STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Beaufort County
Honorable R. Markley Dennis, Jr., Circuit Court Judge
Appellate Case No. 2014-002176

THE STATE,

Respondent,

vs.

JOSEPH BOWERS,

Appellant.

RESPONDENT'S PETITION FOR REHEARING

On August 7, 2019, this Court issued a published opinion in which it reversed Appellant Joseph Bowers's convictions for voluntary manslaughter, assault and battery of a high and aggravated nature, and possession of a weapon during the commission of a violent crime and remanded the matter for a new trial. State v. Bowers, Op. No. 5677 (S.C. Ct. App. filed Aug. 7, 2019). In doing so, this Court first held Bowers's appellate challenge to the jury instructions was preserved for appellate review while only addressing and rejecting a portion of the State's issue preservation arguments. This Court then went on to find the mutual combat charge given by the trial judge was both unsupported by the evidence and prejudicial to Bowers due to its potential to have a confusing impact on and negate the charge on self-defense. Pursuant to Rule 221(a), SCACR, Respondent ("the State") respectfully petitions for rehearing because this Court overlooked, misconstrued, and failed to address several points, including a critical issue

preservation argument raised by the State in addition to the one that was actually analyzed and addressed by this Court.

Initially, in reversing and remanding in Bowers's case, this Court explained the State's issue preservation argument regarding the jury charge issues Bowers raised on appeal consisted of the contention Bowers failed to preserve his objection to the jury instructions "by failing to raise specific grounds," and this Court went on to solely analyze and reject that particular contention on the matter of issue preservation. Significantly, the basis identified by this Court in its opinion was, in fact, *a* basis upon which the State contended Bowers failed to properly preserve his jury charge issues for appellate review, and, for all the reasons identified in the State's brief and during oral argument before this Court, the State reaffirms defense counsel's failure to identify any specific grounds for her general jury charge objections—including after expressly being given an opportunity to put any grounds for the objections on the record—precluded Bowers from being able to properly challenge the trial judge's jury charge decisions on appeal.[1] See State v. Bennett, 328 S.C. 251, 260, 493 S.E.2d 845, 849 (1997) ("[A]s Bennett stated no grounds for his objection, there is nothing for this Court to review."); State v. Hughes, 160 S.C. 474, 476, 158 S.E. 833, 833 (1931) ("The objection made at trial was general, not showing the specific grounds on which it was based, and an exception based on it cannot, therefore, be considered by this court."); State v. Morris, 307 S.C. 480, 485, 415 S.E.2d 819, 823 (Ct. App. 1991) ("Where an objection *and the ground therefor* is not stated in the record, there is no basis for appellate review." (emphasis added)); see also Rule 20(b), SCRCrimP (mandating

[1] At the conclusion of the on-the-record charge conference, the trial judge gave both the solicitor and defense counsel a direct opportunity to put anything they wished regarding the proposed jury instructions on the record, and defense counsel responded she did *not* have anything to add despite the fact she had placed no grounds in support of her objections to the mutual combat charge and voluntary manslaughter charge on the record up to that point. (R. pp. 291-293).

"[a]ny objection [to a jury instruction] shall state distinctly the matter objected to *and the grounds for the objection*" (emphasis added)).

Importantly though, the basis identified and addressed by this Court was not the *only* basis upon which the State contended Bowers's appellate challenge to the jury instructions was not properly preserved for appellate review. Instead, the State *also* contended defense counsel waived any objection that may have previously been raised in regard to the jury instructions by directly affirming to the trial judge she had *no* objections to his jury instructions once they had actually been presented. As support for that additional issue preservation argument, the State noted the trial judge directly asked defense counsel if she had any "exceptions or additions" to his jury instructions—which had included instructions on mutual combat and voluntary manslaughter—after they were presented to the jury and defense counsel responded to that simple and direct inquiry by stating: "None, Your Honor."[2] (R. p. 340). Critically, through that exchange, the trial judge did not ask defense counsel if she had any objections to his jury instructions *other than those previously raised*, and defense counsel did not indicate she did not have any *additional* objections. To the contrary, defense counsel responded to the trial judge's clear, unambiguous question by affirming she had no objections whatsoever to the jury instructions as presented. Accordingly, although it would have been unnecessary for defense counsel to renew any properly-raised objections that had previously been raised to the jury instructions in order to preserve those objections for appellate review, defense counsel did not simply fail to renew a previously-raised objection and, instead, expressly waived any objections she may have had to the jury instructions through her direct affirmation to the trial judge she did

