STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenwood County
Honorable Edward W. Miller, Circuit Court Judge
Appellate Case No. 2017-000481

THE STATE,

Respondent,

vs.

ONTAVIOUS DERENTA PLUMER,

Appellant.

INITIAL BRIEF OF RESPONDENT

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The trial judge neither erred in any manner nor violated Appellant's constitutional right to self-representation by denying Appellant's mid-trial request to relieve defense counsel in order to obtain "another lawyer" because that request was untimely and did not constitute a clear and unequivocal assertion of his right to self-representation since it was a request to replace defense counsel with a different attorney as opposed to a request for Appellant to be permitted to represent himself.

III.

Any issue with the trial judge's exclusion of the testimony of a purported expert witness on gunshot residue was not properly preserved for appellate review because defense counsel never proffered or attempted to proffer the substance of the witness's intended testimony. However, notwithstanding any issue preservation concerns, the trial judge did not abuse his broad discretion by refusing to qualify the witness as an expert so the witness could testify about the results of a gunshot residue analysis he did not personally perform because that testimony would have simply constituted improper and inadmissible hearsay disguised as an expert opinion.

IV.

Any issue with Appellant's five-year sentence for possession of a firearm during the commission of a violent crime was not properly preserved for appellate review because defense counsel did not raise any objections to Appellant's sentence during trial.

STATEMENT OF THE CASE

In December of 2015, Appellant Ontavious Derenta Plumer was arrested following an investigation into a shooting that occurred a few months earlier in Greenwood, South Carolina. In July of 2016, the Greenwood County Grand Jury indicted Appellant for attempted murder, armed robbery, and possession of a firearm during the commission of a violent crime. Prior to trial, the solicitor served timely notice on Appellant indicating the State would seek a sentence of life without parole upon conviction based on Appellant's prior conviction for a "most serious" offense. On February 6, 2017, a jury trial was commenced in the Greenwood County Court of General Sessions with the Honorable Edward W. Miller, circuit court judge, presiding. At the conclusion of the three-day trial, the jury convicted Appellant of attempted murder and possession of a firearm during the commission of a violent crime and acquitted him of armed robbery. Following the verdict, the trial judge sentenced Appellant to terms of imprisonment of life without parole for attempted murder and five years for possession of a weapon during the commission of a violent crime. Appellant then timely filed a notice of appeal.

STATEMENT OF FACTS

On the evening of October 11, 2015, Oshamar Wells ("Victim"), who was making money at that time by selling marijuana, met up with Appellant and another man identified as "Mel" at a pre-arranged location so he could sell them one pound of marijuana, which was worth roughly $3,600.[1] (Tr. pp. 44-45; p. 49; p. 51; pp. 62-63; pp. 71-72; pp. 103-104). After meeting up with the men, Victim led them to his cousin's residence, which was located on Spring Woods Trail in Greenwood, South Carolina, in order to complete the transaction. (Tr. pp. 46-46). Once there, they parked their vehicles outside, entered the residence, sat down at the kitchen table, and proceeded to smoke "a couple of blunts" to test the "product." (Tr. pp. 48-51). After doing so, Victim placed a bag containing the agreed-upon pound of marijuana onto the table and waited for the men to produce his payment for it. (Tr. pp. 49-51; p. 163). However, instead of presenting the money, Appellant suddenly pulled out a gun and began firing it at Victim while "Mel" grabbed the bag of marijuana and fled from the home. (Tr. pp. 51-52; p. 74; pp. 97-98). In response, Victim quickly turned to retrieve his mother's holstered gun from a nearby cabinet, and, as he was doing so, he was hit by bullets in his back, buttocks, and legs. (Tr. pp. 51-54; p. 60; p. 75; p. 81; pp. 97-98; p. 101; p. 103; pp. 112-113). Victim then collapsed to the floor, but he was able to fire several shots in Appellant's direction, which caused Appellant to flee from the home so rapidly he left his vehicle's keys behind. (Tr. pp. 54-55; p. 72; p. 74; pp. 204-205).

Once Appellant was gone, Victim, who was gravely injured, placed a number of phone calls seeking help, including one to his mother. (Tr. p. 56; p. 105; p. 315). In response, Victim's mother, Wenona Wells ("Mother"), quickly responded to the scene along with several young

[1] According to Victim, the drug deal was arranged by Christopher Maggiacomo, who also was known as "Jock." (Tr. p. 64; pp. 102-103). In the past, "Jock" had served as a middleman for Victim, but "Jock" was out of town at the time of the incident. (Tr. pp. 64-65).

children in her care. (Tr. pp. 105-106). Upon arriving, Mother found Victim on the floor in the kitchen, and her grandson found her gun on the floor nearby. (Tr. pp. 106-107). After her grandson picked up the gun, Mother took it from him, secured it in her purse to keep it away from the children present, and later transferred it to the trunk of her vehicle. (Tr. pp. 106-107; p. 109; p. 115). Shortly thereafter, Officer Kerry Cooper of the Greenwood Police Department arrived at the residence and was directed inside to Victim's location. (Tr. pp. 119-121). At that point, Victim reported to the officer he had been shot by two unknown men who tried to rob him. (Tr. pp. 122-124; pp. 134-135). Victim was then rapidly transported to the hospital by emergency medical personnel who responded to the scene. (Tr. p. 124).

At the hospital, Dr. Ricky Ladd, a board-certified emergency room physician, provided treatment to Victim, who reported he had been shot during a home invasion. (Tr. p. 315). During that treatment, Dr. Ladd discovered Victim's femur was broken and Victim had sustained potentially life-threatening gunshot injuries to his buttocks, lower back, thighs, and lower leg. (Tr. pp. 315-316; pp. 319-320).

Once Dr. Ladd and the other medical personnel were able to stabilize Victim's condition, Officer Patrick Durkin of the Greenwood Police Department briefly spoke with Victim at the hospital, and, during that discussion, Victim reported two unknown men entered the residence and told him to "give it up" before shooting at him. (Tr. pp. 259-260; p. 262; p. 265). Officer Durkin then collected evidence for gunshot residue testing from Victim's hands, which had been bagged upon his arrival at the hospital.[2] (Tr. p. 263).

[2] Ultimately, no gunshot residue testing was conducted in regard to the evidence collected from Victim's hands due to the fact Victim eventually admitted to firing a weapon and had unquestionably been shot during the incident. (Tr. pp. 272-278; p. 282).

At the same time Victim was being treated at the hospital, officers and other law enforcement personnel began conducting an investigation into the shooting at the Spring Woods Trail residence. (Tr. pp. 125-126; pp. 155-156; pp. 209-211; p. 231). As part of that investigation, the officers checked the information connected to the vehicles present at the scene and discovered one of the vehicles was registered to an individual named Walter Plumer, who was Appellant's grandfather. (Tr. p. 125; p. 150; pp. 156-157; p. 159; p. 206). Additionally, the officers processed the crime scene, which was in disarray, and discovered blood spots, a number of fired and unfired bullets, multiple shell casings, numerous bullet holes, some unpackaged marijuana, a holster, and several sets of keys, including the keys to Appellant's vehicle. (Tr. p. 126; p. 129; pp. 132-133; p. 167; pp. 204-205; pp. 233-234; pp. 236-239; p. 241; pp. 247-248; p. 251). Upon making those discoveries, the officers collected and secured the evidence, and a number of those items were subsequently submitted for analysis, including a swab collected from blood located on the ground outside of the residence.[3] (Tr. pp. 196-197; pp. 242-244).

Meanwhile, in the immediate aftermath of the shooting, Appellant, who had been shot in the leg during the incident, ran from the scene and was able to solicit a ride from Sameka Hawes, who was driving through the area in her car. (Tr. pp. 140-141; pp. 332-334; p. 337). Upon doing so, Appellant initially requested Hawes drive him to the hospital, but he quickly changed his mind and directed her to transport him to "his baby mom's house." (Tr. p. 334; p. 377). Hawes then drove Appellant to an apartment complex as directed. (Tr. p. 335). Thereafter, while at the apartment complex, Appellant sought assistance from several of his family

[3] Upon analysis, Lieutenant Tracey Thrower, a firearm and toolmark examiner at SLED, determined two of the recovered bullets were fired from the gun used by Victim, two other recovered bullets were fired by a different gun, ten of the recovered shell casings were fired by the gun used by Victim, and six other shell casings were fired by a different gun. (Tr. p. 283; pp. 285-286; pp. 290-291; pp. 294-296). Based on those determinations, Lieutenant Thrower concluded between two and four guns were involved in the shooting. (Tr. p. 298).

members, and his cousin, VanJarvis Martin, ultimately picked him up and drove him to a hospital in Greenville, South Carolina, at his request. (Tr. p. 366; pp. 397-398). Subsequently, at the hospital, Deputy Andrew Reese of the Greenville County Sheriff's Office made contact with Appellant based on the fact Appellant had sustained a gunshot injury. (Tr. pp. 138-139; p. 143). During their conversation, Appellant claimed he was shot in the leg by a stranger as he was walking along a roadway in Greenville and was transported to the hospital by a random bystander after the shooting. (Tr. pp. 140-141). Another officer then took possession of Appellant's clothing from hospital staff and, at approximately 11:15 p.m., collected evidence from Appellant's hands for potential gunshot residue testing. (Tr. p. 143; p. 354; pp. 363-364).

