STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Dorchester County

Maite Murphy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TRAVIS LATRELL LAWRENCE,

APPELLANT

APPELLATE CASE NO. 2018-000989

FINAL BRIEF OF APPELLANT

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II. Did the trial judge err in permitting Appellant's co-defendant, who was not on trial, to assert his Fifth Amendment privilege against self-incrimination based upon a finding that his proposed testimony would expose him to criminal liability where the co-defendant indicated he and Appellant acted in self-defense, which the judge concluded was incriminating because it was an admission that he was present at the scene of a crime, and that he intended to purchase marijuana, which the judge concluded was incriminating?

STATEMENT OF THE CASE

On February 2, 2017, a Dorchester County grand jury indicted Appellant for attempted murder (2016-GS-18-1605). R. 240, 241. Additionally, Appellant was indicted for armed robbery and possession of a firearm by persons unlawful. R. 2, ll. 7-11. The state, represented by Ryan Templeton and Mike Spears, called the case to trial before the Honorable Maite Murphy and a jury on May 21-23, 2018. R. 1. Michelle Williams and John Loy represented Appellant. R. 1.

During the deliberations, the jurors asked if the "hand of one, hand of all applied to all of the charges." R. 228, ll. 1-3; R. 236. Judge Murphy, with the consent of the parties, informed the jurors that the accomplice liability instruction applied only to attempted murder and armed robbery. R. 228, ll. 4-6; R. 236. After deliberating for approximately one and a half hours, the jury indicated it was deadlocked. R. 227, ll. 11-16; R. 238.[1] Judge Murphy then instructed the jurors pursuant to Allen v. United States, 164 U.S. 492 (1896). R. 228, l. 18 – R. 230, l. 9. Approximately thirty minutes later, the jurors requested the definition of malice aforethought. R. 230, ll. 20-22; R. 239. Thereafter, Judge Murphy read the attempted murder instruction to the jury again. R. 231, l. 8 – R. 232, l. 3. Thirty minutes later, the jury returned with its verdict, finding Appellant guilty of attempted murder, but not guilty of armed robbery or possession of the weapon. R. 233, l. 23 – R. 234, l. 10. Judge Murphy sentenced Appellant to thirty years imprisonment. R. 235, ll. 10-12; R. 242.

On May 24, 2018, Appellant served his notice of appeal. This brief follows.

[1] The jury's note indicated it was deadlocked on charge of attempted murder with seven jurors voting for guilty and five voting for not guilty. R. 238.

STATEMENT OF FACTS

On July 2, 2016, Clayton Baxter lived with a friend in a townhouse. R. 12, l. 18 – R. 13, l. 4. At some point that day, Baxter received a telephone call from Terell Bennett allegedly asking to borrow some money. R. 15, ll. 5-19; R. 35, l. 24 – R. 36, l. 2. Baxter helped raise Bennett and considered Bennett his nephew. R. 15, ll. 11-17; R. 35, ll. 19-23. Accordingly, Baxter immediately agreed to loan Bennett money, and he encouraged Bennett to stop by his home soon to pick up the money. R. 15, ll. 20-22; R. 36, ll. 3-9. Later, Bennett called Baxter to let him know that he was outside. R. 17, ll. 5-7. Baxter then opened the door for Bennett. R. 17, ll. 10-11. According to Baxter, Bennett arrived in a gold Cadillac DeVille. R. 16, ll. 23-24.

Baxter claimed that as Bennett was entering the townhome, Baxter was "looking between his legs" and saw "a set of feet walking behind him, slow." R. 17, ll. 13-14. Baxter asked Bennett who was behind him. R. 17, ll. 14-15. Instead of answering, Bennett moved to the right. R. 17, l. 16. Baxter claimed he then saw Appellant holding a .38 revolver on him. R. 17, ll. 16-19; R. 19, ll. 7-10. Baxter was familiar with Appellant because he had met him several times through Bennett. R. 18, ll. 2-10. He claimed the two men never had any problems with each other. R. 18, ll. 11-13. Nevertheless, Baxter alleged Appellant held a gun on him and demanded money. R. 19, ll. 18-22.