[2] Notably, defense counsel later reaffirmed she had no objections to the trial judge's jury charge on mutual combat when it was again presented to the jury in response to a question raised during deliberations. (R. pp. 347-350).

not have *any* objections to the jury instructions as presented. Compare State v. Johnson, 333 S.C. 62, 64, n. 1, 508 S.E.2d 29, 30 (1998) ("[W]here a party requests a jury charge and, after opportunity for discussion, the trial judge declines the charge, it is unnecessary, to preserve the point on appeal, *to renew* the request at conclusion of the court's instructions." (emphasis added)); with Burke v. AnMed Health, 393 S.C. 48, 55, 710 S.E.2d 84, 88 (Ct. App. 2011) ("When a party states to the trial court that it has no objection to the introduction of evidence, *even though the party previously made a motion to exclude the evidence*, the issue raised in the previous motion is not preserved for appellate review." (emphasis added)); and State v. Dicapua, 373 S.C. 452, 455, 646 S.E.2d 150, 152 (Ct. App. 2007) (finding any issue Dicapua may have had with evidence *to which he had previously raised an objection* was waived when defense counsel specifically stated to the trial judge he had no objections to the evidence's admission). Under such circumstances, Bowers cannot properly challenge the trial judge's jury instructions on appeal. See State v. O'Neal, 210 S.C. 305, 312, 42 S.E.2d 523, 526 (1947) (recognizing a previously-raised objection can be waived); see also State v. Brown, 402 S.C. 119, 125, 740 S.E.2d 493, 496 (2013) (holding Brown's issue with a jury instruction was not preserved for appellate review where Brown explicitly stated to the trial judge he had no objection to the instruction).

Significantly, based on the information contained in the record from Bowers's trial, it is not fully clear why defense counsel elected to expressly waive any objections she may have had to the trial judge's jury instructions despite the fact she had earlier raised some. Perhaps defense counsel felt like the trial judge's instructions explaining how self-defense could be restored even if a party had engaged in mutual combat alleviated her concerns about the potential harm the mutual combat charge could cause to Bowers's case such that an objection was no longer

necessary or warranted.[3] Similarly, perhaps defense counsel believed an instruction on the lesser-included offense of voluntary manslaughter was in Bowers's best interests following further deliberation on the matter or discussions with Bowers himself. Although defense counsel's motivations are currently unknown, the answers to the questions raised by her wavier decision can properly be obtained through South Carolina's expansive post-conviction relief process, which will provide Bowers with an opportunity to receive a new trial if defense counsel's waiver rose to the level of constitutional ineffectiveness. See Hughes v. State, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001) (recognizing a criminal defendant can obtain post-conviction relief by establishing defense counsel was deficient and prejudice resulted from the deficiency); see also State v. Passmore, 363 S.C. 568, 585-586, 611 S.E.2d 273, 283 (Ct. App. 2005) (holding Passmore "will be forced to seek redress through the avenue of post-conviction relief" due to the fact her appellate issue was not properly preserved for review). Critically though, defense counsel's express affirmation to the trial judge she had no objections to his jury instructions should not and cannot be simply ignored on appeal as this Court has so far done. See State v. Berry, 418 S.C. 500, 503-504, 795 S.E.2d 26, 28 (2016) (vacating the analysis of the Court of Appeals because the issue that had been addressed by the Court of Appeals was not properly preserved for appellate review); see also State v. Rios, 388 S.C. 335, 342, 696 S.E.2d 608, 612 (Ct. App. 2010) (holding Rios waived his right to allege error with a jury charge on appeal where the trial court specifically asked if there were any objections to the instructions given and Rios responded there were none); cf. Commonwealth v. Moury, 992 A.2d 162, 178

[3] Through his brief instructions to the jury on mutual combat, the trial judge indicated self-defense was not applicable "if a [d]efendant voluntarily participated in mutual combat for the purpose other than protection" but further explained the defendant would be without fault for the difficulty if he withdraw "and tried in good faith to avoid further conflict" prior to the killing. (R. pp. 329-330).

