STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

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SC Court of Appeals

Appeal from Charleston County

William Jeffrey Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RHAJON AKEEM RESHAE SANDERS,

APPELLANT

APPELLATE CASE NO 2016-001785

FINAL BRIEF OF APPELLANT

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[1] The defense objected to this charge as an instruction placed upon the defendant to prove self-defense. The trial judge ruled that the charge was not infirm. Tr. 733, lines 1-20.

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II. The trial judge erred in denying defense counsel the opportunity to present evidence establishing that appellant lived in a high crime neighborhood in support of the self-defense claim and also in limiting the cross-examination of witnesses who knew that crime was rampant where the shooting occurred because this interfered with appellant's right to cross-examine witnesses completely and violated his right to present a full and complete defense at trial.

III. The trial judge erred in not allowing defense counsel to formulate her closing remarks based on reasonable inferences raised in the record because this in turn violated appellant's right to a fair trial.

IV. The trial judge erred in denying appellant's request for the additional "no duty to retreat" charge in connection with the self-defense instruction because there is no affirmative duty requiring one to retreat from the curtilage of his or her home.

V. The trial judge erred in charging the jury that "if [self-defense] is **established** [then they] must find the defendant not guilty" because this confused the jury and nullified the correct law that "the state has the burden of disproving self-defense by proof beyond a reasonable doubt."[2]

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[2] The defense objected to this charge as an instruction placed upon the defendant to prove self-defense. The trial judge ruled that the charge was not infirm. R. 684, lines 1-20.

VI. The trial judge erred in overruling defense counsel's objection after the solicitor asked appellant if marijuana had been found on the dresser in his room near where his gun was located and recovered by police as this was an extremely prejudicial and irrelevant assertion because this injected a prior bad act drug factor into the case, especially when there was no marijuana found on the dresser in the room or anywhere in appellant's room, and where there was no drug link whatsoever connected to the shooting in the case.

VII. The trial judge erred in denying appellant the opportunity to impeach Washington with his prior inconsistent statement.

STATEMENT OF THE CASE

Appellant Rhajon Akeem Sanders was convicted of attempted murder and possession of a weapon during the commission of a violent crime per a trial by jury held during the June 2016 term of the Charleston County General Sessions Court before Judge William W. Jeffrey Young. Appellant was sentenced to imprisonment for an aggregate period of fifteen years. Attorneys Myesha Brown and Natasha Chisholm represented appellant at trial, and Assistant Solicitors Nina Savas and Lauren Frierson appeared on behalf of the state.

Appellant appealed his convictions and sentences. This brief follows.

QUESTION I

The trial judge erred in failing to give a complete self-defense charge that included an instruction that appellant had the right to "act on appearances" because it was the aggressor's hand reach for the waistband of his pants that was properly interpreted as a grasp for a gun, which in turn gave the appearance of danger that caused appellant to shoot in self-defense.

The state alleged that appellant committed attempted murder when he fired gunshots at Nicolas Washington in Charleston, South Carolina, on the night of December 26, 2014. Appellant and Washington testified at trial regarding the shooting.

Appellant testified that he was standing outside his home on the front porch at Kent Avenue around 7:00 p.m. when he noticed a tall suspicious looking male dressed in all black and wearing a hoodie standing across the street. Appellant explained that when this male, who stood at nearly 6'3" and seemed to weigh over 200 pounds, threw his cigarette down and reached for the waistband of his pants with his hand, and advanced in his direction, then he (appellant) fired his gun at the male. Appellant did not leave his property before the shooting transpired and there were no street lights on at that time in the area where the house where he lived was located. R. 520, l. 4 – R. 569, l. 25.

Washington testified at trial and stated that on that same night and time, he was at his aunt's house located at 2311 on Kent Avenue, and that he was standing outside while making a telephone call, and simultaneously lighting a cigarette and listening to music when he saw something like a fireball skim the ground, and that afterwards he fell and then realized that he had been shot. Washington admitted that he was wearing dark clothing and that the porch light was off and it was dark outside. R. 25, l. 3 – R. 110, l. 20. Officer Tucker confirmed that Washington wore dark clothing on that night. R. 245, l. 11-17.

Appellant's brother[3] was an eyewitness who testified at trial also regarding the shooting in question. Sanders stated that he was outside with appellant and saw the male dressed in all black complete with a hoodie looking at them from across the street and that he began advancing and approaching them by crossing the street while simultaneously reaching his hand towards the waistband of his pants. Thereafter, appellant fired his weapon. Sanders stated that it dark out on that night and in effect that the only street light in existence was located farther down the street. R. 456, l. 6 – R. 517, l. 11.

