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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

S.C. SUPREME COURT

Appeal from Charleston County
Honorable J.C. Buddy Nicholson, Circuit Court Judge

Appellate Case No. 2016-000616

THE STATE,

Petitioner,

vs.

DAVID ALAN WHITE,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUES ON APPEAL

I.

The trial court did not err in declining to admit Respondent's hearsay statement that the victim told him he kept a gun and knife in his moped because it was not relevant since Respondent never testified he thought or was worried the victim was armed when he slashed the victim's throat. White was not limited in presenting his defense to either accident or self-defense.

II.

The trial court did not err in declining to instruct the jury on self-defense since no evidence was presented that Respondent was in imminent danger of death or great bodily injury or that he had a reasonable belief he was in imminent danger of death or great bodily injury.

STATEMENT OF THE CASE

The Charleston County grand jury indicted Respondent White for attempted murder, and subsequently indicted White for possession of a weapon during the commission of a violent crime. White was tried by jury on those charges on March 14-17, 2016, before the Honorable J.C. Nicholson, Jr. The jury found White guilty of assault and battery of a high and aggravated nature (ABHAN) and the weapons charge. Judge Nicholson sentenced White to ten years imprisonment for ABHAN and a consecutive five year imprisonment for the weapons conviction.

White appealed his convictions and sentences. Both parties submitted briefs to the Court of Appeals. Without oral argument, the Court of Appeals issued a published opinion reversing the convictions and sentences on October 17, 2018. State v. White, ___ S.C. ___, 821 S.E.2d 523 (Ct. App. 2018). The State petitioned for rehearing on October 30, 2018. The Court of Appeals denied the petition for rehearing on December 13, 2018.

STATEMENT OF FACTS

Respondent White cut his victim's throat with a knife, and the victim lost copious amounts of blood before EMS and emergency doctors saved his life. Spencer Washington, the State's first witness, hosted a get together in the back yard the day before Thanksgiving. Several people were drinking beer and having a good time while Spencer smoked turkeys for friends and neighbors. R. p. 69. The victim, Joseph Johnson, known by his lifelong nickname Little Bear, was at the get together cutting people's hair. White was Johnson's last customer. After cutting White's hair, Johnson packed his haircutting equipment in his moped and then stood with White, Spencer, Henry Washington (Spencer's brother), and others. Both White and Johnson were joking and laughing. Then White walked over, swung a blade towards Johnson, and Johnson told Spencer, "he cut me." Spencer looked at White and said, "You cut him." White dropped his knife and left while Johnson fell into Spencer's brother's arms. R. pp. 67-71.

Spencer's wife called 911. When law enforcement came, Spencer handed the knife over. Spencer first testified he did not hear White say anything, but was impeached with his prior statement in which he told law enforcement that White said to Johnson, "You're about to get this." R. pp. 72-73. He confirmed this during redirect examination. R. p. 88. Spencer advised the jury that Johnson did not act aggressively towards White. Spencer testified Johnson and White were never face to face. When White left, he left his children behind at Spencer's house. R. pp. 73-74; p. 78.

Johnson testified he was fifty-four years old at trial. Johnson has known Spencer since Spencer was a kid. He helped smoke turkeys in Spencer's yard and gave about six haircuts. He cut

White's hair. The two never met before. While he cut White's hair, White was playing around with a knife. After he finished the haircut, Johnson packed his moped and prepared to leave. He was shaking hands with those gathered in the yard when his throat was slashed. White swung at Johnson as he walked past him. Johnson testified White did not say anything to him as he did this. Johnson told Spencer he was cut. When Johnson checked his injury, he felt his hand go inside his throat. He remembered EMS coming to get him, but not much else until he awoke in the hospital. R. pp. 100-09.

Johnson testified he never hit White. R. pp. 128-29. On cross-examination, Johnson confirmed that he told White to put the knife away and White kept taking it out. Johnson testified he only drank two beers and he did not give White any reason to cut him. Johnson needed to be on pain medication afterwards and could not speak. R. pp. 140-41; p. 145. Johnson denied he told White he made shanks while he was in prison. R. p. 143. He agreed with White's attorney that he wrestled in high school but denied he bragged about it during the get together. R. p. 142.