Baxter waited "for them to make one mistake" so he could "capitalize on it." R. 20, ll. 2-7. According to Baxter, Appellant made this mistake when he put the gun down as he tried to go through Baxter's pockets. R. 20, ll. 7-9. Seizing this opportunity, Baxter, who was six feet and seven inches tall, picked up Appellant and slammed him on top of the table. R. 20, ll. 9-10; R. 53, ll. 10-13; R. 182, ll. 17-19. Thereafter, according to Baxter, the three men struggled. R. 20, ll. 15-18. While Baxter's finger was on the trigger of the gun, the gun fired. R. 20, l. 23 – R. 21,

l. 5. Baxter claimed Appellant then got out from underneath him and went into the kitchen. R. 21, ll. 23-24. Baxter could not explain how Appellant, who was less than six feet tall and weighed significantly less than Baxter's three hundred pounds, managed to get out from under him during this struggle for the gun. R. 53, l. 25 – R. 54, l. 2; R. 182, ll. 22-23. Nevertheless, Baxter claimed Appellant retrieved a knife from the kitchen and stabbed him with it. R. 21, l. 24 – R. 23, l. 1.[2] According to Baxter, Appellant told him to let Bennett go, and Baxter did so. R. 23, ll. 1-4. Bennett and Appellant then left with seventy dollars. R. 24, ll. 5-11.[3]

Baxter admitted he smoked marijuana and had some marijuana and a digital scale in his home on July 2, 2016. R. 16, ll. 5-8; R. 50, ll. 11-12; R. 51, ll. 6-12; R. 89, ll. 16-19. He further claimed that Appellant and Bennett were not at his home to purchase drugs that day. R. 50, ll. 9-10. When questioned about his prior record, Baxter admitted only to having a prior conviction for possession of marijuana. R. 52, ll. 9-14. He was forced to admit he was actually convicted of possession with intent to distribute marijuana. R. 51, l. 18 – R. 52, l. 3. Baxter also claimed that he never used any other drugs. R. 52, l. 16 – R. 53, l. 2. Yet, he was convicted of possession of cocaine and the state was forced to admit this fact through a stipulation. R. 71, l. 15 – R. 72, l. 21; R. 237.

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[2] When the police officers arrived, Clayton Baxter told one of the officers that Terell Bennett stabbed him. Defendant's Exhibit #9. During the trial, Baxter repeatedly claimed he never said Bennett stabbed him, but the officer's body cam video showed Baxter told the first responding officer that Bennett "did it" and Lawrence was just there with Bennett. Cf. R. 38, ll. 18-24 with Defendant's Exhibit #9; see also R. 39, ll. 1-9; R. 44, l. 8 – R. 45, l. 7; R. 46, ll. 4-8.

[3] Baxter had over $600 in his home that was not stolen. R. 49, ll. 12-21; R. 89, ll. 14-15; Defendant's Exhibit #3; Defendant's Exhibit #5. This money was "in a whole bunch of different denominations, hundreds, twenties, tens, ones." R. 50, ll. 1-5; Defendant's Exhibit #3; Defendant's Exhibit #5.

ARGUMENT

I. The trial judge erred in permitting a sheriff's deputy to testify regarding a traffic stop of Appellant's co-defendant, who was not on trial, where the testimony was irrelevant and the danger of unfair prejudice arising from the jury learning of the prior contact between Appellant's co-defendant and law enforcement substantially outweighed the probative value.

Standard of review

"'In criminal cases, the appellate court sits to review errors of law only.'" State v. Collins, 409 S.C. 524, 529-530, 763 S.E.2d 22, 25 (2014) (quoting State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006)). The appellate court "'is bound by the trial court's factual findings unless they are clearly erroneous.'" Id. at 530, 763 S.E.2d at 25 (quoting Baccus, 367 S.C. at 48, 625 S.E.2d at 220). "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.; see also State v. Brockmeyer, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

Relevant facts

During the trial, the state proposed to call Jordan Williamson, sheriff's deputy as a witness against Petitioner. According to the state, Williamson was prepared to testify that he stopped Terell Bennett, Petitioner's co-defendant. R. 119, l. 23 – R. 120, l. 3. At that time, Bennett was driving a gold Cadillac. R. 119, l. 23 – R. 120, l. 3. The state argued the testimony was admissible because it "link[ed] with [the alleged] victim's testimony that he was driving a

gold Cadillac on that day." R. 120, ll. 1-3. The testimony was offered "purely for that identification." R. 120, l. 3.