In a case of self-defense, the law to be charged is determined from the facts presented in the case. State v. Bryant, 336 S.C. 340, 520 S.E. 2d 319 (1999). If there is any evidence in the record from which it can be reasonably inferred that an accused justifiably inflicted a wound in self-defense, then the accused is entitled to a charge on the law of self-defense. State v. Stone, 285 SC 386 330 S.E. 2d 286 (1985). In order to establish self-defense, the defendant must have been without fault in bringing on the difficulty and was or believed he was in actual imminent danger of losing his life or sustaining serious bodily injury, which a reasonably prudent person would have so believed, and that he had no other means of avoiding the danger. State v. Davis, 282 S.C. 45, 317 S.E.2d 452 (1984). Moreover, when a one claims self-defense, the state is required to disprove the elements of self–defense beyond a reasonable doubt. State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489 (1998); State v. Williams, 400 S.C. 308, 733 S.E.2d 605 (2012).

Note that the search warrant issued for appellant's residence in the case was based on the following information: **"appellant indicated he shot the victim while the victim was crossing the street...[and that appellant] believe the victim was armed.** R. 220, l. 2-9. Officer Perkins'

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[3] Ferantez Jamal Lamont Sanders.

crime scene incident report stated that appellant shot Washington in fear for his safely after Washington reached for his waistband. R. 240, lines 10 – 19.

In accordance with appellant's self-defense claim, the trial judge agreed to give a self-defense charge to the jury, but denied appellant's request for the added self-defense instruction to charge the jury that appellant had the right to "act on appearances." Counsel objected. R. 680, l. 14 – R. 682, l. 19. R. 583, l. 2 – R. 585, l. 4; R. 589, l. 6 – R. 590, l. 19. Clearly, self-defense was established by the defense in this case. Appellant remained on his property and did not provoke the male dressed in black standing across the street. Therefore, appellant was without fault in bringing on the difficulty in this case. Further, when the suspicious male dressed in all black reached for the waistband of his pants as if to grab a gun, then appellant reacted in self-defense by firing his weapon upon belief that he was in danger of losing his life or sustaining serious bodily injury as any reasonably prudent person would have so believed, particularly since appellant resided in a high crime area where shootings and gunfire, and deaths by gunfire were the norm. This was appellant's obvious state of mind at that time. Therefore, it would logically follow that this suspicious looking and acting male who reached his hand to the waistband of his pants as if to pull out a gun was a red flag warning of pending danger via loss of life or injury and appellant acted on those appearances, which constituted a fair and reasonable interpretation in light of the circumstances.

The law to be charged is determined by the evidence presented at trial and the refusal to charge on the right to act on appearances where the evidence supports it is reversible error. See reversals for failure to charge the "act on appearances" addition to the self-defense elements in State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997); and State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989). The "acting on appearances" addition as a self-defense element was

addressed thoroughly in State v. Fuller, supra, where the Court held that it was error for the trial judge to deny the defendant request for a right to "act on appearances" instruction in connection with a self-defense charge because the evidence supported such a charge. In Fuller, where the defendant testified that he saw a shiny object in one man's hand after his car trunk was opened and that he fired in response. The Fuller Court held that the right to "act on appearances" charge was warranted in that case. Also, see State v. Nichols, supra, where the defendant testified he saw a shiny object in the victim's hand (assumption—gun) and thus the Court held he was entitled to a charge on the right to "act on appearances." Compare, State v. Gandy, 113 S.C. 147, 101 S.E. 644 (1919), where the Court held that:

> A man may act, however, from appearance, and if it turns out, if the appearances are such that a man of ordinary courage, firmness, and prudence would have been justified in coming to the conclusion that the necessity did then and there exist to strike to save himself from serious bodily harm or death that would be sufficient..[even if it was revealed later that no danger existed].

In Fuller, supra, the Court quoted State v. Jackson, 227 S.C. 271, 87 S.E.2d 681 (1955), regarding the matter of "acting on appearances" as follows:

> A defendant must show that he believed he was in imminent danger, not that he was actually in such danger, because he had the right to act on appearances, and under the circumstances as they appeared to him, he believed he was in such danger and a reasonable prudent man of ordinary firmness and courage would have entertained the same belief.

A right "to act on appearances" charge is required where the defendant sees a weapon or even mistakenly sees a weapon. State v. Jackson, supra. See also State v. Starnes, 340 S.C. 312, 531 S.E.2d 907 (2000) where the Court reversed because a right to "act on appearances" charge was not given after the defendant saw one deceased man hold a gun to another's head and fire the gun because he believed the same man would shoot him also. Note that a defendant is not

required to wait until his adversary is on equal terms or until he has fired or aimed his weapon. State v. Starnes, supra. A judge must consider the facts and circumstances of the case in charging an appropriate self-defense charge. In the case at bar, the trial judge erred here in not including a right to "act on appearances" instruction in the self-defense jury charge given in the case.

QUESTION II

The trial judge erred in denying defense counsel the opportunity to present evidence establishing that appellant lived in a high crime neighborhood in support of the self-defense claim and also in limiting the cross-examination of witnesses who knew that crime was rampant where the shooting occurred because this interfered with appellant's right to cross-examine witnesses completely and violated his right to present a full and complete defense at trial.