Spencer's neighbor, Albert Jenkins, came over so Spencer could smoke a turkey for him. He testified he saw Johnson cutting White's hair and they were just cracking jokes. R. pp. 147-50. However, the jokes started getting more serious, and Spencer cautioned them they were getting a little out of hand. Spencer told White to stop acting up in his yard. Spencer then told White to leave, telling him, "[Y]oung man you got to leave my yard because you're disrespecting my yard." White gathered things up and then he and Johnson got close to each other and "pushed off." Afterwards, Johnson grabbed his neck and said, "Oh man, he cut me." R. pp. 150-52 (direct quote, p. 151, lines 23-24). Jenkins testified White just walked off and that was the last Jenkins saw of him. R. p. 154.

Jenkins explained about Johnson and White, "I really don't know them." R. p. 153. This lack of bias towards either of them made a surprise answer on cross-examination particularly enlightening: Jenkins told defense counsel that Spencer asked White to leave the yard because White would not stop playing with his knife. R. p. 156. After Johnson's throat was slashed, Jenkins testified both he and Henry (Spencer's brother) implored Johnson to stay awake as he fell in and out of consciousness. R. p. 153, lines 6-8, lines 20-25.

Henry Washington, Spencer's brother, described White as a "brother." He testified White and Johnson were joking together. The group talked about wrestling and who would be "tapping out" first. White and Johnson joked about who would tap out. However, things were quiet before Johnson's throat was slashed. Henry explained his back was turned when he heard Johnson say White cut him. He turned around and Johnson fell in his arms. Henry held his hand on Johnson's throat to try and stop the bleeding. R. pp. 164-65. He said Johnson at one point prior to being cut was upset and gave White a push, but described it as "a playing push." R. pp. 165-66. Henry testified he did not see whatever triggered White to cut Johnson with a knife. R. p. 164, lines 6-12. On cross-examination, Henry verified from his perspective, neither one seemed upset before the incident. R. p. 168, lines 17-19.

Dwayne Forrest, also at the gathering, did not know White or Johnson at all. Forrest testified the two were fussing and ready to fight each other. Then White swung his arm. He never saw Johnson hit White. Forrest admitted he did not see the knife, he just saw White swing and Johnson hold his neck. R. pp. 171-75. He added on redirect that White's hand was in his pocket and his hand came out of his pocket when he swung the knife. R. p. 178.

Kyle Green was there while Johnson cut White's hair. He testified he later saw them face to face. White's hands went up first, then Johnson's. Green assumed that was when White cut Johnson. He did not see a weapon, only Johnson bleeding badly. R. pp. 182-84.

Joshua Sims, a paramedic, arrived at the scene at 9:34 p.m. He found a male on the ground with his throat slashed. The patient was in critical condition. Sims was unable to completely control the bleeding. R. pp. 100-01.

The patient's eyes were closed and he would only respond to painful stimuli. The patient could not speak, only moan. The large gash on the left side of the throat appeared to involve the external jugular and the trachea. R. p. 201. The patient needed a breathing tube placed in his trachea. EMS administered RSI (Rapid Sequence Intubation) medicines to paralyze and sedate the patient for when EMS placed the breathing tube in the patient's trachea so they could breathe for him. R. p. 202. This particular incident sticks in Sims' memory because he recalled seeing the vocal chords and could see into the patient's chest. R. p. 209, lines 8-16.

Sergeant Ron Lacher went to White's mother's house at 11:50 p.m. and found him there. R. p. 216. White told Sergeant Lacher that he showered and changed his clothes. White did not have any injuries or blood on him. R. pp. 217-18. Detective Glen Kramer spoke with White after he was arrested. Detective Kramer testified White did not have any cuts or bruises and did not appear to be in any medical distress. R. p. 242.

Dr. Samir Fakhry treated Johnson. His patient suffered a ten centimeter laceration to the anterior of the neck. Johnson was not responding to commands, although he moved somewhat. Dr. Fakhry noted the bleeding was controlled somewhat, but not sufficiently. Dr. Fakhry testified that

Johnson lost between two to three pints of blood at the hospital, roughly 20% blood loss. Dr. Fakhry testified Johnson could have potentially died from the injuries. R. pp. 295-96.

Johnson was hospitalized for ten days. R. p. 306. On December 2, Officer Adam Galloway showed a photographic lineup to Little Bear at the hospital. He testified Johnson was unable to speak. R. pp. 193-95.