Defense counsel moved to exclude the evidence as irrelevant and unfairly prejudicial, particularly in light of the speculation the testimony would encourage the jurors to draw. R. 121, ll. 20-21. Counsel argued the testimony invited the jury to speculate regarding the nature of the prior contact between law enforcement and Bennett, a defendant that was not on trial. R. 120, ll. 11-13. Counsel explained the testimony was unfairly prejudicial to Appellant because the prior contact with law enforcement would "plant[] it in the jury's mind that there's ongoing law enforcement contact" with Bennett, a defendant who was not on trial, but who was associated with Appellant. R. 121, ll. 15-18. Further, defense counsel argued Williamson's testimony did not make any fact in dispute more or less likely. R. 121, ll. 6-7. As defense counsel explained, there were no witnesses to say "a gold Cadillac was parked in front of the house that day, to say that two guys got out of a gold Cadillac that day, to say that [Appellant] had ever been in a gold Cadillac that day or otherwise, or that he was present in this Cadillac on the day that it was stopped." R. 121, ll. 1-5.

Judge Murphy thought it was "a stretch to state that a sole traffic stop with law enforcement, prolonged law enforcement contact." R. 121, ll. 22-24. She opined that "it can be a very innocent traffic stop where nothing occurred." R. 121, ll. 24-25. According to Judge Murphy, Williamson's testimony was "corroborative evidence of the gold Cadillac," which she asserted was "an issue" in the case, and was corroborative of the alleged victim's testimony. R. 121, l. 25 – R. 122, l. 4. She determined "the probative value outweigh[ed] the prejudicial effect," and permitted the state to introduce Williamson's testimony. R. 122, ll. 4-5.

Thereafter, Williamson testified before the jury. Williamson was a member of the Dorchester County Sheriff's Office in April 2016, three months before the incident involving Clayton Baxter. R. 124, ll. 15-16. During that time, he interacted with Bennett for "a simple traffic stop." R. 124, l. 25 – R. 125, l. 4. Bennett was "driving a gold in color Cadillac DeVille" at the time of the traffic stop. R. 125, ll. 5-6.

Discussion

Pursuant to the South Carolina Rules of Evidence, all relevant evidence is generally admissible. Rule 402, SCRE. "Evidence which is not relevant is not admissible." Id. Even relevant evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE. A determination on the admissibility of relevant evidence requires consideration of the evidence's probative value, the danger of unfair prejudice posed by the evidence, and the balancing of those two.

"'Relevant evidence' means 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. "Under Rule 401, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy." State v. Preslar, 364 S.C. 466, 476, 613 S.E.2d 381, 386 (Ct. App. 2005). "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears, and it is not required that the inference sought should necessarily follow from the fact proved." State v. Sweat, 362 S.C. 117, 126-127, 606 S.E.2d 508, 513 (Ct. App. 2004). When looking at Rule 403, SCRE, the starting point for analyzing evidence under Rule 403 is determining the probative value of the evidence offered. "'Probative' means '[t]ending to prove or disprove.'" State v. Gray, 408 S.C. 601, 609, 759 S.E.2d 160, 165 (Ct. App. 2014). "'Probative value' is the

measure of the importance of that tendency to the outcome of a case." Id. at 610, 759 S.E.2d at 165. While relevant evidence and probative evidence are not synonymous, the two share many similarities as demonstrated through their definitions. The probative value of evidence is directly related to the how important that evidence is in assisting the jury in rendering a verdict. Id. Thus, when analyzing the probative value of evidence, the court must consider the importance of the evidence as it relates to the issues presented in the case. State v. Lee, 399 S.C. 521, 528, 732 S.E.2d 225, 228 (Ct. App. 2012).

After determining the probative value of the evidence, the court must next evaluate the danger of unfair prejudice presented by the evidence. "The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case." State v. Wilson, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001). "'Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest [a] decision on an improper basis.'" State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (quoting United States v. Bonds, 12 F.3d 540, 567 (6th Cir. 1993)). According to the United States Supreme Court, "[t]he term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." Old Chief v. United States, 519 U.S. 172, 180 (1997). "Rule 403 only requires suppression of evidence that results in unfair prejudice – prejudice that damages an opponent for reasons other than its probative value, for instance, an appeal to emotion." United States v. Mohr, 318 F.3d 613, 619-620 (4th Cir. 2003).