In order to establish self-defense, the defendant must have been without fault in bringing on the difficulty and was or believed he was in actual imminent danger of losing his life or sustaining serious bodily injury, which any reasonably prudent person would have so believed, and he had no other means of avoiding danger. State v. Davis, supra. With respect to the element of being in actual imminent danger of losing his life or sustaining serious bodily injury, the defense sought to elicit testimony proving that the area where the shooting occurred was a high crime area that was inherently dangerous to the extent that loss of life or being injured at existed at all times and that this was always a highly likely possibility where appellant lived. Hence, the reason for appellant reacting by firing his gun in self-defense after the suspicious man dressed in all black reached for his waistband and advanced in his (appellant's direction).

For example, Washington testified on cross-examination that he knew of a friend who had been killed in the Accabee community. R. 50, l. 6 – R. 52, l. 2. Then, when counsel asked Washington if he had been familiar with any other incidents that occurred in the Accabee

Community, the solicitor objected and the trial judge sustained the objection. R. 52, l. 3-8. Note that it was dark outside when the shooting incident took place on Kent Avenue and there were no street lights working in that area (only porch lights) where the shooting occurred. R. 58, lines 2-8; R. 86, l. 4-12. Also, there was an abandoned house next door to appellant's residence. R. 64, l. 1-12. This information along with the dangerousness of this neighborhood was relevant to set the stage for appellant's state of mind which lead to his firing his gun in self-defense.

Washington's mother, Katina Washington, testified that she would visit her family on Kent Avenue daily and that police were always present in the Accabee Community. R. 139, l. 5-11. She said there was only one street light lit on that night. R. 140, l. 14 – R. 141, l. 3.

Police Officer Stanley Tucker testified that he was dispatched to the crime scene on the night in question and that Kent Avenue and the streets there and nearby were dark. R. 166, l. 10-25. When defense counsel asked Officer Tucker on cross-examination about the nature of his patrol of the Accabee Community due to the high level of street crime there, including drugs, guns, and prostitution, no answer was given because the solicitor objected before an answer was given and the judge sustained the objection. R. 169, l. 15 – R. 170, l. 8. The question was not answered.

Police Officer Christian Rothaus testified that he was dispatched to the crime scene at Kent Avenue where appellant resided (R. 191, lines 13-15; R. 205, l. 22-23) shortly after 7:00 p.m. on the night in question, and when defense counsel asked on cross-examination as to whether the Accabee Community area was prone to violence and if it had been known as a high crime area, the solicitor objected (relevance) before an answer was given and the trial judge sustained the objection. R. 199, l. 1 – R. 201, l. 1. The question was not answered.

Police Officer Rebecca Bailey testified that she became involved in the case when she prepared a search warrant for the residence where appellant lived on Kent Avenue that yielded the recovery of the weapon (Taurus gun) used by appellant in the shooting. R. 210, l. 2 – R. 215, l. 14. Officer Bailey was provided with police information that "appellant indicated he shot the victim while the victim was crossing the street...[and that appellant] believed the victim was armed." R. 220, l. 2-9.

Police Officer Shawn Perkins testified that he was dispatched to the crime scene also and that he gave appellant his Miranda Warnings. R. 225, l. 9 – R. 227, l. 3. Officer Perkins went on to explain that some neighborhoods are known for narcotics and crimes, and before he could continue and presumably assign that same reputation to Kent Avenue, the state interpreted and objected, and that line of testimony ceased. R. 236, l. 10-24. Perkins did prepare a police report, however, reflecting appellant's recollection of seeing a male wearing all black standing near his residence and reaching for his waistband and that he responded by shooting due to fear. R. 239, l. 17 – R. 240, l. 19; R. 242, l. 1-2; R. 243, l. 3-7.

Police Officer Michael Cook was also dispatched to the crime scene after the shooting and took photographs while there. R. 247, l. 13 – R. 249, l. 15. After Officer Cook concluded his testimony, trial counsel objected to the inability of the defense to present a full and complete self-defense because of the trial judge's ruling which prohibited the admission of the high crime character of the neighborhood into evidence. Counsel's objection follows:

> Ms. Brown: Yes, Your Honor. I believe that we have had a series of objections made. We have attempted to get information during the course of this trial in front of the jury relating to the neighborhood in which my client resides which, in fact, assist in making our case to the jury on self-defense.
>
> It is our contention that based on the fact that my client lives in a high crime neighborhood and the fact that there's a number of