The only defense witness was White himself. He claimed he did not try to kill Johnson, but he admitted cutting him. White never met Johnson before. Johnson cut his hair and White liked the haircut, there was no dispute over payment. R. p. 320, p. 323. During direct examination, White claimed Johnson told him how he made shanks in prison. White testified he did not pay the comments any attention. R. pp. 342-43. White left the party to go to the store with another individual, but returned after ten minutes. R. p. 343. Johnson and the others talked about what a good wrestler Johnson used to be. R. p. 343.

According to White, as he was about to leave again, White was hit in the back of the head and swung around at the person behind him with his knife – he called it a quick reaction. R. p. 347, lines 24-25. White saw Johnson's neck was cut. White claimed he carried the knife because he was just using it to cut saran wrap off some pallets. When he finished cutting the saran wrap, he did not close the knife, he just put it back in his pocket "not thinking nothing of it." He happened to have the knife because he was fishing earlier in the day. R. pp. 346-47. White's counsel asked White, "When he hit you did you feel threatened?" White answered, "**I didn't feel threatened** but I knew I had a lot of head injuries in my past that I thought could have triggered something." R. p. 348, lines 1-4. White explained he felt threatened by the **earlier statements** that were made. R. p. 348, line 25

– p. 411, line 3. Note he did not testify he felt threatened by Johnson hitting him. White claimed he did not know where Johnson was when he swung his arm and he did not look where he swung the knife. R. p. 349, lines 8-12. White explained he fled “[b]ecause I didn’t want any more commotion or whatever like that to happen to trigger.” R. p. 350, lines 5-7.

Defense counsel asked White, “Why did you swing the knife that night?” White answered:

Because I got hit; it was a reaction. I didn’t realize that I even had the knife like that in my hand in my pocket. I just spin around real quick.
I didn’t know it was him behind me that close or whatever when I swung my arm.

R. p. 351, lines 8-12. On cross-examination, White agreed with the prosecutor he was just swinging wild and it could have been anybody behind him. R. p. 357, lines 10-23. Again on redirect, White advised, **“At the time I didn’t know who it was.”** R. p. 360, lines 8-11.

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).

ARGUMENT

I.

The trial court did not err in declining to admit Respondent's hearsay statement that the victim told him he kept a gun and knife in his moped because it was not relevant since Respondent never testified he thought or was worried the victim was armed when he slashed the victim's throat. White was not limited in presenting his defense to either accident or self-defense.

The Court of Appeals held White should have been allowed to testify Johnson told him he kept a knife and gun in his moped because it was relevant to explain why White believed he was in imminent danger and to show the belief was reasonable. However, White never testified that he was concerned or thought Johnson had a weapon when White slashed Johnson's throat. Early during White's testimony, defense counsel attempted to elicit testimony that before the assault, Little Bear told White he made shanks in prison and kept a gun and knife in his moped. By this point, defense counsel elicited a snippet of testimony from White that arguably supported the defense of accident, but no testimony supporting self-defense. Defense counsel even admitted, out of the presence of the jury that White did not even know if Johnson had a weapon on him. R. p. 330, lines 7-9. Further, White's testimony during the remainder of direct examination did not support self-defense, because White never testified he thought or even was concerned that Johnson might be armed. Therefore, the trial court did not abuse its discretion in sustaining the State's objection to what was irrelevant and unfairly prejudicial hearsay testimony.

The Court of Appeals opinion is based in large part on a misunderstanding of the record. The opinion states: “At trial, White testified he became uncomfortable and felt threatened throughout the night, in part because of Johnson’s statement and decided to leave. White indicated he did not believe he could safely leave after he was punched because of Johnson’s statement **and the possibility that Johnson may have had access to a weapon.**” White, 821 S.E.2d at ___ (emphasis added). However, White never testified he considered the possibility Johnson had access to weapons or testified he contemplated the possibility Johnson was armed when he slashed Johnson’s throat. The Court of Appeals reiterated this point when it found the present case was distinguishable from State v. Washington, 367 S.C. 76, 623 S.E.2d 836 (Ct. App. 2005), *aff’d as mod.*, 379 S.C. 120, 665 S.E.2d 602 (2008), stating: “White testified Johnson said he kept a gun and a knife on his moped, and Johnson accessed his moped before the incident. **Because White had reason to believe Johnson stored weapons on his moped and accessed his moped prior to the stabbing**, we find Johnson’s statement was relevant to White’s self-defense claim.” White at ___ (emphasis added). However, no evidence was produced to show that White was aware or believed that Johnson accessed his moped prior to White slashing Johnson. The record simply does not support the Court of Appeal’s holding.

