: _____
Mark R. Farthing

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

February 6, 2018

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS



Appeal from Chesterfield County
Honorable Roger E. Henderson, Circuit Court Judge
Honorable Paul M. Burch, Circuit Court Judge
Appellate Case No. 2016-000779

THE STATE,

Respondent,

vs.

GARY MOORE,

Appellant.

**PROOF OF SERVICE**

I, Mark R. Farthing, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by sending two copies of the same to:

Tricia A. Blanchette, Esquire
Post Office Box 2147
Leesville, SC 29070

I further certify that all parties required by Rule to be served have been served.
This 6th day of February, 2018.

MARK R. FARTHING
Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ALAN WILSON
ATTORNEY GENERAL

February 6, 2018



Tricia A. Blanchette, Esquire
Post Office Box 2147
Leesville, SC 29070

RE: State v. Gary Moore – Appellate Case No. 2016-000779

Dear Ms. Blanchette:

I am enclosing two copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Mark R. Farming
Assistant Attorney General
Bar Number 76901

MRF/
Enclosures

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