> incidents that have happened in that neighborhood it led him or gave him the state of mind in which he entertained when he saw Nicholas Washington standing in the dark across from his home. It is extremely pertinent to our case in chief, and it's my understanding that the information, even though some of the officers have information about the neighborhood because they patrolled it for a number of years and responded there for a number of years, investigated cases there for a number of years, none of that information has been admissible or allowed to come in front of the jury. It is also our contention that it is very difficult ad it's going to be very difficult and extremely impossible nearly to establish a defense for our client that needs to go in front of this jury. R. 284, l. 1-24.
>
> [Appellant]...should have every opportunity to allow and explore the issue of what kind of neighborhood he live in, why he believed at the time he was in fear, why he acted the way he did...[and] the witness (police officers) that [testify have] information about that neighborhood...R. 285, 1.7
>
> [The violent nature of the community at issue] is extremely relevant to this trial because it deals with [appellant's] state of mind....[This is] a community where people are shot all the ___ the time....where people are robbed all the time...where people are constantly hurt for no reason whatsoever, and when [appellant] saw a gentleman standing across the street that jury stood in the dark, I was not able to see him, [appellant] feared that he was going to hurt me [because]...other people in that neighborhood being hurt under the same set of circumstances. And at the time that [appellant] pulled my weapon is only after he approached me and also reached for what I believe was a weapon. And if we cannot talk about the things on that street in that community or the things that happen on that street I don't understand how we give the jury a complete picture. R. 285, l.12-14; R. 285, l. 25 – R. 286, l. 14.

The trial judge ruled that the defense would "not be able to discuss the neighborhood, but that [the defense] [was] on the record and protected [for appeal]. R. 290, l. 4-7.

At the close of the state's case, the defense renewed the objection regarding the abrogation of the right to cross-examine witnesses completely and the right to present a complete and full self-defense. R. 382, l. 23 – R. 383, l. 20.

Also, after the state rested, the defense counsel offered a proffer on the record of the testimony from witnesses Cynthia Sanders (appellant's mother) and Ferantez Jamal Lamont Sanders (appellant's brother) to expound on the matter of the high crime are in which they lived as proof of appellant's state of mind (that being fear) and to establish what evidence they sought to present as self-defense evidence, but which the trial judge precluded at trial. R. 419, l. 5 – R. 420, l. 6. The Court denied the motion. R. 420, lines 7-9. The proffered testimony from Cynthia E. Sanders was that the Accabee community had been a high crime area since she moved there in 2013, and that she had personal knowledge of a burglary, a stabbing, and the shooting death of a 16-year old while she lived there, and that gunshots were "going off" constantly in the neighborhood. R. 386, l. 22 – R. 391, l. 14. She explained that the crime rate was so high there that a police station was placed there in the community. R. 398, l. 3-9.

In addition, proffered testimony was taken from appellant's brother Ferantez Jamal Lamont Sanders, who lived with appellant on Kent Street at the time of the shooting. Sanders explained that their neighborhood was a high crime area since they moved there and that drug activities, break-ins, and shootouts were in effect the norm there. Sanders added that police officers were always present in their neighborhood. R. 400, l. 5 – T. 401, l. 3. Sanders stated that he heard the gunshots fired that killed a 16-year old in the neighborhood, and that he himself was robbed at a bus stop there, and that he witnessed a drive-by shooting there as well. R. 407, l. 6 – R. 408, l. 4; R. 412, l. 6 – R. 413, l. 12. Sanders concluded that since the neighborhood was a high crime area, then suspicious people (like the man dressed in black) who were not from the neighborhood in effect brought fear to the residents. R. 414, l. 19 – R. 415, l. 18.

Thereafter, the case for the defense went forward without any evidence and/or testimony from witnesses that the neighborhood in which this shooting occurred was a high crime area

where danger and violence were common occurrences and that based on that climate, which meant that appellant's state of mind was one in which it was reasonable to react in self-defense, particularly under the instant circumstances where the suspicious actions of Washington's threatening and menacing movements produced fear, self

During the case for the defense, Cynthia Sanders testified and inadvertently stated that they "lived in a high crime area" without being asked any question of this nature by defense counsel about that and the trial judge replied with "the jury will strike the last statement." Tr. 486, lines 15-20. Also, Cynthia Sanders stated that she was told it was a high crime area when she was thinking of moving there and when the solicitor objected, the trial judge sustained on hearsay grounds. R. 450, l. 21-24. Thereafter, the trial judge admonished counsel as follows:

> Defense Counsel: I just want to make sure I get clarification....they can discuss some things that happened on Kent Avenue? Is that my understanding?
>
> The Court: Right, between there parties. You are not saying, well, I was scared because there was a shooting over on Suffolk Avenue, or something like that. You can't bring that in. That's part of the neighborhood that I'm excluding from evidence.
> R. 454, l. 20 – R. 455, l. 3.