Once a court has determined the probative value and the danger of unfair prejudice of the evidence, the court must balance the two. State v. Dial, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct.

App. 2013). When juxtaposing the prejudicial effect against the probative value, the determination must be based on the entire record and will turn on the facts of each case. State v. Collins, 409 S.C. 524, 534, 763 S.E.2d 22, 27-28 (2014) (citing State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008)). Only after balancing the probative value and the danger of unfair prejudice may the court determine if the danger of unfair prejudice outweighs the probative value of the proffered evidence as required by Rule 403, SCRE.

The probative value of Williamson's testimony was very low. Williamson placed Bennett, a co-defendant who was not on trial, in a gold Cadillac approximately three months prior to the alleged encounter with Baxter. Williamson did not describe the car in any specific or special way – it looked like all the other gold Cadillacs. While Baxter told the jurors that Bennett arrived in a gold Cadillac, he was unable to describe any unique features to identify that gold Cadillac from all the other gold Cadillacs. Admittedly, Williamson corroborated Baxter's testimony that Bennett was connected to a gold Cadillac, Williamson could only place Bennett in a gold Cadillac three months prior to Baxter's claim. Further, whether Bennett arrived at Baxter's townhome in a gold Cadillac was not a matter of any importance to the trial – frankly, it was irrelevant because it did not make any fact of consequence more or less probable.

The danger of unfair prejudice arising from Williamson's testimony was high. Williamson provided a direct link between law enforcement and Bennett, someone with whom Appellant associated. Williamson told the jurors that he stopped Bennett three months before Bennett's encounter with Baxter. The testimony was couched in terms of a "simple traffic stop," but the point was made that Bennett had violated some law in the past, even if only a traffic law. In other words, Bennett was someone who broke the law, and Appellant was someone who associated with criminals.

Balancing the very low probative value of Williamson's testimony against the extreme danger of unfair prejudice required exclusion of Williamson's testimony regarding his stop of Bennett three months prior to the encounter with Baxter. An examination of the facts presented by the state demonstrated that anything related to Bennett's car was irrelevant to the charged offenses. As such, the probative value was very low. The danger of unfair prejudice was high and based upon the weak evidence presented by the state – as demonstrated by the jury's questions during deliberations and its verdict – there was serious concern the jurors would base their verdicts on guilt by association, not the evidence. The trial judge erred by permitting the state to present Williamson, a member of law enforcement, as a witness to testify about his prior encounter with Bennett.

II. The trial judge erred in permitting Appellant's co-defendant, who was not on trial, to assert his Fifth Amendment privilege against self-incrimination based upon a finding that his proposed testimony would expose him to criminal liability where the co-defendant indicated he and Appellant acted in self-defense, which the judge concluded was incriminating because it was an admission that he was present at the scene of a crime, and that he intended to purchase marijuana, which the judge concluded was incriminating.

Standard of review

In a case reviewing a trial court's decision to hold a party in contempt for asserting his privilege against self-incrimination where the trial court determined the party's assertion was in error, this Court explained an appellate court would reverse a trial court's decision regarding contempt only if it were without evidentiary support or were an abuse of discretion. First Union Nat. Bank v. First Citizens Bank and Trust Co. of South Carolina, 346 S.C. 462, 466, 551 S.E.2d 301, 303 (Ct. App. 2001) (citing Stone v. Reddix-Smalls, 295 S.C. 514, 369 S.E.2d 840 (1988)).

Similarly, when reviewing whether an individual waived his privilege against self-incrimination when speaking with law enforcement, the appellate courts review the trial court's decision using an abuse of discretion standard. State v. Von Dohlen, 322 S.C. 234, 243, 471 S.E.2d 689, 695 (1996). Specifically, "[o]n appeal, the conclusion of the trial judge as to the voluntariness of a confession will not be reviewed unless so erroneous as to show an abuse of discretion." Id. "When reviewing a trial court's ruling concerning voluntariness, [the appellate court] does not reevaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial court's ruling is supported by any evidence." State v. Saltz, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001).