On the following morning, Detective Wesley McClinton and Detective William Kay of the Greenwood Police Department went to speak with Victim at the hospital in Greenwood.[4] (Tr. p. 57; p. 78; pp. 146-147; p. 155; p. 161; p. 197). During the conversation, Victim, who was afraid he would get in trouble if he revealed the truth about being shot during a drug transaction, falsely claimed two random men came to the residence, tried to rob him, and shot him when did not have anything for them to steal.[5] (Tr. p. 58; p. 79; pp. 89-90; p. 148; p. 161).

After speaking with Victim, Detective McClinton went to speak with Appellant's grandfather at his home in Starr, South Carolina, along with Lieutenant Mike Dixon, who was

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[4] Due to the severity of his injuries, Victim was at the hospital for approximately one week following the shooting. (Tr. p. 57).

[5] In addition to being involved in a drug transaction, Victim also had prior convictions for possession of marijuana and possession of marijuana with intent to distribute, so he could not lawfully possess a firearm. (Tr. p. 62; p. 99). Notably, prior to the shooting, Appellant had previously been convicted of attempted armed robbery. (Tr. p. 460; Life Without Parole Notice). Therefore, Appellant *also* could not lawfully possess a firearm at the time of the incident. See S.C. Code Ann. § 16-23-500(A) ("It is unlawful for a person who has been convicted of a violent crime, as defined by Section 16-1-60, that is classified as a felony offense, to possess a firearm or ammunition within this State."); see also S.C. Code Ann. § 16-1-60 (identifying attempted armed robbery as a violent crime).

the supervisor of the investigations unit at the Greenwood Police Department. (Tr. p. 205; p. 207; p. 209). During that conversation, Appellant's grandfather initially claimed his car had been stolen. (Tr. p. 208; p. 213). However, he eventually acknowledged his car was not actually stolen and, instead, was loaned to Appellant, whom he called "Too-Too." (Tr. p. 206; p. 208; p. 213). Appellant's grandfather further admitted he was initially untruthful because his vehicle had been "involved in something." (Tr. p. 214).

On the following day, Detective McClinton and Detective Kay returned to the hospital to speak with Victim again, and Victim again claimed to have been shot during an attempted robbery. (Tr. p. 79; pp. 91-92; p. 162; p. 198). However, after being confronted about the implausibility of his account and speaking with a family member, Victim eventually told the truth and revealed he was shot during the course of a drug transaction. (Tr. p. 58; p. 80; pp. 147-148; pp. 162-163; p. 188). Additionally, Victim revealed he shot at Appellant during the incident, but he consistently indicated he only fired his weapon after Appellant first began shooting. (Tr. pp. 147-148; p. 164; pp. 179-180; pp. 195-196). Victim also revealed his mother was currently in possession of the gun he used to defend himself, which enabled Detective McClinton to retrieve the gun from Mother a short time later. (Tr. pp. 109-110; p. 115; pp. 164-165). Furthermore, Detective McClinton showed a photographic lineup containing Appellant's picture to Victim, and Victim immediately identified Appellant as the person who shot him.[6] (Tr. pp. 58-59; pp. 149-150; pp. 152-153; pp. 163-164).

Thereafter, the investigating officers obtained an arrest warrant for Appellant in connection to the shooting, but they were initially unable to locate him despite searching "quite a few places." (Tr. p. 214; pp. 376-377). However, a few months after the shooting, Appellant

[6] Later on during trial, Victim identified Appellant in the courtroom as the person who shot him. (Tr. p. 52).

was finally apprehended and arrested. (Tr. p. 215). Following his arrest, Appellant was brought before a judge for a bond hearing, and, during the hearing, Appellant acknowledged he was present at the scene of the shooting while asserting he had also been shot. (Tr. pp. 215-216; p. 226). Furthermore, a sample of Appellant's DNA was collected for comparative purposes, and, upon analysis, Appellant's DNA profile was conclusively matched to the DNA profile developed from the blood recovered on the ground outside of the Spring Woods Trail residence shortly after the shooting. (Tr. pp. 244-245; pp. 302-307).

Subsequently, Appellant was indicted for attempted murder, armed robbery, and possession of a firearm during the commission of a violent crime, and he chose to proceed forward to trial. (Tr. pp. 14-15; Indictments). At the conclusion of trial, the jury convicted Appellant solely of attempted murder and possession of a firearm during the commission of a violent crime. (Tr. p. 457). The trial judge then sentenced Appellant to an aggregate sentence of life without parole based on his prior "most serious" conviction for attempted armed robbery. (Tr. pp. 460-461).

ARGUMENT

I.

The trial judge properly declined to instruct the jury on self-defense because the evidence and testimony presented during trial did not establish any of the required elements of self-defense and, instead, established Appellant unlawfully shot his victim after pulling out a gun and attempting to rob him during the course of a drug transaction.

Appellant contends the trial judge committed reversible error by refusing to instruct the jury on self-defense. In support of that contention, Appellant maintains the evidence and testimony presented during trial warranted such a charge, and he points to a variety of things he alleges support an inference Victim first produced a gun during the incident.[7] To the contrary, the testimony and evidence presented during trial established Appellant attempted to rob Victim at gunpoint and unlawfully shot him when Victim turned to retrieve his own gun to protect himself, and Appellant neither testified in his own defense nor offered anything else to refute that version of events. Therefore, because no testimony or evidence was presented to establish the required elements of self-defense, the trial judge properly declined to instruct the jury on self-defense. Appellant's convictions should be affirmed.

RELEVANT FACTS

During the course of trial, the officers and other witnesses who responded after the shooting testified about the events that followed it and the ensuing investigation that culminated

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[7] Through his appellate challenge to the trial judge's jury instructions, Appellant has raised entirely new arguments in support of a self-defense charge. See State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) (instructing a party cannot properly argue one ground in support of an issue during trial and then argue an alternative ground on appeal). However, because those arguments were not properly presented to the trial judge during trial, they cannot appropriately be raised or considered for the first time on appeal. Cf. State v. Benton, 338 S.C. 151, 156-157, 526 S.E.2d 228, 231 (2000) (finding Benton's appellate challenge to the trial judge's refusal to give a requested charge was not preserved for appellate review where Benton "argued one ground in support of a circumstantial evidence charge at trial (State only presented circumstantial evidence of intent) and argues another ground in support of the charge on appeal (palm print is circumstantial evidence).").

in Appellant's arrest. (Tr. pp. 105-106; pp. 118-119; pp. 146-147; pp. 155-156; pp. 209-210; p. 215; p. 231; pp. 259-260; pp. 283-285; pp. 301-302). Likewise, Dr. Ladd testified about Victim's injuries after the shooting, and, during his testimony, he indicated Victim "more than likely" fell when he was shot and would not have been able to bear weight on his leg after his femur was broken. (Tr. p. 320; p. 322; p. 328). However, he specifically noted he had no idea which of Victim's injuries was caused first or last. (Tr. p. 328).

Furthermore, regarding the shooting itself, Victim consistently and unwaveringly testified Appellant produced a gun during the course of the drug transaction and shot him when he reached for his own gun, which was stored nearby for defensive purposes, solely to defend himself from Appellant's actions. (Tr. pp. 51-52; p. 56; pp. 74-75; p. 81; pp. 97-98; pp. 101-102). Similarly, the officers who spoke with Victim after the shooting testified about his various out-of-court accounts of the incident, and, in those accounts, Victim never indicated he reached for his own weapon at any point before Appellant and his confederate either attempted to rob him or pulled out a gun. (Tr. p. 134; pp. 147-148; p. 161; p. 163; pp. 179-180; pp. 195-196; p. 263).

Beyond that testimony and evidence, Appellant elected *not* to testify during trial and, thus, did not personally offer an alternative version of events that could have supported a conclusion he acted in self-defense during the incident. (Tr. p. 396). However, testimony was presented establishing Appellant made claims at different times after the shooting he either was shot by a stranger while walking along a roadway in an entirely different city or was present at the time of the incident and was *also* shot during it. (Tr. pp. 139-141; p. 226). Notably, in neither of those accounts did Appellant assert he acted in self-defense at any point in time. (Tr. pp. 139-141; p. 226).

At the conclusion of the evidentiary phase of trial, the trial judge asked the parties if they had any requests for jury instructions, and defense counsel responded by requesting a charge on self-defense based on the fact Appellant "may have been shot at [the] incident location." (Tr. p. 400; pp. 402-403). However, the solicitor noted nothing had been presented during trial to establish Appellant acted in self-defense, and the trial judge indicated he agreed. (Tr. p. 403). In response, defense counsel alleged "a good bit of evidence" had been presented establishing Appellant was not the individual who fired the first shots, and the trial judge asked defense counsel to identify the specific evidence supporting that particular contention while noting the only evidence of how the shooting occurred had come from Victim. (Tr. p. 403). At that point, defense counsel incorrectly claimed Dr. Ladd testified Victim would not have been able to shoot when his femur was broken, and both the trial judge and the solicitor immediately responded Dr. Ladd had not, in fact, testified in that fashion. (Tr. p. 403). The trial judge then denied defense counsel's request for a self-defense instruction after having been presented with nothing to justify such a charge. (Tr. p. 404).

Subsequently, the trial judge instructed the jury on the applicable law. (Tr. pp. 441-451). In doing so, the trial judge—consistent with his earlier ruling—did not present a jury instruction on self-defense.[8] (Tr. pp. 441-451).

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). 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

[8] At the conclusion of the trial judge's jury instructions, defense counsel renewed all his prior motions and objections while raising no new arguments. (Tr. p. 451).

S.C. 396, 402, 585 S.E.2d 305, 308 (2003) ("[J]ury charges should be examined in their entirety and not in isolation[.]"). Significantly, the appellate court will only reverse a trial judge's decision regarding jury instructions when that decision constituted a prejudicial abuse of discretion. 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."). Meanwhile, if the jury instructions presented were substantially correct and covered the applicable law, the trial judge's decision will not be reversed on appeal. 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.").