(Pa. Super. Ct. 2010) ("Generally, a defendant waives subsequent challenges to the propriety of the jury charge on appeal if he responds in the negative when the court asks whether additions or corrections to a jury charge are necessary.").

Moreover, beyond this Court's failure to address one of the State's critical issue preservation arguments, this Court also appeared to misconstrue the State's argument in regard to the effect an error in the giving of the mutual combat charge could have had on Bowers's conviction for assault and battery of a high and aggravated nature, which was related to his act of shooting Richard Green in the back as Green merely attempted to flee. Specifically, in finding the error determined to have occurred in regard to the mutual combat charge also warranted a reversal of Bowers's assault and battery of a high and aggravated nature conviction, this Court stated the State maintained during oral argument Bowers's "charges were intertwined and a reversal would apply to all of [his] convictions." State v. Bowers, Op. No. 5677 (S.C. Ct. App. filed Aug. 7, 2019). However, although the State agreed Bowers was *appealing* of all his convictions, the State did *not* at any point during oral argument or in its appellate brief state any possible error on the part of the trial judge in the giving of a mutual combat instruction could have prejudiced Bowers in regard to the assault and battery of a high and aggravated nature charge.[4] [5] To the contrary, the State contended the mutual combat charge *could not have had*

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[4] Notably, the reason the State agreed Bowers was appealing all his conviction was Bowers sought for all his convictions to be reversed in his appellate brief. (App. Br. p. 21).

[5] As to what was specifically stated during oral argument, the State—in response to a question about "the charge that was not appealed or the charges that were not appealed"—agreed with Bowers's appellate counsel Bowers was *appealing* all of his convictions based on Bower's appellate issue related to the mutual combat charge. (State v. Bowers Oral Argument Recording, 21:21 to 22:03). However, when asked about whether an error in the giving of a mutual combat charge could have had an impact on the assault and battery of a high and aggravated nature conviction, the State responded: "I believe the mutual combat charge can't possibly relate to Richard Green because Richard Green, there's no testimony involved—presented to suggest he

anything to do with Bowers's conviction for assault and battery of a high and aggravated nature under the specific circumstances of Bowers's case.

Critically, looking to the evidence supporting the assault and battery of a high and aggravated nature charge, the only evidence presented established Green, who was the victim of that particular charge, merely exited a house at the scene before quickly being shot in the back as he attempted to flee from the gunfire that suddenly erupted, and no testimony was presented to suggest Green was armed, involved in the altercation or shooting, or acted in a threatening matter towards Bowers.[6] (R. pp. 105-107; p. 222). In light of that evidence, neither the mutual combat or self-defense jury instructions had anything to do with the shooting of Green, and any confusion the mutual combat charge could have caused in regard to the self-defense charge could not have had any possible impact on the assault and battery of a high and aggravated nature charge since Green was not and could not have been shot in self-defense based on the evidence presented.[7] See State v. Bixby, 388 S.C. 528, 554, 698 S.E.2d 572, 586 (2010) (recognizing it is

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did anything other than come out of the house that—I believe it's Ms. Poot's house—that's next door to the club, he saw a ruckus, turned around to flee, and got shot in the back. So, he certainly—Joseph Bowers certainly wasn't involved in mutual combat with him. *So, I don't think that charge has anything to do with that particular conviction.*" (State v. Bowers Oral Argument Recording, 22:13 to 22:43 (emphasis added)).

[6] As to the evidence regarding Green's actions on the night of the shooting, this Court summarized what it showed as follows: "Richard Green, who had his back to the club and was outside of the club owner's nearby house, heard the first shot and attempted to flee. He was shot in the back and paralyzed from the waist down." State v. Bowers, Op. No. 5677 (S.C. Ct. App. filed Aug. 7, 2019).