The Sixth Amendment "essentially constitutionalizes the right to present a defense in an adversarial criminal trial," and the Sixth amendment is applicable to the states via the Fourteenth Amendment and thus, the Sixth and Fourteenth Amendments guarantee a defendant of the right to present a defense and cross-examine witnesses.[4]. State v. Gillian, 360 S.C. 433, 602 S.E.2d 62

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[4] The Sixth Amendment rights to notice, confrontation, and compulsory process guarantee that a criminal charge may be answered through the calling and interrogation of favorable witnesses, the cross examination of adverse witnesses, and the orderly introduction of evidence. These basic rights are applicable to the states through the due process clause of the Fourteenth Amendment. The Amendment essentially "constitutionalizes" the right to present a defense in

(2004), aff'd as modified in State v. Gillian, 373 S.C. 601, 646 S.E.2d 872 (2007); Faretta v. California, 422 U.S. 806 (1975); State v. Schmidt, 288 S.C. 301, 342 S.E.2d 401 (1986); State v. Thomas, 2015 WL 3884239 (S.C. Ct. of App. 2015). Specifically included in the Sixth Amendment is the right to meaningfully cross examine adverse witnesses. State v. Gillian, supra. In Schmidt, the Court held that the denial of the defendant's request to present evidence of a "vendetta" against of him by the parents of a child prosecutrix alleging sexual misconduct that violated his right to present a defense.

Note that our Courts have held certain "high crime area evidence" to be admissible when the same is relevant in cases. For example, compare by analogy cases where a defendant challenged a police officer's reasonable suspicion to make a Terry[5] stop or arrest, and where our Courts have held that a defendant's presence in a high crime area, although not dispositive, is nonetheless a factor or consideration under the totality of the circumstances in examining the legality of the stop and/or arrest. See State v. Taylor, 401 S.C. 104, 736 S.E.2d 663 (2013). In Taylor, the Court upheld the admissibility of evidence that the police suspected illegal activity after following up on a tip and finding a male on a bicycle huddled up with another male on an unpaved street known for high incidents of drug trafficking at night as a factor leading to the arrest in the case. Compare the case of United States v. Lender, 985 F.2d 151 (4th Cir. 1993), where police suspected a drug transaction was in progress where police observed four to five men, including the defendant huddled together in an area known for heavy drug traffic at 12:15 a.m. in the morning and upheld the detention of the defendant by the police as follows:

> Here the officers personally knew that the area they were patrolling had a large amount of drug traffic. While the defendant's mere

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an adversary criminal trial. Faretta v. California, 422 U.S. 806, 95 S.Ct 2525, 45 L.Ed.2d 562 (1975).

[5] Terry v. Ohio, 392 U.S. 1 (1968).

> presence in a high crime area is not by itself enough to raise reasonable suspicion, an area's propensity toward criminal activity is something an officer may consider.

The same "high crime as a relevant factor" analogy holds true in other cases as well. For example, in Jeffords v. Lessene, 343 S.C. 656, 541 S.E.2d 847 (2001) the Court found that in a negligence action filed against a bar owner (patron was assaulted), there was clearly a jury question as to whether there was a foreseeable risk of patrons being assaulted and other criminal conduct because of the fact that the bar was in a high crime area was a factor that led to this ruling. Note also the case of State v. Alexander, 309 S.C. 495, 424 S.E.2d 526 (1992), where the Court held upheld as reasonable the basis for the traffic stop under a totality of the circumstances analysis where the officers made observations during early morning hours in a particular area was known for its disposition toward criminal activities, and noticed a vehicle with out of state tags that held a passenger that kept turning around to watch police who were following. Note Hill v. York County Sheriff's Department, 313 S.C. 303, 437 S.E.2d 179 (1994), where there was a proximate cause issue in a lawsuit where an arrestee was shot after being released in a high crime area on the ground that the area was extremely dangerous and that police should have foreseen such danger and the consequences. See State v. Elmore, 368 S.C. 230, 628 S.E.2d 271 (2006) where the Court cited to State v. Cherry, 348 S.C. 281, 559 S.E.2d 297 (Ct. App. 2001), affirmed in result, 361 S.C. 588, 606 S.E.2d 475 (2005), where the Cherry Court found sufficient evidence of the intent to distribute to withstand a motion for a directed verdict as there was sufficient evidence of intent to distribute to withstand a motion for a directed verdict where:

> the arrest occurred in a high crime area; (2) defendant possessed eight rocks of crack cocaine; (3) defendant possessed no drug paraphernalia; (4) defendant possessed $322 in cash, predominately in twenty dollar bills; and (5) testimony provided that a single rock of crack cocaine is typically sold for twenty dollars. Cherry, 348 S.C. at 285, 559 S.E.2d at 299. Our supreme

> court granted a writ of certiorari to review this court's opinion in Cherry, and the majority opinion affirmed the issue, holding the above combination of factors was sufficient to submit the charge of possession with intent to distribute to the jury. Cherry, 361 S.C. at 594-95, 606 S.E.2d at 478.

Furthermore, evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which indirectly bears or indirectly bears. State v. Hamilton, 344 S.C. 344, 543 S.E.2d 586 (2001). See Rule 401, SCRE. Clearly, evidence that appellant lived in a high crime area and reacted to a threat of loss of life by shooting in self-defense was evidence that was relevant to his self-defense claim.