ANALYSIS

In South Carolina, four elements must be present in order for the defense of self-defense to be established. State v. Bryant, 336 S.C. 340, 344, 520 S.E.2d 319, 321 (1999). Specifically, the required elements of self-defense 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). Critically, it is axiomatic all four elements of self-defense must be established in order for that defense to apply. State v. Bixby, 388 S.C. 528, 554, 698 S.E.2d 572, 586 (2010).

When determining whether the issue of self-defense should be submitted to the jury, the trial judge must look to the evidence actually introduced during trial because "[t]he law to be charged to the jury is determined by the evidence presented at trial." Goodson, 312 S.C. at 280, 440 S.E.2d at 372. If any evidence of self-defense is presented, the trial judge should instruct the jury on self-defense in the event such an instruction is requested. State v. Hill, 315 S.C. 260, 261, 433 S.E.2d 848, 849 (1993); see Stone v. State, 294 S.C. 286, 287, 363 S.E.2d 903, 904 (1988) ("Upon request, a defendant is entitled to a jury instruction on self-defense *if he has produced evidence tending to show the four elements of that defense*." (emphasis added)). Conversely, if no evidence is presented to support the issue of self-defense, the trial judge should *not* present a self-defense instruction to the jury. State v. Slater, 373 S.C. 66, 69, 644 S.E.2d 50, 52 (2007); see State v. Wigington, 375 S.C. 25, 31, 649 S.E.2d 185, 188 (Ct. App. 2007) ("A jury charge on self-defense is not required unless it is supported by the evidence."); see also State v. Blurton, 352 S.C. 203, 208, 573 S.E.2d 802, 804 (2002) ("If a jury instruction is provided to the jury that does not fit the facts of the case, it may confuse the jury. Only law applicable to the case should be charged to the jury. Instructions that do not fit the facts of the case may serve only to confuse the jury." (citations omitted)).

In the case sub judice, the testimony and evidence presented during trial did not establish all the required elements of self-defense. Specifically, regarding the first element, both Victim's

trial testimony and the testimony regarding Victim's out-of-court accounts of the shooting established Appellant pulled out a firearm during the course of an attempt to rob Victim, and no testimony was presented to establish a contrary version of events in which Appellant was not the person responsible for the gunfight that ensued. Under those circumstances, the evidence and testimony presented only supported a conclusion Appellant brought about the difficulty that transpired, which meant Appellant could not validly raise a claim of self-defense. Cf. State v. Santiago, 370 S.C. 153, 160, 634 S.E.2d 23, 27 (Ct. App. 2006) (finding a self-defense jury instruction was not warranted where the evidence presented did not support a finding Santiago was without fault for bringing about the difficulty). Furthermore, due to the absence of any testimony from Appellant regarding his account of the shooting, there was no evidence or testimony presented establishing Appellant shot Victim in order to defend himself from imminent danger of losing his life or sustaining serious bodily injury. Cf. State v. Bruno, 322 S.C. 534, 536, 473 S.E.2d 450, 452 (1996) ("Bruno was not entitled to a self-defense charge, because he presented no evidence that he believed he was in imminent danger of losing his life or sustaining serious bodily injury."). Because no testimony or evidence was presented that established those required elements of self-defense, Appellant was simply not entitled to a jury instruction on that defense. See Goodson, 312 S.C. at 280, 440 S.E.2d at 372 (finding the trial judge committed no error by declining to instruct the jury on self-defense where no evidence was presented establishing several of the required elements of self-defense).

In arguing to the contrary, Appellant first contends a charge on self-defense was supported by the fact Victim had a gun nearby at the time of the drug transaction and was willing to use it. However, Victim's act of keeping a holstered gun in close proximity for defensive purposes in no way constituted evidence *Appellant* was acting in self-defense at the time he shot

Victim as individuals can unquestionably arm themselves for protection. See, e.g., State v. Burriss, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999) (recognizing "a person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting").

Additionally, Appellant maintains a charge on self-defense was warranted because some testimony, including the testimony establishing Victim would have fallen when his femur was broken, could have supported a conclusion Victim reached for his gun before his was shot. Importantly though, the testimony presented during trial only established Victim reached for his gun *after* Appellant pulled out his own gun and tried to rob him. In light of that testimony, Victim's act of reaching for his gun—even if it occurred before he was actually shot—could not have justified Appellant shooting Victim in self-defense since Victim was only responding to an unlawful provocation from Appellant when reached for his own weapon.[9] See Bryant, 336 S.C. at 345, 520 S.E.2d at 322 (explaining an individual who provokes or initiates an assault cannot escape criminal liability by invoking self-defense); cf. Santiago, 370 S.C. at 160, 634 S.E.2d at 27 ("Even assuming, as Santiago testified, that [the victim] reached for the gun while in Santiago's hands, he did so after Santiago brought about the difficulty by removing the shotgun from the trunk and aiming it at [him].").

Next, Appellant contends a charge on self-defense was warranted because Victim allegedly conspired to hide the gun he used during the incident with Mother. However, notwithstanding the fact no testimony was actually presented to establish Victim conspired with

[9] Had any actual testimony or evidence been presented to establish Victim first brandished a weapon during the drug transaction without any provocation, Appellant very well might have been entitled to a jury instruction on self-defense. Cf. State v. Muller, 282 S.C. 10, 10, 316 S.E.2d 409, 409 (1984) (finding the trial judge erred by refusing to charge the jury on self-defense where Muller testified during trial "he shot [the victim] after [the victim] took out a gun and began shooting at him").

his mother for any purpose, Victim's actions after the shooting—even if they were designed to conceal or minimize his own criminal responsibility—simply did not constitute evidence of Appellant's actions during the shooting and could not have justified a charge on an otherwise unsupported theory of self-defense. See Barber v. State, 393 S.C. 232, 236, 712 S.E.2d 436, 438-439 (2011) (recognizing there must be some evidence presented on a particular issue in order to warrant a jury instruction on that issue while speculation based on the possibility "the jury may believe some of the evidence and disbelieve other evidence" is not sufficient to warrant an instruction); State v. Funchess, 267 S.C. 427, 430, 229 S.E.2d 331, 332 (1976) (explaining the presence of evidence "determines whether [an issue] should be submitted to the jury and the 'mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice' " (citation omitted)).

Furthermore, Appellant maintains self-defense should have been charged because there was evidence establishing he retreated at some point. While unquestionable the evidence established Appellant fled after the shooting, the fact Appellant fled did not establish he attempted to retreat *before* shooting Victim or otherwise acted in self-defense *before* taking flight. See, e.g., Santiago, 370 S.C. at 161, 634 S.E.2d at 27 ("If the defendant provokes or initiates the assault, he cannot invoke self-defense; however, he may restore his right to self-defense *if he withdraws from the conflict and communicates that decision to his adversary.*" (emphasis added)). Therefore, the evidence of Appellant's escape from the area after the shooting did not constitute evidence of any of the required elements of self-defense. See Bryant, 336 S.C. at 345, 520 S.E.2d at 322 ("A robber, who is met with such violent resistance by his victim that he has no opportunity to convince the victim that he has abandoned his criminal

intentions and only wants to withdraw, may not claim self defense if he injures or kills his victim." (citations, brackets, and internal quotations omitted)).

Finally, Appellant maintains his acquittal for the armed robbery charge somehow warranted a jury instruction on self-defense. Critically though, the jury's verdict on the armed robbery charge neither was evidence of anything for the jury to consider nor converted the actual evidence presented during trial into evidence of self-defense when it otherwise was not such evidence. See, e.g., State v. Minor, 171 S.C. 120, __, 171 S.E. 737, 737 (1933) ("The fact that [Minor] was acquitted on [one] charge does not now make the evidence incompetent, and cannot result in a reversal of her conviction on the other charge of having in possession."). Therefore, the jury's verdict did not establish Appellant was entitled to a jury instruction on self-defense. See State v. Gaines, 380 S.C. 23, 31, 667 S.E.2d 728, 732 (2008) ("The law to be charged to the jury is determined by *the evidence presented at trial.*" (emphasis added)).

Accordingly, because none of the evidence and testimony presented during trial supported a conclusion Appellant was acting in self-defense at the time he shot Victim, a self-defense instruction was not warranted in Appellant's case. See Slater, 373 S.C. at 69, 644 S.E.2d at 52 ("A self-defense charge is not required unless it is supported by the evidence."). As a result, the trial judge committed no error by declining to instruct the jury on a legal theory wholly unsupported by any of the evidence and testimony presented during trial. See Bryant, 336 S.C. at 345-346, 520 S.E.2d at 322 ("[Bryant]'s statements fail to establish the elements of self-defense entitling [Bryant] to a self-defense charge. No question of fact for the jury is created on this issue. . . . Accordingly, [Bryant] was not entitled to a self-defense charge and the trial judge correctly refused the charge."). Appellant's convictions should be affirmed.

II.

The trial judge neither erred in any manner nor violated Appellant's constitutional right to self-representation by denying Appellant's mid-trial request to relieve defense counsel in order to obtain "another lawyer" because that request was untimely and did not constitute a clear and unequivocal assertion of his right to self-representation since it was a request to replace defense counsel with a different attorney as opposed to a request for Appellant to be permitted to represent himself.