Further, at the point in time White’s counsel sought to admit the statement, White had not provided any testimony to support a foundation showing he acted in self-defense. White’s testimony at that point in time was, if anything, contrary to a self-defense claim. Prior to seeking to admit White’s hearsay testimony, White testified (1) he did not try to kill Little Bear; (2) he admitted he cut Johnson; (3) he did not mean to cut Johnson; and (4) he did not aim for Johnson’s throat. R. p. 320,

lines 14-23. He further testified he never met Johnson Bear before the gathering, there was no tension between them, and there was no dispute over money or the quality of the haircut. R. p. 323, lines 5-24. At this point defense counsel attempted to elicit testimony that Johnson told White he made shanks in prison, and he kept a knife and gun in his moped. R. pp. 324-27. Defense counsel claimed it was admissible because it went to White's state of mind for purposes of self-defense. R. pp. 328-29.

Given the absence of evidence supporting self-defense, the trial court keenly observed **"based upon what he has already said** how can you possibly raise self-defense because self-defense is a [purposeful] act you intentionally inflicted physical harm on a person that you were in imminent fear of. Well, he's already said he did not cut him on purpose. . . . Now where is self-defense going to come into this?" R. p. 329, lines 7-14 (emphasis added).

The trial court further observed, "So none of this testimony he has said so far has any relevancy at all unless there is a valid self-defense case." R. p. 329, lines 21-23. Counsel advised the trial court that White would admit he never saw a weapon **and did not know whether Johnson had a weapon.** R. p. 330, lines 7-9. Further, White's counsel explained White allegedly feared Johnson could do him harm because Johnson talked about making shanks and bragged about being a good wrestler. R. p. 330, lines 10-12.

The trial court found the testimony about the shank was not relevant to accident or self-defense and found it was inadmissible for that purpose. R. p. 335, lines 18-23. The trial court subsequently allowed the testimony to be admitted for impeachment purposes. R. p. 338, lines 8-10. The trial court provided a limiting instruction that the statement about shanks was allowed for

impeachment only. R. p. 341. The Court of Appeals noted any issue with the trial court's limitation on the shank testimony was not preserved for review. White, 821 S.E.2d at ___ n.1.

Additionally, the trial court also ruled it would not allow White to testify that Johnson told him about the gun and knife allegedly kept in the moped, noting it had no bearing on the case. R. p. 340, lines 1-3. The trial court ruled correctly because White's counsel admitted that White did not know if Johnson had a weapon on him at the time he cut him. R. p. 338, lines 11-12. Since White never testified that he fostered a belief or concern that Johnson was armed at the moment White struck him with the knife, the testimony about the knife and gun stored in the moped was irrelevant. Additionally, in the absence of a foundation supporting self-defense, the statement constituted hearsay.

The Court of Appeals relied on State v. Williams, 400 S.C. 308, 733 S.E.2d 605 (Ct. App. 2012). In Williams, the trial court failed to instruct the jury on either self-defense or accident. The Court of Appeals first found evidence that supported self-defense. The Court of Appeals determined evidence also existed that supported an instruction on accident. Williams testified the victim started shooting at him and Williams ran away. Williams testified he was in fear for his life and he was afraid he would be shot in the back. His driver tossed him the rifle Williams claimed went off without him pulling the trigger. His testimony was inconsistent – he alternatively claimed he shot the victim because he thought the victim would shoot him first. Id. at 315-16, 733 S.E.2d at 609-10.

After concluding evidence supported instructions for both self-defense and accident, the Court of Appeals in Williams observed, "We note that even though self-defense and accident charges are often mutually exclusive, there is evidence in the record to support both charges **in this case.**"

Id. at 317, 733 S.E.2d at 610 (emphasis added). The instant case is distinguishable from Williams because, as more fully discussed later in the brief, the evidence did not support self-defense. The defenses of accident and self-defense occasionally mutually coexist, but they do not in this case. See id. at 318, 733 S.E.2d at 611 (J. Lockemy, concurring).