Generally, in criminal cases, appellate courts review errors of law only and are bound by the trial court's findings of fact unless those findings are clearly erroneous. State v. Edwards, 384 S.C. 504, 508, 682 S.E.2d 820, 822 (2009). Thus, appellate review is limited to determining whether the trial court abused its discretion. Id. A trial court abuses its discretion when its decision is unsupported by the evidence or controlled by an error of law. State v. Black, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012).

Relevant facts

Appellant wanted to call Terell Bennett, as a witness. R. 127, ll. 7-9. However, Bennett indicated he wanted to invoke his right to silence. R. 128, ll. 4-8; R. 135, ll. 17-19. Therefore, Judge Murphy held an *in camera* hearing to determine whether Bennett could invoke his right to silence – whether the proposed testimony would be incriminating. R. 127, ll. 18-25; R. 129, ll. 1-6; R. 135, ll. 23-24; R. 136, ll. 9-12.

The solicitor met with Bennett twice prior to Appellant's trial. R. 148, ll. 1-10; R. 152, l. 25 – R. 153, l. 12. Eric Melendez, the solicitor's investigator, was present for these meetings. R. 146, ll. 20-24. These meetings were not memorialized. R. 147, ll. 19-21. While the first meeting was considered unproductive by the state's investigator, the second meeting bore greater fruit. R. 148, ll. 6-21; R. 149, l. 4 – R. 150, l. 20. When defense counsel learned about these meetings from Bennett's counsel, counsel contacted the solicitor. R. 153, l. 23 – R. 154, l. 16; R. 156, ll. 6-8. The solicitor informed counsel that he had not taken any notes during the meetings. R. 154, ll. 18-21. After learning from Bennett's counsel that Melendez was present for the meetings, defense counsel contacted the investigator prior to the trial. R. 155, ll. 3-8. What occurred during this contact was disputed as demonstrated by defense counsel's questioning of the investigator during an *in camera* hearing. Most importantly, the investigator denied telling

defense counsel that Bennett stated that Baxter rushed or lunged at Appellant. R. 151, ll. 5-17. The investigator also did not recall telling defense counsel that Bennett's statement indicated Appellant acted in self-defense. R. 151, l. 22 – R. 152, l. 16.

Outside the presence of counsel, Judge Murphy questioned Bennett. Bennett explained that he spoke with the solicitor shortly before Appellant's case was called to trial. R. 136, l. 23 – R. 139, l. 17. The judge asked Bennett to tell her what he told the solicitor during that meeting. R. 139, ll. 18-21. Bennett told "the truth of what happened," including that he was "being held against [his] will and falsely accused." R. 139, ll. 22-25. When Bennett and Appellant went to Baxter's home, Baxter attacked them. R. 139, l. 25 – R. 140, l. 1. Bennett and Appellant went to Baxter's home to buy marijuana. R. 140, ll. 1-2. Bennett believed Appellant and Baxter had a "history." R. 140, ll. 2-3. As soon as Bennett and Appellant went into Baxter's house, Baxter "attacked [Appellant] first." R. 140, ll. 8-9. As soon as Baxter saw Appellant, "his whole demeanor just flip out of nowhere like he was frustrated." R. 140, ll. 17-20.

Bennett's counsel admitted Bennett's testimony would "provide or bolster" a self-defense case for Appellant. R. 143, ll. 6-8. Further, she admitted that she would "probably call" Bennett to testify in his defense at his trial. R. 145, ll. 2-8. However, she argued Bennett would be asked to give information "that could potentially be used against him." R. 143, ll. 8-10.

Judge Murphy indicated that Bennett's statement that he was going to Baxter's home to buy marijuana would implicate him in a crime. R. 141, ll. 1-5. She also indicated that Bennett was "putting [himself] at the scene of this alleged crime." R. 141, ll. 11-14. Nevertheless, she agreed that Bennett's testimony showed his actions and Appellant's actions were in self-defense. R. 141, ll. 15-20. Judge Murphy found Bennett's answers to the questions she posed "would be indicative that would establish a hazard of incrimination for him." R. 159, ll. 2-5. She further

held "his silence [was] certainly justified in this matter" because "if he were allowed to testify, that he would incriminate himself." R. 159, ll. 5-8. She concluded that even if "those specific single questions may not be overtly incriminating" they "would be incriminating through any further confessional proof." R. 159, ll. 8-11. Thus, she permitted Bennett to assert his Fifth Amendment right to silence *in toto* and prohibited Appellant from calling him as a witness. R. 159, ll. 11-13.