Appellant contends the trial judge erred by denying his mid-trial motion to relieve defense counsel and by not allowing him to represent himself in a pro se capacity. In support of that contention, Appellant does *not* allege he ever actually attempted to invoke his right to self-representation at any point during trial. Nonetheless, Appellant maintains the trial judge should have construed his request to relieve defense counsel in order to replace defense counsel with "another lawyer" as a motion for self-representation and somehow violated his right to represent himself by failing to do so. Importantly though, in order to effectively invoke the right to self-representation, Appellant was required to assert that right in a clear, unequivocal, and timely manner. Since Appellant did not do so at any point during his trial, he did not properly invoke his right to self-representation, and the trial judge was under no obligation to ensure Appellant was knowingly, voluntarily, and intelligently invoking a right he never actively sought to invoke. Accordingly, the trial judge committed no error through the manner in which he handled Appellant's mid-trial request to relieve defense counsel and in no way violated Appellant's constitutional right to represent himself. Appellant's convictions should be affirmed.

RELEVANT FACTS

Over the course of the first two days of trial, the State fully presented its case against Appellant and rested after introducing the testimony of fifteen separate witnesses. (Tr. p. 12; p. 44; p. 105; p. 118; p. 138; p. 146; p. 155; p. 187; p. 205; p. 209; p. 231; p. 254; p. 259; p. 267; p. 283; p. 301; p. 314). Once the State's case was concluded, defense counsel unsuccessfully

moved for a directed verdict and then presented the first witness for the defense. (Tr. pp. 329-331). At the conclusion of that witness's testimony, the trial judge released the jury for the day. (Tr. p. 340). Thereafter, following a brief discussion about a potential defense witness, the trial judge cautioned Appellant about the seriousness of the sentence he was facing in the event he was convicted before suspending the trial for the day.[10] (Tr. p. 343).

On the following morning, the trial resumed, and Appellant personally presented a motion seeking to relieve counsel and to have a competency evaluation conducted that had apparently been prepared by an inmate who was incarcerated with him at the jail. (Tr. p. 344; Court's Ex. # 3 (Pro Se Motion)). In response to the motion, the trial judge noted Appellant had appeared competent throughout the proceedings, and defense counsel confirmed he did not have any concerns about Appellant's competency. (Tr. p. 345). Appellant then indicated he wished to relieve defense counsel because defense counsel purportedly failed to "make it so [he] could understand what was going on." (Tr. pp. 345-346). In support of that request, Appellant claimed he did not know he was facing a mandatory sentence of life without parole until the second day of trial, alleged he had received a plea offer of seven years at some point, and asserted defense counsel told him not to worry about the life without parole sentence because he would be facing a lengthy sentence upon conviction under any circumstances. (Tr. pp. 345-346). In rebuttal, the solicitor promptly denied ever extending a seven-year offer during plea negotiations, and defense counsel clarified he was the one who proposed the seven-year offer, which was rejected by the

[10] Regarding the substance of the brief discussion, defense counsel identified the next witness who might testify for the defense, and the solicitor responded by noting that particular witness appeared to have been instructed how to testify by multiple individuals who contacted her from jail. (Tr. pp. 340-341). Upon hearing that information, the trial judge warned he would take any efforts to manipulate the proceedings "very seriously" and cautioned there would be "a price to pay" if falsified evidence was introduced. (Tr. p. 342). Defense counsel then conferred with the prospective witness and, after doing so, confirmed she did not wish to testify. (Tr. p. 342).

solicitor. (Tr. p. 346). Appellant then claimed defense counsel had never relayed that information to him, and defense counsel refuted that contention while confirming he relayed all plea offers to Appellant and also discussed the life without parole sentence with him. (Tr. pp. 346-347).

At that point, the trial judge asked Appellant if he wanted to go forward with the trial, and Appellant responded he wanted "to get [himself] another lawyer."[11] (Tr. p. 347). However, because the trial was already underway and the jury had been sworn, the trial judge indicated he was not going to relieve defense counsel and stop the trial to allow Appellant to get a new attorney. (Tr. p. 347). The trial judge then again asked Appellant if he wanted to go forward with the trial, and Appellant confirmed he did while stating he had "no choice." (Tr. p. 347). Immediately in response, the trial judge advised Appellant he did, in fact, have a choice of which he was aware, and Appellant replied he had a constitutional right to relieve his counsel whenever he wanted to do so. (Tr. p. 347). The trial judge then again asked Appellant if wanted to go forward with the trial while noting Appellant was aware of his choices, and, once again, Appellant claimed he did not have a choice. (Tr. p. 347). Thereafter, the trial judge advised Appellant the solicitor was willing to remove the prospect of mandatory life without parole in the event he elected to plead guilty, but Appellant continued to insist he did not have a choice while affirming he wanted to go forward with the trial. (Tr. pp. 347-348).

As the discussion continued, Appellant complained the trial judge did not believe him about his "disability," asserted the trial judge believed defense counsel over him, and alleged his constitutional rights had been violated repeatedly. (Tr. p. 348). He then instructed the trial judge

[11] Notably, Appellant's statement indicating he wanted "another lawyer" was consistent with the relief requested in his motion, which was an order relieving defense counsel so he could "obtain further representation[.]" (Court's Ex. # 3).

to "go on" with the trial. (Tr. p. 348). After listening to those remarks, the trial judge informed Appellant he was facing his "last chance" to avoid a mandatory life without parole sentence and asked him if he understood, which Appellant confirmed he did. (Tr. p. 349). The trial judge then provided one final warning to Appellant before giving him an opportunity to confer with defense counsel. (Tr. p. 350). Following a brief pause in the proceedings, defense counsel indicated Appellant wished to proceed forward with the trial. (Tr. p. 350). The jury then returned to the courtroom, and the trial continued on without Appellant ever making any actual request to represent himself. (Tr. pp. 344-350).

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Mazique, 419 S.C. 282, 288, 797 S.E.2d 730, 733 (Ct. App. 2016). When a defendant requests to proceed pro se after his trial has begun, "the grant or denial of the right to proceed pro se rests within the sound discretion of the trial judge[,]" and, therefore, such a ruling must necessarily be reviewed on appeal for an abuse of discretion. State v. Fuller, 337 S.C. 236, 241, 523 S.E.2d 168, 171 (1999); see United States v. Singleton, 107 F.3d 1091, 1099 (4th Cir. 1997) (reviewing a trial judge's ruling on a mid-trial assertion of the right to self-representation for an abuse of discretion). "An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law." Mazique, 419 S.C. at 288, 797 S.E.2d at 733.

ANALYSIS

Pursuant to both the United States Constitution and the South Carolina Constitution, a criminal defendant brought to trial in South Carolina "must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment." Faretta v. California, 422 U.S. 806, 807 (1975); see U.S. Const. amend. VI ("In all criminal prosecutions,

the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."); S.C. Const. art. I, § 14 ("Any person charged with an offense shall enjoy the right . . . to be fully heard in his defense by himself or by his counsel or by both."). However, "[t]he right to defend is personal." Faretta, 422 U.S. at 834. As a result, a defendant is permitted to waive his right to counsel and represent himself during a trial in a pro se capacity. State v. Thompson, 355 S.C. 255, 262, 584 S.E.2d 131, 134 (Ct. App. 2003); see State v. Barnes, 407 S.C. 27, 35, 753 S.E.2d 545, 550 (2014) ("A South Carolina criminal defendant has the constitutional right to represent himself under both federal and state constitutions."). Thus, even though it ultimately may be detrimental for a defendant to personally conduct his own defense, that defendant's choice to do so "must be honored out of 'that respect for the individual which is the lifeblood of the law.' " Thompson, 355 S.C. at 262, 584 S.E.2d at 134 (citation omitted).

In order to invoke the right to self-representation, a defendant "must take affirmative steps" to advise the trial judge of his desire to proceed in that manner. Benitez v. United States, 521 F.3d 625, 632 (6th Cir. 2008); see United States v. Leggett, 81 F.3d 220, 224 (D.C. Cir. 1996) ("The law presumes that a defendant has not exercised his right to represent himself nor waived the right to counsel in the absence of an articulate and unmistakable demand by the defendant to proceed pro se."). Therefore, if a defendant actually wishes to proceed pro se during trial, the defendant must *clearly and unequivocally* make an assertion of the right to self-representation *prior to trial.* Mazique, 419 S.C. at 291, 797 S.E.2d at 734; see State v. Reed, 332 S.C. 35, 41, 503 S.E.2d 747, 750 (1998) ("The right to proceed pro se must be clearly asserted by the defendant prior to trial."). Significantly, the requirement for a clear and unequivocal assertion of the right to self-representation both "protect[s] against an inadvertent waiver of the right to counsel by a defendant's occasional musings on the benefits of self-representation" and

"prevents a defendant from taking advantage of and manipulating the mutual exclusivity of the rights to counsel and self-representation." United States v. Frazier-El, 204 F.3d 553, 558-559 (4th Cir. 2000) (citations and internal quotations omitted)).