While the Court of Appeals imputed legal error to the trial court's observations, context suggests that the trial court was noting the evidence did not support both theories based on White's limited testimony at the point in time White's counsel moved for the admission of the testimony. Williams stands for the proposition that a jury instruction is required if supported by evidence, even if other evidence contradicts the notion of the instruction. However, Williams does not stand for the proposition that a defendant can plan to present multiple inconsistent stories or plan on giving inconsistent testimony when making a proffer to admit evidence.

In Williams, the defendant happened to contradict himself and give inconsistent testimony. However, in the instant case, the Court of Appeals is suggesting that counsel was planning to present two different version of events and should have been allowed to do so. Ultimately, White failed to show **at the time of the trial court's ruling** that Johnson's conversation with White was relevant. Further, White never testified, and his counsel never proffered, any suggestion that White believed or was concerned Johnson could be armed when he struck his knife at Johnson. Further, Johnson's conversation with White never became relevant evidence, because White's belief that Johnson had weapons stored in the moped was immaterial since White did not know who he swung his knife at. Therefore, the trial court did not err in suppressing the testimony because it never took on a purpose beyond its use for the matter asserted, that Johnson had a weapon in his moped. See State v.

Hendricks, 408 S.C. 525, 532-33, 759 S.E.2d 434, 438 (Ct. App. 2014) (rejecting argument that declarant's statement was not for the truth of the matter, and finding the declarant's statement was hearsay, because the probative value of the statement was in the truth of the matter asserted, that defendant raped victim, rather than for the purpose of explaining officer's reasons for going to see victim at the hospital, which carried minimal probative value).

"The relevance, materiality, and admissibility of evidence are matters within the sound discretion of the trial court and a ruling will be disturbed only upon a showing of an abuse of discretion." State v. Shuler, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003). The admission or exclusion of evidence is a matter addressed to the trial court's sound discretion and will not be reversed absent a manifest abuse of the trial court's discretion and probable prejudice. State v. Wise, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004). "An error without prejudice does not warrant reversal." State v. King, 367 S.C. 131, 136, 623 S.E.2d 865, 867 (Ct. App. 2005).

"While defendants are entitled to a fair opportunity to present a defense, that right does not encompass the right to present any evidence, regardless of its admissibility under the rules of evidence." State v. Hamilton, 344 S.C. 344, 359, 543 S.E.2d 586, 594 (Ct. App. 2001) *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Rule 801, SCRE. Hearsay is inadmissible except as provided by statute, the Rules of Evidence, or other court rules. Rule 802, SCRE; State v. LaCoste, 347 S.C. 153, 553 S.E.2d 464 (Ct. App. 2001).

Relevant evidence is "evidence having any tendency to make the existence of any fact that is

of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Rule 401, SCRE. For evidence to be admissible, it must be relevant. Rule 402, SCRE. Relevant evidence may be excluded where its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE; State v. Pagan, 369 S.C. 201, 210, 631 S.E.2d 262, 266 (2006).

The Court of Appeals in its opinion determined State v. Washington, 367 S.C. 76, 623 S.E.2d 836 (Ct. App. 2005), *aff’d as mod.*, 379 S.C. 120, 665 S.E.2d 602 (2008) was distinguishable from the present case. In Washington, the trial court did not allow Washington to admit evidence that the victim kept weapons in his trunk because no evidence was presented that Washington knew the victim kept weapons in his trunk or that he kept weapons at all. Also no evidence was presented the victim approached his trunk prior to being stabbed. Washington claimed he thought the victim might have a gun in his car because the victim was rummaging under the car seats and Washington testified that most people carry a gun under their car seat. This Court found no prejudicial error from the trial court excluding the testimony. Id. at 81-82, 623 S.E.2d at 839.

The Court of Appeals distinguished Washington on the mistaken belief White knew Johnson accessed his moped before the incident. However, White never testified whether he was aware Johnson accessed his moped. No evidence was presented that White believed Johnson was armed. Instead, defense counsel was clear, admitting, “But again my client he’ll be honest; he didn’t know if the man had a weapon on him.” R. p. 338, lines 11-12. Further, White admitted he did not know who hit him or who he was swinging his knife at when he retaliated at the alleged slight. Therefore, as in Washington, the evidence was not relevant because White failed to establish a belief that

Johnson was armed or that he knew Johnson was the person who hit him when he swung his knife. Accordingly, the testimony was irrelevant and inadmissible hearsay.