Discussion

No person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend V.[4] "The essence of this basic constitutional principle is the requirement that the state which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips." Estelle v. Smith, 451 U.S. 454, 462 (1981); see also Kastigar v. United States, 406 U.S. 441, 444 (1972) (explaining the privilege "reflects a complex of our fundamental values and aspirations, and marks an important advance in the development of our liberty"). The privilege is "accorded liberal construction in favor of the right it was intended to secure," and may be claimed when a witness "has reasonable cause to apprehend danger from a direct answer." Hoffman v. United States, 341 U.S. 479, 486 (1951). "The settled law provides that the privilege extends not only to answers that would themselves support a criminal conviction, but also to answers furnishing a link in the chain of evidence needed to prosecute an individual." Grosshuesch v. Cramer, 377 S.C. 12, 659 S.E.2d 112 (2008) (citing Hoffman, 341 U.S. at 486); see also Maness v. Mayers, 419 U.S. 449, 461 (1975); United States v. Pardo, 636 F.2d 535, 544 (D.C. Cir. 1980) (explaining that "a witness does not lose his Fifth Amendment right to refuse to

[4] The South Carolina Constitution also provides for protection against compelled self-incrimination. S.C. Const. art. I, § 12.

testify concerning other matters or transactions not included in his conviction or plea arrangement").

"The privilege against self-incrimination, one of our most cherished fundamental rights, is jealously guarded by the courts." North River Ins. Co., Inc. v. Stefanou, 831 F.2d 484, 486 (4th Cir. 1987). Examining the validity of the assertion of the privilege, the Sixth Circuit held a valid assertion "exists where a witness has reasonable cause to apprehend a real danger of incrimination." In re Morganroth, 718 F.2d 161, 167 (6th Cir. 1983). "While the privilege is to be accorded liberal application, the court *may* order a witness to answer if it *clearly* appears that he is mistaken as to the justification for the privilege in advancing his claim as a subterfuge." Id. (emphasis added).

For a court to "overrule the claim of privilege, it must be [p]erfectly clear from a careful consideration of all the circumstances, that the witness is mistaken in the apprehension of self-incrimination and the answers demanded [c]annot possibly have such tendency." Commonwealth v. Carrera, 227 A.2d 627, 629 (Pa. 1967). "[I]f the witness, upon interposing his claim, were required to prove the hazard [of self-incrimination] in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee." Hoffman, 341 U.S. at 486.

According to the South Carolina Supreme Court, "[i]n determining whether the information is incriminating," there are "at least two categories of potentially incriminating questions." Grosshuesch, 377 S.C. at 23, 659 S.E.2d at 117. "First, there are questions whose incriminating nature is evident on the questions' face in light of the question asked and the surrounding circumstances." Id. at 23, 659 S.E.2d at 117-118. "Second, there are questions which though not overtly incriminating, can be shown to be incriminating through further

contextual proof." Id. at 23, 659 S.E.2d at 118. A court must answer "whether there is a reasonable possibility that requiring a party to answer a certain question would provide information that could be used against the party in a criminal proceeding or would lead to the discovery of such information." Id. at 24, 659 S.E.2d at 118. "[T]he guiding principle in a self-incrimination inquiry is the objective reasonableness of a witness's claimed fear of future prosecution." Id. at 26, 659 S.E.2d at 119.

Presence at the scene of a crime

In ruling that Bennett could invoke his right against self-incrimination and refuse to testify, Judge Murphy determined that Bennett was exposing himself to criminal liability by admitting his presence at the scene of a crime. As an initial matter, Bennett did not admit to being present at the scene of a crime. Bennett admitted to being present when Appellant acted in self-defense against Baxter's unprovoked attack. As Bennett explained, Appellant acted in self-defense. Additionally, merely being present at the scene of a crime is not incriminating – even under an accomplice liability theory. State v. Johnson, 291 S.C. 127, 129, 352 S.E.2d 480, 482 (1987). "'Mere presence at the scene is not sufficient to establish guilt as an aider or abettor.'" State v. Mattison, 388 S.C. 469, 480, 697 S.E.2d 578, 584 (2010) (quoting State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 272 (1987)). The trial judge erred in finding Bennett's mere presence at the scene of a crime was self-incriminating. Further, according to Bennett, there was no crime. While Bennett did not provide many details, he was clear that Baxter attacked Appellant and that Appellant acted in self-defense. Thus, there was no crime for which Bennett was present as Appellant's conduct was justified as self-defense.