If a criminal defendant in South Carolina makes a proper request to exercise his right to self-representation, the trial judge must take steps to ensure the defendant is knowingly, voluntarily, and intelligently waiving his right to counsel, including by advising the defendant of his right to counsel and adequately warning him of the dangers and disadvantages of self-representation. See Barnes, 407 S.C. at 35, 753 S.E.2d at 550 ("So long as the defendant makes his request prior to trial, the only proper inquiry is that mandated by Faretta."); see also Ex parte Jackson, 381 S.C. 253, 259, 672 S.E.2d 585, 588 (Ct. App. 2009) ("It is the trial court's responsibility to determine whether there was a knowing and intelligent wavier [of the right to counsel] by the accused." (citation omitted)); Thompson, 355 S.C. at 262-263, 584 S.E.2d at 135 (explaining the preferred method for determining whether the defendant knowingly and voluntarily waived his right to counsel is for the trial judge to conduct a specific inquiry addressing the dangers and disadvantages of pro se representation with the defendant). However, absent an unambiguous and timely assertion of the right to self-representation, the trial judge is under no obligation to conduct any inquiry on the matter. See United States v. Cromer, 389 F.3d 662, 682 (6th Cir. 2004) ("Faretta procedures are only required when a defendant has clearly and unequivocally asserted his right to proceed pro se."); see also Benitez, 521 F.3d at 632 (instructing the trial judge has a duty to determine the validity of an attempted waiver of the right to counsel *when the defendant has taken steps to communicate his desire for self-representation*); cf. State v. Winkler, 388 S.C. 574, 587, 698 S.E.2d 596, 603 (2010) ("[Winkler] argues the trial court erred by failing to properly provide [him] with Faretta warnings when [he]

sought to proceed pro se at the beginning of the sentencing phase. . . . [Winkler] did not timely waive his right to counsel and proceed pro se. Hence, [Winkler]'s reliance on Faretta is misplaced. Had [Winkler] moved to proceed pro se before the trial began, then Faretta would apply.").

In the case at bar, Appellant did nothing to invoke his right to self-representation at any point prior to the beginning of his trial. See Reed, 332 S.C. at 41, 503 S.E.2d at 750 (instructing the right to self-representation must be clearly invoked prior to trial). As a result, Appellant did not make a timely assertion of his right to represent himself, and the trial judge was under no obligation of any kind to permit Appellant to begin representing himself after the trial had begun. See Singleton, 107 F.3d at 1099 ("[T]he court was under no obligation to allow Singleton to begin representing himself *at all* at mid-trial[.]" (emphasis added)); cf. State v. Sims, 304 S.C. 409, 415, 405 S.E.2d 377, 381 (1991) ("Sims . . . argues that the trial judge erred in not allowing him to proceed pro se. We disagree. The right to appear pro se must be clearly asserted by the defendant before trial. Here, Sims gave no indication of a desire to proceed pro se prior to trial. This contention is without merit." (citation omitted)).

However, even if the trial judge did somehow have an obligation to let Appellant begin representing himself after the trial was underway, Appellant never at any point during the course of trial actually made a clear attempt to assert his right to self-representation as was necessary in order for him to invoke that right. See City of Columbia v. Assa'ad-Faltas, 420 S.C. 28, 45, 800 S.E.2d 782, 791 (2017) (instructing the assertion of the right to self-representation must be, amongst other things, clear and unequivocal in order to be effective). Instead, on the third day of the three-day trial, Appellant sought to relieve defense counsel in order to get "another lawyer." Cf. State v. Shumaker, 914 So. 2d 1156, 1162 (La. Ct. App. 2005) ("[Shumaker] never expressly

asked that he be allowed self-representation. He simply indicated that he wanted to fire his counsel. That statement certainly does not reach a clear and unequivocal expression requesting the right to represent oneself as required by Faretta."). As representation by another lawyer is obviously not self-representation for a pro se defendant, Appellant's request for an opportunity to get new defense counsel—which the trial judge had no duty to grant—did *not* clearly and unequivocally constitute an invocation of the right to represent himself. See State v. Jones, 270 S.C. 587, 588, 243 S.E.2d 461, 462 (1978) ("[A]t least after the trial has begun, a mere disagreement between a defendant and his counsel as to a matter of trial tactics is not sufficient cause, in itself, to require the trial court to replace or to offer to replace court appointed counsel with another attorney at that time."); cf. United States v. Callwood, 66 F.3d 1110, 1114 (10th Cir. 1995) (recognizing Callwood's complaints about defense counsel's performance and suggestion he would prefer for defense counsel not to represent him did "not qualify as an unequivocal request for self-representation"). Under those circumstances, the trial judge was free to presume Appellant was not waiving—or attempting to waive—the right to counsel and was under no obligation to conduct an inquiry to determine if Appellant was knowingly, voluntarily, and intelligently exercising the right to self-representation. See Brewer v. Williams, 430 U.S. 387, 404 (1977) (instructing courts must "indulge in every reasonable presumption against waiver" of the right to counsel); see also Cromer, 389 F.3d at 682 (6th Cir. 2004) (instructing a Faretta colloquy is only necessary when a defendant clearly and unequivocally asserts his right to self-representation); cf. Assa'ad-Faltas, 420 S.C. at 46-47, 800 S.E.2d at 791 ("In light of the record and the constitutional primacy of the right to counsel over the right to self-representation . . . along with the presumption against waiver of the constitutional right to

counsel, . . . we cannot say that the municipal court erred in failing to construe [Assa'ad-Faltas]'s musings as a waiver of the right to counsel." (citations and internal quotations omitted)).

Accordingly, because Appellant did not make a timely and unequivocal invocation of his right to self-representation at any point during trial, the trial judge neither erred through the manner in which he addressed Appellant's motion to relieve defense counsel nor infringed in any way upon Appellant's constitutional right to represent himself. See Frazier-El, 204 F.3d at 559 ("In ambiguous situations created by a defendant's vacillation or manipulation, we must ascribe a 'constitutional primacy' to the right to counsel because the right serves both individual good and collective good, as opposed to only the individual interest served by protecting the right of self-representation." (citations omitted)); see also Fields v. Murray, 49 F.3d 1024, 1029 (4th Cir. 1995) (instructing a trial judge is allowed "safely to presume that the defendant should proceed with counsel absent an unmistakable expression by the defendant that so to proceed is contrary to his wishes"); cf. Benitez, 521 F.3d at 632 (holding the appellate decisions addressing the right to self-representation were inapplicable because "[t]he record in the present case clearly demonstrates that Benitez did not attempt to waive his right to counsel by requesting self-representation"); United States v. Nunez, 877 F.2d 1475, 1478 (10th Cir. 1989) (holding Nunez's request to invoke his right to self-representation on the third day of trial was untimely and, thus, properly denied). Appellant's convictions should be affirmed.

III.

Any issue with the trial judge's exclusion of the testimony of a purported expert witness on gunshot residue was not properly preserved for appellate review because defense counsel never proffered or attempted to proffer the substance of the witness's intended testimony. However, notwithstanding any issue preservation concerns, the trial judge did not abuse his broad discretion by refusing to qualify the witness as an expert so the witness could testify about the results of a gunshot residue analysis he did not personally perform because that testimony would have simply constituted improper and inadmissible hearsay disguised as an expert opinion.

Appellant contends the trial judge committed reversible error by refusing to qualify Dr. Bennett as an expert witness. In support of that contention, Appellant maintains Dr. Bennett personally met the requirements to testify as an expert and should have been permitted to present the results of a gunshot residue analysis that he admittedly did not actually perform. Initially, any issue with the exclusion of Dr. Bennett's testimony was not properly preserved for appellate review because defense counsel never proffered or attempted to proffer the substance of Dr. Bennett's intended testimony. Absent such a proffer, it is not clear what Dr. Bennett would have testified to if he had, in fact, been qualified as an expert, and the prejudice resulting from the exclusion of that evidence cannot accurately be evaluated on appeal. Therefore, the issue was simply not preserved for appellate review and cannot appropriately be considered or reviewed on appeal. However, even assuming the issue had somehow been preserved for appellate review despite the fact no proffer was made or attempted, Dr. Bennett's testimony was not admissible during trial because he merely intended to relay the results of a gunshot residue analysis he did not personally conduct and, thus, was attempting to present the out-of-court conclusions of another individual for the truth of the matter asserted under the guise of offering an expert opinion. Accordingly, the trial judge did not abuse his broad discretion by refusing to qualify Dr. Bennett as an expert merely so Dr. Bennett could present inadmissible hearsay evidence. Appellant's convictions should be affirmed.

RELEVANT FACTS

On the date of the shooting, evidence was collected from the hands of both Victim and Appellant for potential gunshot residue testing.[12] (Tr. pp. 263-264; pp. 354-355; pp. 363-364). After the evidence was collected from Victim's hands, it was secured and later transported to SLED. (Tr. p. 264; pp. 275-276). However, the evidence was never ultimately analyzed. (Tr. p. 275). Meanwhile, the evidence collected from Appellant's hands was secured by the Greenville County Sheriff's Office until it was transferred to the Greenwood Police Department a few months later. (Tr. pp. 350-351; pp. 355-356; p. 358; p. 368). After that, the Greenwood Police Department released the evidence to a private investigator working for defense counsel, and the investigator delivered the evidence to Dr. Robert Bennett, a forensic scientist from Charleston, South Carolina, who had been retained by defense counsel. (Tr. pp. 381-382). Dr. Bennett then sent the evidence to an "accredited facility" identified as "RJ Regroove," and an unidentified individual at that facility purportedly analyzed the evidence to determine if gunshot residue was present. (Tr. pp. 391-392; p. 393).