Further, after the trial court's preliminary ruling, White's counsel never sought to revisit this ruling after White completed his direct testimony. Even if White did attempt to revisit the ruling, the evidence never became admissible because White's supposed fear of Johnson was not relevant when he swung the knife without knowing who he swung it at. On cross-examination, White provided the following testimony:

Q: You took a knife and you swung behind you.

A: I did not intentionally mean to swing out the knife at him. I mean I just swung out the knife. I just swung out.

Q: You were just swinging wild?

A: Pretty much.

Q: [Johnson] could have been behind you?

A: **Spencer could have been behind me.**

Q: Anyone could have been behind you?

A: Whoever hit me.

R. p. 357, lines 10-19 (emphasis added).

The Court of Appeals referred to other times he testified he knew it was Johnson that hit him. The Court of Appeals found that testimony supported self-defense. However, that testimony does not specify what he knew **when he acted**, which is the relevant question. He testified on direct examination that he did not know where Johnson was when he swung his knife and did not look where he swung. R. p. 349, lines 8-19. He then admitted on direct examination, "I didn't know it

was him behind me that close or whatever when I swung my arm.” R. p. 351, lines 8-12. He admitted “Spencer could have been behind me” and agreed anyone could have been behind him. R. p. 357, lines 16-21. When his counsel attempted to rehabilitate his testimony on redirect examination, instead White admitted, “**At the time I didn’t know who it was.**” R. p. 360, lines 8-11. The trial court did not err in declining a self-defense instruction.

Accordingly, the trial court did not err in declining to allow the hearsay testimony, as it was irrelevant to the case. Determination of relevancy is largely within the discretion of the trial court and will not be reversed absent an abuse of that discretion. State v. Sweat, 362 S.C. 117, 127, 606 S.E.2d 508, 513 (Ct. App. 2004). Further, any error was harmless, since evidence did not even support a self-defense instruction and the evidence of guilt was overwhelming. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (holding whether an error is harmless depends on the circumstances of the case, but it is harmless where it could not reasonably have changed the outcome of the trial).

II.

The trial court did not err in declining to instruct the jury on self-defense since no evidence was presented that Respondent was in imminent danger of death or great bodily injury or that he had a reasonable belief he was in imminent danger of death or great bodily injury.

The Court of Appeals found the trial court erred by not instructing the jury on self-defense. However, no evidence was presented that White reasonably feared he was in danger of death or great bodily injury.

The Court of Appeals found there was some evidence White believed he was in imminent danger, and based its determination on testimony Johnson kept a gun and knife in his moped, and that Johnson accessed the moped at some point before the assault supported self-defense. However, White never testified he was concerned Johnson was armed and never testified he observed Johnson access the moped, or was concerned Johnson accessed the moped at the time he swung his knife at Johnson. Completely absent from the record is any indication White thought Johnson might be armed when he decided to swing his knife in Johnson's direction.

“The law to be charged must be determined from the evidence presented at trial.” State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 512 (2000). “An appellate court will not reverse the trial judge’s decision regarding a jury charge absent an abuse of discretion.” State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010). “To warrant reversal, a trial judge’s refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant.” Mattison, 388 S.C. at 479, 697 S.E.2d at 583.

The elements of self-defense are as follows: (1) the defendant must be without fault in

bringing on the difficulty; (2) the defendant must have actually believed he was in actual danger of losing his life or sustaining serious bodily injury, or he must have been in actual imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based on his belief of imminent danger, the defendant must show that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that he was actually in imminent danger and that the circumstances were such that would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or loss of his life; and (4) the defendant had no other probable means of avoiding the danger. State v. Rivera, 389 S.C. 399, 699 S.E.2d 157 (2010). “A jury charge on self-defense is not required unless it is supported by the evidence.” State v. Wigington, 375 S.C. 25, 31, 649 S.E.2d 185, 188 (Ct. App. 2007).