[7] Tellingly, when the trial judge indicated the mutual combat charge would only negate self-defense as it related to Michael Morgan—the victim related to Bowers's voluntary manslaughter conviction—in the event the jury found mutual combat had been established, defense counsel responded: "Correct." (R. p. 346). Based on that trial concession, Bowers—who was nonetheless free to attempt to appeal all his convictions—could not properly claim the improper presentation of a mutual combat charge could have prejudicially impacted the assault and battery of a high and aggravated nature conviction by negating self-defense in regard to that specific

axiomatic all four elements of self-defense must be established in order for that defense to apply); see also Jamison v. State, 410 S.C. 456, 471, 765 S.E.2d 123, 131 (2014) ("The transferability of intent in a self-defense claim has not been recognized in South Carolina[.]"); State v. Porter, 269 S.C. 618, 622, 239 S.E.2d 641, 643 (1977) (declining to recognize the theory of transferred self-defense as a viable theory in South Carolina); cf. State v. Curry, 406 S.C. 364, 372, 752 S.E.2d 263, 267 (2013) (finding a request for immunity from prosecution was properly denied where evidence was presented establishing the unarmed victim was shot in the back); Jackson v. State, 355 S.C. 568, 573, 586 S.E.2d 562, 565 (2003) (holding the absence of a self-defense instruction that was warranted under the circumstances of Jackson's case could not have affected the outcome of trial in light of the overwhelming evidence of guilt presented, which included evidence establishing the victim was shot in the back); State v. Boozer, 92 S.C. 495, __, 75 S.E. 864, 866 (1912) (Fraser, J., dissenting) ("It seems to me that the defendant would have been very unwise to confine his defense to self-defense, when the deceased was shot in the back of the head[.]"); State v. Oates, 421 S.C. 1, 23, 803 S.E.2d 911, 923 (Ct. App. 2017) (holding the trial judge properly declined to grant a directed verdict based on a claim of self-defense where the evidence—in part—established the victim was shot in the back). As a result, the prejudice this Court found resulted from the improper presentation of a mutual combat charge could not have been applicable to Bowers's conviction for assault and battery of a high and aggravated nature since no evidence whatsoever suggested Bowers shot Green in self-defense, and, thus, that conviction should not have been reversed even if the mutual combat charge was improperly given and negated self-defense as it related to the shooting of Bowers's other victim. See State v. Smith, 230 S.C. 164, 168, 94 S.E.2d 886, 887 (1956) ("The burden is upon the appellant to

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charge. See State v. Bryant, 372 S.C. 305, 315-316, 642 S.E.2d 582, 588 (2007) (recognizing an issue conceded during trial cannot subsequently be argued on appeal).

satisfy [the appellate] court that there has been *prejudicial* error." (emphasis added)); State v. King, 367 S.C. 131, 136, 623 S.E.2d 865, 867 (Ct. App. 2005) (recognizing an error that has not been shown to be prejudicial simply does not warrant the reversal of a criminal conviction).

Accordingly, for all the foregoing reasons coupled with the reasons raised through the State's brief and during oral argument before this Court, the State respectfully urges this Court to reconsider this matter pursuant to Rule 221(a), SCACR, vacate its prior opinion, and issue a new opinion correctly finding Bowers's issues with the trial judge's jury instructions were not properly preserved for appellate review in light of defense counsel's express affirmation she had no objections to those instructions after they were presented to the jury. Furthermore, even if this Court declines to alter its opinion on the matter of issue preservation, this Court should nonetheless grant rehearing, address the potential prejudice caused in regard to the assault and battery of a high and aggravated nature charge, and ultimately affirm that conviction as the mutual combat charge could not have had a prejudicial impact on the conviction for that particular offense even if improperly given.

Respectfully submitted,

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August 22, 2019

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County
Honorable R. Markley Dennis, Jr., Circuit Court Judge
Appellate Case No. 2014-002176

THE STATE,

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vs.

JOSEPH BOWERS,

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PROOF OF SERVICE

I, Shana Montgomery, certify I have served the within Respondent's Petition for Rehearing on Appellant by sending two copies of the same to:

Robert M. Dudek, Esq.
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 22nd day of August, 2019.

Shana Montgomery

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ALAN WILSON
ATTORNEY GENERAL

August 22, 2019

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: State v. Joseph Bowers – Appellate Case No. 2014-002176

Dear Ms. Kitchings:

Enclosed please find the original and six copies of Respondent's Petition for Rehearing, along with proof of service, for filing in the above-referenced appeal.

Sincerely,

Mark R. Farthing
Assistant Attorney General
Bar Number 76901

MRF/
Enclosures

cc: Robert M. Dudek, Esquire
Victim Advocacy Division