Later on during trial, Agent Megan Fletcher, a forensic scientist at SLED, testified—without objection—as an expert on gunshot residue. (Tr. p. 267; p. 269). Through her testimony, Agent Fletcher explained gunshot residue analysis involved looking for particles associated with a gunshot, including lead, barium, and antimony, and, to conduct such an analysis, she indicated she used a scanning electron microscope with an energy dispersive x-ray detector, which magnified the microscopic particles associated with gunshot residue so they could be seen. (Tr. pp. 269-270). Additionally, Agent Fletcher instructed gunshot residue could

[12] Significantly, the evidence from Appellant's hands was collected roughly four hours after the shooting in an entirely different county from where that shooting took place. (Tr. pp. 44-46; p. 72; pp. 138-139; pp. 354-355; pp. 363-364).

travel up to twenty feet in a forward direction and a few feet in the opposite direction when a gun was fired, and she noted anyone in the vicinity of a fired gun could get gunshot residue on them. (Tr. pp. 270-271). Likewise, Agent Fletcher explained gunshot residue was very fragile, could be washed or wiped away, and would begin to dissipate within a few hours of a gun being fired. (Tr. p. 271). She also noted gunshot residue was ordinarily found on and expected to be present on gunshot *victims*. (Tr. p. 272; pp. 277-278). Furthermore, Agent Fletcher explained the presence of gunshot residue meant a person either was in the vicinity of a shooting, shot a firearm, or had touched something with gunshot residue on it, and she indicated it was only possible to eliminate one of those alternatives in rare circumstances. (Tr. p. 279). Meanwhile, Agent Fletcher explained the absence of gunshot residue could not eliminate the possibility an individual was involved in a shooting because any residue that had been present could have simply been removed or washed away. (Tr. p. 273).

Subsequently, as part of the defense's case, defense counsel offered the testimony of Dr. Bennett. (Tr. p. 329; p. 387). During his testimony, Dr. Bennett noted he had received a pharmacy degree, a doctorate in drug sciences with a focus on toxicology, and "a couple" of training certifications from the United States Department of Justice in the area of firearms, which included "a basic primer" on gunshot residue analysis. (Tr. p. 388). Additionally, Dr. Bennett explained he had previously "worked" with gunshot residue in the past, was familiar with it, had learned to test it, and had made it a part of his "core study" for approximately twenty years. (Tr. pp. 390-391). However, he conceded he had never previously testified or been qualified as an expert on gunshot residue analysis. (Tr. p. 390; p. 394). Likewise, Dr. Bennett conceded his gunshot residue analyses were actually performed by an "accredited facility," which he asserted conducted the "mechanistic" and "technical" function of "proving the gunshot residue stuff on

the instrument." (Tr. pp. 391-392). Similarly, Dr. Bennett conceded a "visual examination" was part of the analysis process, and he acknowledged the visual examination—like the other parts of the analysis—was conducted solely by the laboratory staff. (Tr. pp. 391-391). He further noted he did not put the evidence in the instrument used to conduct the analysis in Appellant's case and was not, in fact, present when that process was performed. (Tr. p. 393). Moreover, Dr. Bennett acknowledged he had *never* actually conducted a gunshot residue analysis personally, but he asserted he had witnessed the testing being performed at some unspecified point in the past. (Tr. p. 393). Furthermore, he claimed any report of the results he received following an analysis had been reviewed by "the professionals at the laboratory" before it was given to him. (Tr. pp. 392-393).

Following the presentation of that testimony, the solicitor indicated she objected to Dr. Bennett testifying as an expert in light of the facts he had never personally performed a gunshot residue analysis, did not conduct the analysis of the evidence collected from Appellant's hands, was not present when that evidence was placed into the testing instrument, and did not know how the evidence was handled since he was not present for the actual analysis. (Tr. p. 393). Based on those factors, the solicitor asserted Dr. Bennett would merely be interpreting another person's results and, therefore, could neither qualify as an actual expert nor establish a complete chain of custody regarding the evidence. (Tr. p. 393). In rebuttal, defense counsel asserted Dr. Bennett intended to testify "about the test that he had run" and had brought the report he received with him. (Tr. p. 395). However, the trial judge pointed out Dr. Bennett had simply interpreted a report prepared by a laboratory from which no one was present for trial and, if permitted to testify, would be offering an opinion without even looking through the electron microscope used

to conduct the analysis in Appellant's case. (Tr. pp. 395). Nevertheless, defense counsel asked the trial judge to let Dr. Bennett "give the results of the test." (Tr. p. 395).

After considering the arguments of counsel and taking a brief recess, the trial judge declined to permit Dr. Bennett to testify as an expert. (Tr. p. 395). Defense counsel then urged the trial judge to reconsider his ruling while contending Dr. Bennett was "clearly" personally qualified as an expert. (Tr. pp. 395-396). However, in seeking reconsideration, defense counsel acknowledged "[a]ll [Dr. Bennett] [was] doing [was] looking at the report that was run that he asked to have run at the place that he worked where he knows it's a controlled situation." (Tr. p. 396). Following defense counsel's remarks, the trial judge reaffirmed his ruling excluding the evidence, and the trial proceeded forward without any proffer being made or attempted in regard to the substance of Dr. Bennett's intended testimony. (Tr. p. 396).

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Trial judges have considerable discretion in ruling on the admission or exclusion of evidence, and an appellate court will not reverse a trial judge's ruling on evidentiary matters absent a clear abuse of that discretion resulting in prejudice to the defendant. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) ("The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court."); State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) ("A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice."); see also Bixby, 388 S.C. at 556, 698 S.E.2d at 587 ("[D]eference is due to the trial court's admission of the evidence."). Likewise, a decision

as to whether to admit or exclude expert testimony rests within the trial judge's sound discretion and will not be reversed on appeal absent a prejudicial abuse of that discretion. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006); see State v. White, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009) ("A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion."); see also State v. Myer, 301 S.C. 251, 255, 391 S.E.2d 551, 554 (1990) ("The qualification of a witness as an expert falls largely within the discretion of the trial judge."). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000); see Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) ("A trial court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion when the ruling is manifestly arbitrary, unreasonable, or unfair.").

ANALYSIS

A. Appellant's Failure to Preserve Any Issue with the Exclusion of the Purported Expert's Testimony for Appellate Review

In South Carolina, issue preservation requirements are a fundamental component of appellate procedure. Gaddy v. Douglass, 359 S.C. 329, 350, 597 S.E.2d 12, 23 (Ct. App. 2004). The key purpose of those requirements is "to give the trial court a fair opportunity to rule on the issues, and thus provide [the appellate court] with a platform for meaningful appellate review." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). Through their enforcement and application, the trial court is guaranteed a fair opportunity "to rule properly after it considered all relevant facts, law, and arguments." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

When an issue arises during trial involving the exclusion of evidence or testimony, a party is required to proffer the evidence or testimony sought to be admitted in order to preserve any issue related to its exclusion for appellate review. See Santiago, 370 S.C. at 163, 634 S.E.2d at 29 ("[A] proffer of testimony is required to preserve the issue of whether testimony was properly excluded by the trial judge, and an appellate court will not consider error alleged in the exclusion of testimony unless the record on appeal shows fairly what the excluded testimony would have been."). By proffering the disputed testimony and evidence, the party enables an appellate court to accurately review the issue and discern any prejudice that may have resulted in the event an error occurred. State v. King, 367 S.C. 131, 137, 623 S.E.2d 865, 868 (Ct. App. 2005). Critically, "[f]ailure to make an offer of proof precludes the appellant from raising the issue on appeal." State v. Cabbagestalk, 281 S.C. 35, 36, 314 S.E.2d 10, 11 (1984).

In Appellant's case, Appellant seeks to challenge on appeal the trial judge's decision to exclude Dr. Bennett's testimony about the results of an analysis purportedly performed by an unidentified individual who was not present to offer any testimony during trial. However, once that testimony was ruled to be inadmissible during trial, Appellant did *not* proffer Dr. Bennett's intended testimony, did *not* proffer the report of the test results, and did *not* ask the trial judge to permit any proffer to occur. Cf. State v. Simmons, 360 S.C. 33, 46, 599 S.E.2d 448, 454 (2004) (finding no issue was preserved for appellate review regarding the trial judge's refusal to allow a defense witness to testify further where "no proffer was made as to what [the defense witness's] testimony would have been had he been allowed to continue"). Without such a proffer, the substance of Dr. Bennett's testimony remains entirely unclear, and the findings of the absent analyst who supposedly conducted the gunshot residue analysis remain wholly unknown. See King, 367 S.C. at 137, 623 S.E.2d at 868 ("The reason for the rule requiring a proffer of

excluded evidence is to enable the reviewing court to discern prejudice."). Under those circumstances, any issue related to the exclusion of Dr. Bennett's intended testimony was not properly preserved for appellate review and cannot appropriately be reviewed on appeal. See State v. Roper, 274 S.C. 14, 20, 260 S.E.2d 705, 708 (1979) ("[I]t should be pointed out that such an exception was waived in that no proffer of testimony was made. It is well settled that a reviewing court may not consider error alleged in exclusion of testimony unless the record on appeal shows fairly what the rejected testimony would have been."); see also Taylor v. Taylor, 294 S.C. 296, 299, 363 S.E.2d 909, 911 (Ct. App. 1987) ("The burden is on the appellant to furnish a sufficient record on appeal from which this court can make an intelligent review."). Appellant's convictions should be affirmed.

B. Propriety of the Trial Judge's Decision to Exclude the Purported Expert's Testimony

During trial, an expert's testimony "may be used to help the jury to determine a fact in issue based on the expert's specialized knowledge, experience, or skill and is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge." Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010). Pursuant to the South Carolina Rules of Evidence, such testimony is admissible under the following circumstances:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 702, SCRE. Therefore, before admitting expert testimony, the trial judge must find: (1) the expert's testimony will assist the trier of fact; (2) the expert has the required knowledge, skill, experience, training, or education; and (3) the testimony is reliable. State v. Martin, 391 S.C. 508, 514, 706 S.E.2d 40, 42 (Ct. App. 2011).