“Because all of the elements are required to establish self-defense . . . [i]t is an axiomatic principle of law that [self-defense] has not been established **if any one element is disproven.**” In re Tracy B., 391 S.C. 51, 704 S.E.2d 71 (Ct. App. 2010) (emphasis added) *quoting* State v. Bixby, 388 S.C. 528, 554, 698 S.E.2d 572, 586 (2010). If evidence is lacking supporting a single element of self-defense, then a defendant is not entitled to an instruction on self-defense. See State v. Lockamy, 369 S.C. 378, 631 S.E.2d 555 (Ct. App. 2006) (noting all four elements must exist for a defendant to be entitled to a self-defense instruction and concluding appellant was not entitled to an instruction on self-defense because the evidence failed to show the appellant did not have any other means to avoid the danger).

The Court of Appeals found the trial court erred in declining to instruct the jury on self-defense, opining some evidence supported each element of self-defense. However, no evidence was

presented that White was at risk of death or serious bodily injury or that White believed he was imminent danger of losing his life or sustaining serious bodily injury, and no evidence was presented that he could reasonably believe he was actually in imminent danger of losing life or sustaining serious bodily injury.

White testified in camera that while Victim was cutting White's hair, Victim told him he had a knife and gun in his moped. R. p. 327, lines 3-4. Before the jury, White testified that after Victim finished cutting White's hair, White paid Victim and there was no disagreement. R. p. 320, p. 323. White left the gathering briefly and then returned. R. pp. 343-44. White, Victim, and others were gathered in conversation at the fire pit. White was about to call his wife to leave when he was hit behind. R. pp. 344-45. At best, White was inconsistent about whether he knew who hit him. However, White testified he reacted and swung out at whoever hit him. R. pp. 357-58. He testified he did it in self-defense. R. p. 349. However, White never testified before the jury **or in camera** that he swung at Victim with a knife because he was afraid Victim might be armed. State v. Knighton, 334 S.C. 125, 136, 512 S.E.2d 117, 123 (Ct. App. 1999) (finding an appellant bears the burden of presenting an adequate record that is sufficiently complete so that the appellate court is able to review the lower court's actions).

The Court of Appeals stated, "White indicated he did not believe he could safely leave after he was punched because of Johnson's statement **and the possibility that Johnson may have had access to a weapon.**" White, at _____. However, at no point during his trial testimony or his in camera testimony did White indicate that he believed he could not leave because Johnson might have a weapon. He never testified that at the time he reacted and swung his knife, he thought Johnson

could have a weapon. There is simply no evidence that when he swung his knife at Johnson, White considered the possibility that Johnson might be armed – no evidence in the record indicates it was a factor in his decision to use lethal force.

Accordingly, no evidence was presented he was actually in fear of death or serious bodily harm when he swung his knife. Further, such a belief was not reasonable. The Court of Appeals noted Johnson could have accessed his moped while White was absent and when Johnson put his hair-cutting equipment away. But this overlooks the fact that while it is plausible Johnson might have retrieved a weapon from his moped after he cut White's hair and before White returned to the party, it is only conjecture that he might have done so. Specifically, the Court of Appeals stated "Johnson testified he accessed his moped directly before the incident." However, his specific testimony is he **put away** his belongings in his moped because he was preparing to leave. Johnson never indicated he retrieved any items. R. p. 106, lines 10-12; p. 107, lines 21-25. More importantly, White never testified he saw Johnson access the moped immediately before the incident or contemplated whether Johnson accessed his moped, so Johnson's testimony to that effect has no bearing on White's state of mind. Accordingly, this evidence does not support a self-defense instruction.

The State would further argue that conversations by Johnson or about Johnson, a man in his fifties, about how he used to wrestle in high school, have no relevance in a self-defense claim. Nor is the fact he allegedly made shanks in prison relevant to the analysis since he did not claim to have a shank on him that day.

Also, White testified he did not know who was behind him when he swung his knife. Other

times he testified he knew it was Johnson that hit him. However, that testimony does not specify what he knew **when he acted**, which is the relevant question. He testified on direct examination that he did not know where Johnson was when he swung his knife and did not look where he swung. R. p. 349, lines 8-19. He then admitted on direct examination, “I didn’t know it was him behind me that close or whatever when I swung my arm.” R. p. 351, lines 8-12. He admitted “Spencer could have been behind me” and agreed anyone could have been behind him. R. p. 357, lines 16-21. When his counsel attempted to rehabilitate his testimony on redirect examination, instead White admitted, **“At the time I didn’t know who it was.”** R. p. 360, lines 8-11. The trial court did not err in declining a self-defense instruction.