In the instant case, testimony from residents of the Accabee community and knowledgeable police officers who were familiar with the high crime associated with Kent Street and Accabee Community constituted relevant evidence in support of appellant's self-defense claim to the extent that appellant, who lived in an area where getting shot was the norm, believed on the night of the shooting that he was in actual imminent danger of losing his life or sustaining serious bodily injury based on Washington's menacing behavior and based on the historical character of the community in which he lived; and that any reasonable person would have believed the same, i.e., that there was imminent danger of the loss of life or injury based on the scenario in question. This proved appellant's state of mind based on the circumstances he faced and the high crime area community in which he lived.

Therefore, the trial judge's exclusion of this relevant evidence, i.e. the high crime area nature where appellant resided, impacted appellant's state of mind which led to his decision to fire a weapon in self-defense, constituted error and precluded complete cross-examinations and a defense from being presented on appellant's behalf at trial. The cross examination of the officers regarding this issue and the proffered testimony on the same would have produced invaluable

evidence with respect to appellant's self-defense claim. Finally, appellant could not recall the officers during the case for the defense because the judge had already prohibited this line of questioning. All of the excluded high crime area evidence and testimony violated appellant's Sixth and Fourteenth Amendment rights and article 1, section 14 of the South Carolina State Constitution.

QUESTION III

The trial judge erred in not allowing defense counsel to formulate her closing remarks based on reasonable inferences raised in the record because this in turn violated appellant's right to a fair trial.

Before closing arguments, defense counsel apprised the trial judge of the fact that Washington testified that a friend of his from the Accabee Community had been killed recently there (R. 51, l. 25 – R. 52, l.2), and based on that testimony, defense counsel requested leave to refer to this at closing as couched in terms of the crime infested character of the neighborhood as a reasonable inference from the record and how this played into appellant's reaction in self-defense in light of the background information regarding his knowledge of the area being a high crime area. R. 590, l. 21 – R. 592, l. 6. The trial judge ruled that the objections made by the solicitor regarding the high crime nature of the neighborhood had been consistently sustained and that counsel could not refer to this information revealed during Washington's testimony about this high crime neighborhood to the jury by the defense during closing arguments. R. 413, l. 21 – R. 594, l. 3.

With the respect to closing arguments, counsel is allowed to draw reasonable references from the record. State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981). A closing argument

must be confined to the evidence in the record and the reasonable inference drawn from there and counsel may state his version of the testimony and comment on the weight of it. Smith v. State, 654 S.E.2d 523 (2007). Hence, the trial judge's ruling denying defense counsel the opportunity to address the issue of the high crime character of the neighborhood which emanated form the Washington (state's witness) as an inference supported by the record, which was relevant to appellant's self-defense claim, constituted error that prejudiced the defense and denied appellant his right to fair trial in violation of the Fourteenth Amendment and Article 1, section 3 of the South Carolina State Constitution.

QUESTION IV

The trial judge erred in denying appellant's request for the additional "no duty to retreat" charge in connection with the self-defense instruction because there is no affirmative duty requiring one to retreat from the curtilage of his or her home.

Defense counsel objected to the trial judge's denial of appellant request's for a "no duty to retreat" charge in connection with the self-defense charge. R. 682, l. 20 – R. 683, l. 8. The trial judge denied this request as inapplicable on the ground that no Castle Doctrine defense had been pleaded in the case. R. 683, l. 10 – R. 684, l. 1.

The absence of a Castle Doctrine claim in this case had no bearing on the "no duty to retreat" requested jury charge made at trial by the defense. The "no duty to retreat" charge was applicable in this case. Here, appellant stayed on his own property and watched Washington reach for his waist band while he (Washington) advanced across the street onto his (appellant's) property. Appellant had no duty to retreat; and note furthermore that retreating would have increased his danger of experiencing death or serious bodily injury.

Under the law of self-defense, one who is attacked on his own premise is immune from the duty to retreat. State v. Brown, 321 S.C. 184, 467 S.E.2d 922 (1996); State v. Merriman, 287 S.C. 74, 337 S.E.2d 218 (1985). A defendant is not required to retreat if he has "no other probable means of avoiding the danger of losing his life or suffering serious bodily injury." State v. Dickey, 394 S.C. 491, 716 S.E.2d 97 (2011), citing to State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489 (1998). Also, there is no duty to retreat around the cartilage of one's own premises. State v. Wiggins, supra; State v. Brooks, 252 S.C. 504, 167 S.E.2d 307 (1969). The trial judge erred in failing to charge the "no duty to retreat" component of self-defense in the present case.

QUESTION V

The trial judge erred in charging the jury that "if [self-defense] is **established** [then they] must find the defendant not guilty" because this confused the jury and nullified the correct law that "the state has the burden of disproving self-defense by proof beyond a reasonable doubt."[6]

Clearly, charging the jury that they must find appellant not guilty "if [appellant] **established** [self-defense]" surely led them to believe that appellant had the burden of proving the elements of self-defense in the case, which nullified the correct law that the state had to disprove self-defense beyond a reasonable doubt. At the very least, this confused the jury. At the most (and worst), this vitiated the correct law on the proof of self-defense. This error was prejudicial and reversible error because appellant's defense hinged primarily on self-defense, and because in light of the facts, the state could not disprove self-defense by proof beyond a reasonable doubt.