In order for a witness to properly be qualified as an expert, the witness must have "acquired by study or practical experience such knowledge of the subject matter of his testimony as would enable him to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the jury's good judgment and common knowledge." State v. Henry, 329 S.C. 266, 273, 495 S.E.2d 463, 467 (Ct. App. 1998). When determining whether a witness's knowledge, skill, training, or experience qualifies the witness as an expert, no mandatory set of qualifications is required. Id. at 274, 495 S.E.2d at 467. Instead, an expert can become sufficiently skilled or knowledgeable to be able to provide an opinion helpful to the jury in a multitude of ways. Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 556, 658 S.E.2d 80, 86 (2008). Significantly, "[t]he test for qualification [as an expert] is a relative one that is dependent on the particular witness's reference to the subject[,]" and "defects in the amount and quality of education and experience go to the weight of the expert's testimony and not its admissibility." Lee v. Suess, 318 S.C. 283, 285-286, 457 S.E.2d 344, 346 (1995).

Assuming a witness is personally qualified to testify as an expert and the other requirements for the admission of expert testimony are satisfied, an expert witness ordinarily may offer an opinion *based on* hearsay evidence that is not itself admissible *if* the evidence is the type of evidence ordinarily and reasonably relied upon by experts to form their opinions or inferences. See Rule 703, SCRE ("The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type *reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject*, the facts or data need not be admissible in evidence." (emphasis added)). Importantly though, an expert's ability to base their own independent opinions on hearsay evidence in certain situations does *not* allow the admission of

hearsay evidence simply because an expert used it in forming an opinion. Jones v. Doe, 372 S.C. 53, 62-63, 640 S.E.2d 514, 519 (Ct. App. 2006); see State v. Kromah, 401 S.C. 340, 358, 737 S.E.2d 490, 499 (2013) ("[Rule 703] does not . . . make hearsay automatically admissible simply because it was relied upon by the expert."). Thus, an expert witness may not simply transmit and repeat inadmissible hearsay evidence under the guise of offering an expert opinion. See United States v. Mejia, 545 F.3d 179, 197 (2nd Cir. 2008) ("The expert may not . . . simply transmit that hearsay to the jury. Instead, the expert must form his own opinions by applying his extensive experience and a reliable methodology to the inadmissible materials. Otherwise, the expert is simply repeating hearsay evidence without applying any expertise whatsoever, a practice that allows [a party] to circumvent the rules prohibiting hearsay." (citations and internal quotations omitted)); see also Price, 368 S.C. at 498, 629 S.E.2d at 365 (concluding the testimony of a witness qualified as an expert violated the prohibition against out-of-court statements being offered for the truth of the matter asserted where the witness "did not testify to his expert opinion, but rather relayed information from informants").

In the case sub judice, defense counsel sought to introduce the testimony of Dr. Bennett, who had *never* personally conducted a gunshot residue analysis at any point in his lifetime, for the expressly-stated purpose of "giv[ing] the results of [a] test." However, that test was *not* conducted by Dr. Bennett and, instead, was conducted by one of the unidentified "professionals at the laboratory," who might—or might not—have actually placed the evidence collected from Appellant's hands into a testing instrument and conducted a *visual examination* of that evidence before generating the results Dr. Bennett wanted to relay to the jury. Significantly though, since Dr. Bennett was *not* present for the test, he—and, thus, the jurors—had no way of knowing—outside of blind faith in the experts retained to generate the test results—whether Appellant's

sample was actually tested, whether an accurate and complete chain of custody was maintained prior to the analysis, and whether the appropriate protocols were followed in generating the analysis results. Cf. Young v. United States, 63 A.3d 1033, 1045 (D.C. 2013) ("Because Craig was not personally involved in the process that generated the profiles, she had no personal knowledge of how or from what sources the profiles were produced. She was relaying, for their truth, the substance of out-of-court assertions by absent lab technicians that, employing certain procedures, they derived the profiles from the evidence furnished by Villatoro or [Young]. Those assertions were hearsay. Without them, what would have been left of Craig's testimony—that she matched two DNA profiles she could not herself identify—would have been meaningless." (footnote omitted)).

Under such circumstances, Dr. Bennett could not properly "give the results of the test" by virtue of testifying as an expert because he would have merely been relaying the out-of-court statements and conclusions of a non-testifying witness purely for the truth of the matter asserted.[13] See Marvel Characters, Inc. v. Kirby, 726 F.3d 119, 136 (2nd. Cir. 2013) (explaining "a party cannot call an expert simply as a conduit for introducing hearsay under the guise that the testifying expert used the hearsay as the basis of his testimony" (citation and internal quotations omitted)); see also People v. Sanchez, 374 P.3d 320, 334 (Cal. 2016) ("When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth."). Therefore, regardless of whether Dr. Bennett personally had the minimum level of training and experience necessary to qualify as an expert, the trial judge properly declined to qualify Dr. Bennett as an expert and

[13] Importantly, "giv[ing] the results of the test" was the *only* purpose for Dr. Bennett's testimony that was identified by defense counsel. (Tr. p. 395).

allow him to serve as a mere conduit for inadmissible hearsay in Appellant's case, and the trial judge's ruling in that regard in no way constituted an abuse of discretion.[14] See Jones, 372 S.C. at 62-63, 640 S.E.2d at 519 (recognizing our evidentiary rules governing expert testimony do "not allow for the unqualified admission of hearsay evidence merely because an expert has used it in forming an opinion"); see also Engebretsen v. Fairchild Aircraft Corp., 21 F.3d 721, 728 (6th Cir. 1994) (recognizing the federal evidentiary rules regarding expert testimony—which are identical to the related South Carolina evidentiary rules—"do not . . . permit the admission of materials, relied on by an expert witness, for the truth of the matters they contain if the materials are otherwise inadmissible"); cf. Price, 368 S.C. at 498, 629 S.E.2d at 365 (concluding the testimony of a witness qualified as an expert violated the prohibition against out-of-court statements being offered for the truth of the matter asserted where the witness "did not testify to his expert opinion, but rather relayed information from informants"). Appellant's convictions should be affirmed.

[14] Even assuming the trial judge somehow erred by excluding Dr. Bennett's testimony, it is quite possible any error in the exclusion of that testimony—regardless of what the testimony revealed—would have been entirely harmless since: (1) the presence of gunshot residue would have been expected based on the fact Appellant had indisputably been shot during the incident; (2) the absence of gunshot residue would have been virtually meaningless based on the fact the evidence was not collected from Appellant's hands until hours after the shooting; and (3) the presence of gunshot residue following a shooting would have only revealed a range of possibilities that could not ordinarily be narrowed further. See State v. Lyles, 379 S.C. 328, 345, 665 S.E.2d 201, 210 (Ct. App. 2008) (recognizing an error resulting from the exclusion of evidence can be harmless where the excluded evidence "would have no impact on the outcome of the case"). However, due to the lack of an evidentiary proffer, it is not possible for such a harmless error analysis to be conducted, which emphatically demonstrates why our issue preservation requirements are so fundamentally important. Cf. Cabbagestalk, 281 S.C. at 36, 314 S.E.2d at 11 ("We are unable to determine from the record whether the testimony was so material as to render its exclusion prejudicial. Failure to make an offer of proof precludes the appellant from raising the issue on appeal.").

IV.

Any issue with Appellant's five-year sentence for possession of a firearm during the commission of a violent crime was not properly preserved for appellate review because defense counsel did not raise any objections to Appellant's sentence during trial.

Appellant contends the trial judge erred by sentencing him to a five-year term of imprisonment for possession of a firearm during the commission of a violent crime. In support of that contention, Appellant maintains he could not lawfully be sentenced for the firearm conviction because he was sentenced to life without parole for his other conviction. Pursuant to South Carolina law, Appellant should not have been sentenced to five years for possession of a firearm during the commission of a violent crime since he received a life without parole sentence for attempted murder. However, defense counsel did *not* object to Appellant's five-year sentence at any point during trial. As a result, any issue with Appellant's five-year sentence—which could not result in Appellant being incarcerated for longer than permissible for his crimes—was not properly preserved for appellate review and cannot appropriately be raised or addressed for the first time on appeal. Appellant's convictions and sentence should be affirmed.

RELEVANT FACTS

At the conclusion of trial, the jury convicted Appellant of attempted murder and possession of a firearm during the commission of a violent crime, and the trial judge sentenced him to terms of imprisonment of life without parole for attempted murder and five years for the firearm offense. (Tr. p. 457; p. 461). After the sentences were imposed, neither Appellant nor defense counsel raised any objections of any kind. (Tr. p. 461).

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Palmer, 415 S.C. 502, 511, 783 S.E.2d 823, 827 (Ct. App. 2016); see generally State v. Kimbrough, 212 S.C.

348, 353, 46 S.E.2d 273, 275 (1948) ("The power of an appellate court to review a sentence for the purpose of determining whether it offends the constitutional provision against cruel and unusual punishment may be sustained under the grant of power to correct errors of law in the judgment appealed from."). As a result, an appellate court is limited to determining on appeal whether the trial judge abused his discretion, which occurs when the trial judge's decision is unsupported by the evidence or controlled by an error of law. Palmer, 415 S.C. at 511, 783 S.E.2d at 827.

ANALYSIS

For an issue to be preserved for appellate review pursuant to our issue preservation requirements, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004); see also JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 185 (3rd ed. 2016) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review). If an issue is not presented to and ruled upon by the trial judge, it cannot be raised for the first time on appeal. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005); see State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial."). Critically, as our appellate courts have repeatedly recognized, plain error review is simply not permitted in South Carolina. See State v. Sheppard, 391 S.C. 415, 421, 706 S.E.2d 16, 19 (2011) ("[T]he plain error rule does not apply in South Carolina state courts."); State v. Burroughs, 328 S.C. 489, 496, 492 S.E.2d 408, 411 (Ct. App. 1997) ("South Carolina has no 'plain error' rule.").