In State v. Bruno, 322 S.C. 534, 536, 473 S.E.2d 450, 452 (1996), the defendant claimed he was riding with a friend from a bar and fell asleep. He testified he was awakened when the car hit a curb. He asked what happened, and the driver told him the victim tried to run them off the road. The defendant testified he saw the victim going into his car trunk and felt the victim “was coming toward him.” The defendant claimed “something snapped” and he shot the victim. Id. at 535, 473 S.E.2d at 451. This Court found the defendant was not entitled to a self-defense instruction “because he presented no evidence that he believed he was in imminent danger of losing his life or sustaining serious bodily injury.” This Court noted, “On direct examination, his only testimony was that he felt Victim was coming at him with something. He testified, ‘It happened so quick, you know. I didn’t mean to kill him. I just wanted him to keep away from me.’” Id. at 536, 473 S.E.2d at 452. Similar to the facts in Bruno, in the instant case, White admitted he was not in fear and explained he just reacted. Retaliation is not self-defense.

In State v. Goodson, 312 S.C. 278, 440 S.E.2d 370 (1994), Goodson and victim argued over a dollar bet during a pool game at a bar. Victim threatened Goodson with a pool stick, Goodson drew his gun. Goodson was escorted outside by the bar owner. Goodson subsequently shot victim. He testified the gun “just went off” as victim was “coming at him.” Id. at 279, 440 S.E.2d at 371-72. This Court found, “Here, Goodson presented no evidence which shows that he believed he as in imminent danger of losing his life or sustaining serious bodily injuries at the time he shot [victim]. There also is no evidence that Goodson was actually in imminent danger at the time he shot [victim].” Id. at 280, 440 S.E.2d at 372; see also Tate v. State, 308 S.C. 163, 417 S.E.2d 553 (1992), (where there is no evidence to suggest defendant believed she was in imminent danger of loss of life at the time she killed, counsel’s failure to secure expert on self-defense was not ineffective assistance because the defense was not applicable). Likewise, in the instant case, there was no evidence White was in fear of losing his life or sustaining serious bodily injury or he was in imminent danger of losing his life or sustaining serious bodily injury.

Further, under White’s version of events, he was bumped on the back of his head and did not know who hit him. Based on his version of events, White did not even know if he was intentionally hit or whether it was an accident. By no stretch was his response proportional to the “danger” from being bumped or hit. See State v. Wood, 1 S.C.L. 351 (1 Bay 351) (1794) (key to self-defense is the defendant can only respond with proportionality). In State v. Quin, 5 S.C.L. 515 (S.C. Const. App. 1815), the court held: “Proof that the prosecutor was the aggressor would not justify an enormous battery; nor, indeed, any, beyond the bounds of self-defense.”

In State v. Campbell, 111 S.C. 112, 96 S.E. 543 (1918), the Supreme Court held, “The defendant, if without fault, had the right to use such **necessary** force as required for his complete protection from loss of life or serious bodily harm, and could not be limited to the degree or quantity of attacking opposing force.” Id. 111 S.C. at 112, 96 S.E. at 544 (emphasis added). White’s response to merely being bumped in the back of the head did not warrant the use of deadly force. Accordingly, his testimony failed to support self-defense. Therefore, the trial court did not err in declining to instruct the jury on self-defense. Accordingly, this Court should grant the petition for writ of certiorari and affirm the convictions and sentences.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be granted and Respondent's convictions and sentences should be affirmed. If this Court should see fit to grant the petition, the State respectfully requests permission to more fully brief the issues herein.

Respectfully submitted,

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January 10, 2019

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

JAN 10 2019

Appeal from Charleston County
Honorable J.C. Buddy Nicholson, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No. 2016-00616

THE STATE,

PETITIONER,

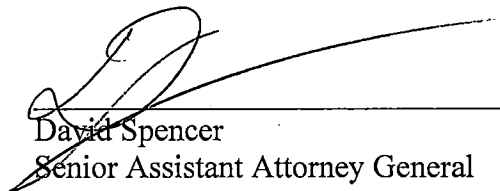
v.

DAVID ALAN WHITE

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of Petition for Writ of Certiorari and Appendix in the above referenced case has been served upon Laura R. Baer, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, SC 29211-1589, this 10th Day of January, 2019.



David Spencer
Senior Assistant Attorney General