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6 The defense objected to this charge as an instruction placed upon the defendant to prove self-defense. The trial judge ruled that the charge was not infirm. R. 684, lines 1-20.

The trial judge charged the jury regarding the burden of proof of self-defense as follows:

> Now, ladies and gentlemen, the defendant has raised the defense of self-defense and self-defense is a complete defense, and if it is **established** you must find the defendant not guilty...the state has the burden of disproving self-defense by proof beyond a reasonable doubt and if you have a reasonable doubt of the defendant's guilt after considering all of the evidence including the evidence of self-defense, then you must find the defendant not guilty on the other hand; if you have no reasonable doubt of the defendant's guilt after considering all of the evidence including the evidence of self-defense, then you must find the defendant guilty. R. 675, l. 3-15.

Previously, the defendant bore the burden of establishing self-defense by a preponderance or greater weight of the evidence, but now the current law requires the state to disprove self-defense when raised by the defendant beyond a reasonable doubt. State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489 (1998). A jury instruction misstating the law of self-defense amounts to an error of constitutional magnitude and is presumed prejudicial. See State v. Burkhart, 350 S.C.252, 565 S.E.2d 298 (2002). The Court reversed in Burkhart, supra, holding that the requested charge that the state must disprove self-defense is clearer than a description of the self-defense burden of proof that states that the defendant does not need to prove self-defense. Although the concurring opinion in Burkhart espoused the view that the instant charge is acceptable, the majority opinion in Burkhart refused to agree to the legitimacy of such a charge. Compare also State v. Addison, 343 S.C. 290, 540 S.E.2d 449 (2001), where the Court reversed (despite the model Davis charge) based on the following charge that was given in the case:

> If you have a reasonable doubt of the defendant's guilt after considering all the evidence including the evidence of self-defense, then you must find him not guilty. On the other hand, if you have no reasonable doubt of the defendant's guilt after considering all the evidence including the evidence of self-defense, then you must find him guilty.

Here, this error was not harmless error because it was not the law and it confused the jurors, which probably contributed to the jury's guilty verdicts, and therefore denied appellant the opportunity of an acquittal on self-defense, which violated appellant's right to a fair trial guaranteed under the Fourteenth Amendment and Article 1, §3 of the South Carolina State Constitution. It is error to refuse to charge the correct statement of the law. State v. Kimbrell, 294 S.C. 51, 362 S.E.2d 630 (1987). The trial judge erred in failing to charge the proper burden of proof on a self-defense claim.

QUESTION VI

The trial judge erred in overruling defense counsel's objection after the solicitor asked appellant if marijuana had been found on the dresser in his room near where his gun was located and recovered by police as this was an extremely prejudicial and irrelevant assertion because this injected a prior bad act drug factor into the case, especially when there was no marijuana found on the dresser in the room or anywhere in appellant's room, and where there was no drug link whatsoever connected to the shooting in the case.

During the solicitor's cross-examination of appellant, the following colloquy occurred:

> Q. Right that's your gun that's your dresser, that's your extended magazine right?
>
> A. Yes, ma'am
>
> Q. That's your weed too, right?
>
> A. What weed?
>
> Defense Counsel: Objection, Your Honor.
>
> The Court: Overruled. Proceed.
>
> Q. Is that weed?
>
> A. That's not weed

R. 558, l.1-17

The injection of drugs (marijuana) into a case that involved a shooting that was devoid of any drug link or connection was extremely prejudicial because it injected a negative character/bad act component in the case in order to cast appellant in the light of one who engages in gun violence and does drugs also, which in turn created a criminal propensity image of appellant to the extent that he was predisposed to commit crimes and thus guilty as charged.

This identical issue was raised in State v. Peake 302 S.C. 378, 396 S.E.2d 362 (1990), where the Court reversed due to a similar case when the solicitor introduced a drug factor in the case, which was a murder case, where the murder was the only issue in the case sans any involvement of a drug connection to the murder. In Peake, the Court held that it was improper to allow testimony into evidence that the defendant offered to sell marijuana to the deceased ten days prior to the deceased's murder because this was impermissible prior bad acts evidence that was irrelevant and more prejudicial than probative. In Peake, the Court's rationale as follows:

> Generally, when alleged prior bad acts have not resulted in arrest, indictment or conviction, evidence of such crimes is admissible. State v. Diddlemeyer, 296 S.C. 235, 371 S.E.2d 793 (1988); State v. Smith, 279 S.C. 440, 308 S.E.2d 794 (1983). Evidence of prior criminal acts which are independent and unconnected to the crime for which an accused is on trial is admissible for purposes of proving that the accused possesses a criminal character or has a propensity to commit the crime with which he is charged. State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987); 381 State v. Green, 261 S.C. 366, 200 S.E.2d 74 (1973). Implicit in the rules of evidence 88364 which permit the introduction of prior bad acts or crimes into evidence is the prerequisite that they establish either" 1) motive; 2) intent); 3) the absence of mistake or accident; 4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; 5) the identity of the person charged with the commission of the crime on trial." State v. Lyle, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923).