Therefore, based on our issue preservation rules, a criminal defendant is required to contemporaneously object to an alleged sentencing error during trial in order to preserve an issue with a sentence for appellate review. State v. Salisbury, 330 S.C. 250, 276, 498 S.E.2d 655, 669 (Ct. App. 1998). Importantly, a defendant's failure to timely object to or seek modification of a sentence in the trial court precludes him from pursuing the issue on appeal. State v. Winestock, 271 S.C. 473, 475, 248 S.E.2d 307, 308 (1978); see State v. Garner, 304 S.C. 220, 222, 403 S.E.2d 631, 632 (1991) ("No objection to sentencing was raised at trial and this issue is not properly before the court."); State v. Shumate, 276 S.C. 46, 47, 275 S.E.2d 288, 288 (1981) ("A defendant's failure to timely object to or seek modification of his sentence in the trial court precludes him from presenting his objection for the first time on appeal. Appellant's contention was not advanced at the probation revocation hearing where the results were most favorable to him. By failing to object to or seek modification of the revocation sentence in the trial court he is now foreclosed from doing so on appeal." (citations omitted)).

Notably though, in State v. Johnston, 333 S.C. 459, 463-464, 510 S.E.2d 423, 425 (1999), our Supreme Court crafted a very specific and limited exception to our issue preservation requirements. In that case, Johnston was convicted of conspiracy to possess marijuana with intent to distribute and was sentenced—without objection—to a term of imprisonment of ten years for that offense despite the fact the maximum sentence statutorily authorized was only five years. Id. at 462, 510 S.E.2d 424. Johnston subsequently appealed her sentence, and, on appeal, this Court affirmed on issue preservation grounds since no objections were raised during trial. Id. at 461, 510 S.E.2d at 424. Thereafter, the Supreme Court granted a petition for a writ of certiorari and reversed. Id. In reversing, the Supreme Court noted it had "consistently held that a challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate

review." Id. at 462, 510 S.E.2d at 425. However, the Supreme Court found Johnston's case involved "exceptional circumstances" because: (1) the State had conceded error in regard to the sentence; *and* (2) a "real threat" existed Johnston would be incarcerated beyond the permissible sentencing range for her conviction if she was forced to pursue relief through a post-conviction relief action.[15] Id. at 463-464, 510 S.E.2d at 425. Based on those limited circumstances, the Supreme Court remanded Johnston's case for resentencing despite the fact the sentencing issue had not been preserved during trial. Id. at 464, 510 S.E.2d at 425. Importantly though, the Supreme Court expressly cautioned its holding in Johnston's case was based on the "unique" facts involved, which "demand[ed] an expedited result," and was "not intended to disrupt our settled rules on issue preservation and PCR applications." Id. at 464, n. 3, 510 S.E.2d at 425.

In the case at bar, Appellant was convicted of attempted murder and possession of a firearm during the commission of a violent crime, and he was respectively sentenced to terms of imprisonment of life without parole and five years for those convictions. However, pursuant to

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[15] Subsequent to the decision in Johnston, this Court has recognized the limited nature of that case's holding and has declined to apply its carefully-crafted exception broadly. See State v. Passmore, 363 S.C. 568, 585-586, 611 S.E.2d 273, 282-283 (Ct. App. 2005) ("We find the exceptional circumstance carefully carved out by the Johnston court is not present here. [Passmore] has already served the duration of her sentence; therefore, she does not face the threat of continuing incarceration beyond the legal sentence. Johnston does not control. . . . Regrettably, [Passmore] has suffered a violation of her right to a jury trial in this case. However, because she failed to raise an objection at trial, we are compelled to let the unconstitutional sentence stand."). However, at other times, this Court has addressed unpreserved sentencing issues that did not squarely fall within the limited exception created in the Johnston decision. See State v. Bonner, 400 S.C. 561, 564, 735 S.E.2d 525, 526 (Ct. App. 2012) ("[A]n exception to the general rule of issue preservation exists authorizing the appellate court to consider an unpreserved issue in the interest of judicial economy under appropriate circumstances."); State v. Vick, 384 S.C. 189, 202, 682 S.E.2d 275, 282 (Ct. App. 2009) ("While the case at hand does not present a threat that Vick will remain incarcerated beyond the legal sentence as in Johnston, our courts have, in the past, 'summarily vacated' sentences for kidnapping where such sentences were precluded by § 16-3-910 because the defendant received a concurrent sentence under the murder statute." (citations omitted)); but see Johnston, 333 S.C. at 462, n. 2, 510 S.E.2d at 425 ("[N]one of these cases addressed error preservation. Thus, they provide no support for Defendant's position here.").

South Carolina law, the five-year sentence statutorily authorized for possession of a firearm during the commission of a violent crime is *not* applicable when a criminal defendant is sentenced to life without parole for the underlying violent crime. See S.C. Code Ann. § 16-23-490(a) ("This five-year sentence does not apply in cases where the death penalty or a life sentence without parole is imposed for the violent crime."). Therefore, in light of his life without parole sentence for attempted murder, Appellant could not properly be sentenced to five years for the firearm offense, and the five-year sentence that was actually imposed was unquestionably objectionable. See Palmer, 415 S.C. at 525, 783 S.E.2d at 835 (vacating Palmer's five-year sentence for possession of a weapon during the commission of a violent crime where Palmer was sentenced to life without parole for murder *and* "Palmer objected to the [five-year] sentence").

Critically though, defense counsel did *not* object to Appellant's objectionable five-year sentence—which in no way could create a "real threat" Appellant would be incarcerated for a longer period of time than he permissibly could be incarcerated since he was also sentenced to life without parole—at any point during trial, and no arguments were raised to or ruled upon by the trial judge in regard to the propriety of the five-year sentence. See In re Walter M., 386 S.C. 387, 392, 688 S.E.2d 133, 136 (Ct. App. 2009) ("Generally, an issue must be both raised to and ruled upon by the trial court in order to be preserved for appellate review."); see also Johnston, 333 S.C. at 463-464, 510 S.E.2d at 425 (addressing an unpreserved sentencing issue where a "real threat" existed Johnston would be incarcerated beyond the permissible sentencing range for her conviction if she was forced to pursue relief through a post-conviction relief action). Because defense counsel did not raise the sentencing issue Appellant is now attempting to raise on appeal, the sentencing judge was wholly denied an opportunity to consider, address, or rule upon it during trial. See Queen's Grant, 368 S.C. at 372-373, 628 S.E.2d at 919 ("Issue

preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." (citations omitted)); see also State v. Torrence, 305 S.C. 45, 64, 406 S.E.2d 315, 326 (1991) (Toal, J., concurring in result for the majority) ("[A] contemporaneous objection requirement to preserve legal errors operates to procedurally preclude a defendant from allowing error to occur at trial and then complaining of it on appeal."). Under those circumstances, Appellant's appellate challenge to his sentence is not properly preserved for appellate review and simply cannot appropriately be raised or addressed for the first time on appeal.[16] See State v. Head, 330 S.C. 79, 87, 498 S.E.2d 389, 393 (Ct. App. 1997) (instructing an appellate court "cannot address unpreserved errors"); cf. State v. Walker, 252 S.C. 325, 327-328, 166 S.E.2d 209, 210 (1969) (declining to address Walker's appellate contention the sentence he received could not have properly been imposed "on the elementary ground that the question was not raised below"). Otherwise, any appellate review of Appellant's sentencing issue would constitute plain error review, which is not permitted in South Carolina. See Sheppard, 391 S.C. at 421, 706 S.E.2d at 19 (instructing plain error review is not applicable in South Carolina). Appellant's convictions and sentence should be affirmed.

[16] Although Appellant's sentencing issue was not properly preserved for appellate review on direct appeal, Appellant will in no way be prevented from seeking a remedy for that issue through the post-conviction relief process, which has been specifically designed to address and remedy the exact situation involved in Appellant's case. See S.C. Code Ann. § 17-27-20(A)(3) (recognizing one of the express grounds upon which a person may seek and obtain post-conviction relief is when "the sentence exceeds the maximum authorized by law"); see also Johnston, 333 S.C. at 464, n. 3, 510 S.E.2d at 425 ("Our holding today is not intended to disrupt our settled rules on issue preservation and *PCR applications*. The facts here are unique and demand an expedited result." (emphasis added)); cf. Passmore, 363 S.C. at 586, 611 S.E.2d at 283 ("Appellant will be forced to seek redress through the avenue of post-conviction relief.").

CONCLUSION

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

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

September 10, 2018

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenwood County
Honorable Edward W. Miller, Circuit Court Judge
Appellate Case No. 2017-000481

THE STATE,

Respondent,

vs.

ONTAVIOUS DERENTA PLUMER,

Appellant.

PROOF OF SERVICE

I, Destiny Blue, certify I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

E. Charles Grose, Jr., Esq.
Grose Law Firm
404 Main St.
Greenwood, SC 29646

I further certify that all parties required by Rule to be served have been served.
This 10th day of September, 2018.

Destiny Blue

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ALAN WILSON
ATTORNEY GENERAL

September 10, 2018

E. Charles Grose, Jr., Esq.
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RE: State v. Ontavious Derenta Plumer – Appellate Case No. 2017-000481

Dear Mr. Grose:

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

Sincerely,

Mark R. Farthing
Assistant Attorney General
Bar Number 76901

MRF/
Enclosures

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