Attempting to purchase marijuana

Likewise, Judge Murphy's determination that Bennett's testimony that he went to Baxter's residence to purchase marijuana exposed him to criminal liability was legal error. Bennett did not admit to buying or possessing marijuana; thus, the only consideration left is whether his testimony incriminating him in attempting to purchase marijuana in violation of section 44-53-370 of the South Carolina Code. Under South Carolina law, it is unlawful for a person to attempt to purchase a controlled substance. S.C. Code Ann. § 44-53-370(a)(1).

"Generally, the mens rea of an attempt crime is one of specific intent such that the act constituting the attempt must be done with the intent to commit that particular crime." State v. Reid, 383 S.C. 285, 292, 679 S.E.2d 194, 198 (Ct. App. 2009) (citing State v. Sutton, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000)). "'In the context of an attempt crime, specific intent means that the defendant consciously intended the completion of acts comprising the choate offense.'" Id. (quoting State v. Nesbitt, 346 S.C. 226, 231, 550 S.E.2d 864, 866 (Ct. App. 2001)). Additionally, "the defendant's specific intent" must be "accompanied by some overt act, beyond mere preparation, in furtherance of the intent." Id.

In Reid, this Court discussed how "[c]ourts have struggled to determine the point at which conduct moves beyond the preparatory stage to the perpetration stage." Id. at 293, 679 S.E.2d at 198. Further, this Court explained that "[c]ases in South Carolina do not clearly establish any absolute guiding test for our trial courts to employ in resolution of this issue." Id. After discussing other tests used by other courts, this Court looked to *dicta* from the South Carolina Supreme Court in State v. Quick, 199 S.C. 256, 259-260, 19 S.E.2d 101, 102-103 (1942). Id. at 296, 679 S.E.2d at 199. This Court relied upon the Supreme Court's notation that "'preparation consists in devising or arranging the means or measures necessary for the

commission of the crime; the attempt or overt act is the direct movement toward the commission, after the preparations are made.'" Id. (quoting Quick, 199 S.C. at 260, 19 S.E.2d at 103). Further, the Supreme Court, as explained by this Court, "went on to articulate 'the act' is to be liberally construed, and in numerous cases it is said to be sufficient that the act go far enough toward accomplishment of the crime to amount to the commencement of its consummation." Id. (quoting Quick, 199 S.C. at 259, 19 S.E.2d at 102). Finally, this Court noted that according to the Supreme Court, "'the act need not be the last proximate step leading to the consummation of the offense.'" Id. (quoting Quick, 199 S.C. at 259, 19 S.E.2d at 102).

According to this Court, "no definite rule as to what constitutes an overt act for attempt purposes can safely be laid down and each case is dependent upon its particular facts and the inferences which the jury may reasonably draw therefrom." Id. at 298, 679 S.E.2d at 200. The only self-incriminating evidence gained from Bennett's testimony was that he went to Baxter's house to buy marijuana. There was no evidence from his testimony that he acted in any way in furtherance of that act. At most, his testimony indicated that his purpose in going to Baxter's house was to purchase marijuana, but that is far cry from an overt act. Perhaps going to Baxter's home could be preparation as it may be "arranging the means or measures necessary" to purchase the marijuana, but it was not a direct movement toward the commission of a crime. In light of Baxter's testimony that he did not sell drugs and the officer's testimony that less than one ounce of marijuana was found in Baxter's residence, there seems to have been no pre-arrangement made by Bennett in hopes of buying marijuana from Baxter – there was none to buy and he did not sell it.

The trial judge erred in finding Bennett's testimony would expose him to criminal liability. Being merely present at the scene of a crime is not a crime, and there was no evidence

of an overt act for an attempt to purchase marijuana. Quite simply, the judge erred, and Appellant was denied the opportunity to present testimony from an eyewitness that Appellant acted in self-defense.

CONCLUSION

Appellant respectfully requests this Court reverse his conviction and remand for a new trial.

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ATTORNEY FOR APPELLANT

This 24th day of October, 2019.

CERTIFICATE OF COUNSEL

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

October 24, 2019

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