Clearly, there must be a logical connection between the unrelated prior bad acts evidence and the charged crime, and that determination of the prejudicial effect of the prior bad act evidence must be based on the entire record and the facts of the case. State v. Brooks, 341 S.C. 57, 533 S.E.2d 325 (2000). Compare State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006), where the Court held that it was error to admit a prior failure to stop for a blue light conviction where the defendant was on trial for murder. Finally, compare also the reversal in State v. King, 334 S.C. 504, 514 S.E.2d 578 (1999), where the Court held that it was prejudicial error to admit prior thefts from the defendant's ex-wife in support of the theory that the defendant needed money to support a bad drug habit during his trial on the charges of murder, arson, and armed robbery, particularly where the deceased was known to carry large sums of money, because the priors showed bad character and criminal propensity on the defendant's behalf as proof that he was criminally predisposed to commit crimes and was guilty of the crimes with which he was on trial.

Here, the solicitor attempted to inoculate the jury with the idea that appellant was a weed-smoking and gun-toting criminal who was predisposed to commit violent crimes despite the fact that no marijuana was found during the search of his room and that he used the weapon only in self-defense. Clearly, this prior bad act error evidence constituted irrevocable prejudice because of the impact of bad character assigned to appellant and the bad behavior that would accompany bad character. The trial judge erred in overruling the objection by the defense to the prior bad acts evidence, which turned out to be factually untrue. This error deprived appellant of his right to a fair trial in violation of the Fourteenth Amendment and article 1, §3 of the South Carolina State Constitution.

QUESTION VII

The trial judge erred in denying appellant the opportunity to impeach Washington with his prior inconsistent statement.

The defense sought to impeach Washington's testimony regarding how he was such an innocent bystander with his prior statement that painted another picture indicating that Washington's activities were not so innocent, i.e., a call to his brother for money while he was continually walking and pacing outside. This constituted relevant evidence in support of what appellant saw and interpreted with respect to Washington's movements on the night in question as well as his (appellant's) state of mind and reaction to Washington. R. 96, l. 7 – R. 100, l. 23.

When the defense moved to admit Washington's statement into evidence for the purpose of impeachment after Washington admitted that the signature was his, the solicitor objected and stated the proper foundation has not been laid, and that it was not inconsistent, and that the officer who took the statement needed to be questioned to lay the foundation before its admission into evidence. R. 100, l. 24 – R. 102, l. 14; R. 102, l. 21 – R. 103, l. 14. The trial judge stated as follows:

> How has there not been a foundation laid when he has now acknowledged that it is his words, that it is correct, and that he signed it after reviewing it? R. 102, l. 17-20.

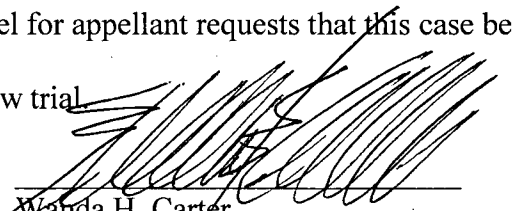
Nonetheless, the Court sustained the solicitor's objection and the statement was not admitted into evidence at trial. R. 103, l. 15-16.

Rule 613(b), SCRE, states that a prior inconsistent statement may be admitted as substantive evidence when the declarant testifies at trial and is subject to cross-examination (See State v. Stukes, 381 S.C. 390, 673 S.E.2d 434 (2009)) as long as a proper foundation for the statement is laid, which would include permitting the witness to admit, deny, or explain a prior

inconsistent statement. See State v. Moses, 390 S.C. 502, 702 S.E.2d 395 (2010); State v. McCleod, 362 S.C. 73, 606 S.E.2d 215 (2004). Undoubtedly, it was obvious that Washington admitted that this was his statement, which the defense sought to admit in order to highlight inconsistences; so therefore, the foundation was laid and the trial judge noted that Washington admitted that this statement was his statement as this was the proper test. The trial judge erred in not allowing Washington's statement into evidence even after the proper foundation had been laid. This erred prejudiced the defense because there was a denial of an opportunity to reveal the inconsistencies as part of the defense. The error denied appellant the right to present evidence in his defense in violation of the Sixth and Fourteenth amendments to the United States Constitution and article 1, section 14 of the South Carolina State Constitution.

CONCLUSION

Based on the foregoing arguments, counsel for appellant requests that this case be reversed and remanded to the lower court for a new trial.



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ATTORNEY FOR APPELLANT

This 21st day of March, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

March 21, 2018

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