STATE OF SOUTH CAROLINA
In the Court of Appeals

ORIGINAL

Appeal from Barnwell County
The Honorable Doyet A. Early, III, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

Demontay Markeith Payne,

APPELLANT

Appellate Case No. 2017-002014

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

I. Did the trial judge err in failing to instruct the jury on voluntary manslaughter where (1) the undisputed evidence showed that Appellant and the deceased were in a heated argument immediately prior to the shooting, (2) there was additional evidence that the deceased pulled a gun and shot at Appellant immediately prior to Appellant returning fire, and (3) the judge based his decision not to instruct the jury on the lesser-included offense because Appellant did not remember the content of the argument?

II. Did the trial judge err in failing to tailor the self-defense instruction to the evidence presented, including that if a defendant is justified in firing the first shot, the defendant is justified in continuing to shoot until it is apparent that the danger to his life and body has ceased?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

I. Was the trial judge correct in declining to provide a voluntary manslaughter jury charge when Appellant (1) did not testify that he acted under the heat of passion during the shooting, (2) testified that he fired his gun in self-defense, (3) demonstrated that he could not recall whether or not an argument ensued immediately before the gunfire, and (4) could not recall the topic of the possible argument, if an argument occurred at all?

II. Did the trial judge commit prejudicial error in refusing to instruct the jury as requested with language that Appellant, if deemed to be acting in self-defense, is justified to continue shooting until the apparent danger has ceased when Appellant's own defense testimony demonstrated that he did not know whether he had shot victim, was firing behind his back while attempting to run away, and where such an instruction would constitute an charge upon the facts?

STATEMENT OF THE CASE

Appellant was indicted for murder by a Barnwell County Grand Jury (2017-GS-06-00066). Assistant Solicitors David Miller and Jackson Cooper represented the State at trial, and Defendant Demontay Markeith Payne (hereinafter "Appellant") was represented by attorney Joshua Koger, Esquire (hereinafter "Defense Counsel"). (R. p. 1). Prior to trial, Appellant filed a Motion to Dismiss pursuant to the Protection of Persons and Property Act, for which a hearing was conducted on August 22-23, 2017. The trial court heard testimony and concluded that the testimony of witnesses differed considerably, such that he could not find by preponderance of the evidence that Appellant was entitled to protection under the Act.

The case was called to trial before the Honorable Doyet A. Early, III, and a jury, on September, 18-19, 2017. (R. p. 1). At the conclusion of trial the jury returned a guilty verdict against Appellant for murder. Judge Early sentenced Appellant to thirty-five (35) years imprisonment with credit for time served. (R. p. 240). This appeal follows.

STANDARD OF REVIEW

"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). An abuse of discretion "means nothing more or less than that the ruling of the trial court was without reasonable factual support, resulted in prejudice to the rights of appellant, and therefore, in the circumstances, amounted to error of law." *Bridges v. Wyandotte Worsted Co.*, 239 S.C. 37, 40, 121 S.E.2d 300, 302 (1961). A jury charge which is substantially correct and covers the law does not require reversal. *State v. Otts*, 424 S.C. 150, 155, 817 S.E.2d 540, 543 (Ct. App. 2018), reh'g denied (Aug. 16, 2018), cert. granted (Dec. 13, 2018), cert. dismissed as improvidently granted, No. 2018-001671, 2019 WL 1783684 (S.C. Apr. 24, 2019). "In reviewing jury charges

for error, [the appellate court] must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011). The denial of a requested jury charge is subject to harmless error analysis, and both error and prejudice must be demonstrated in order to warrant reversal. *State v. Commander*, 396 S.C. 254, 270-71, 721 S.E.2d 413, 422 (2011). *State v. Battle*, 408 S.C. 109, 116, 757 S.E.2d 737, 740 (Ct. App. 2014).

STATEMENT OF FACTS

The Crime

On the evening of May 23, 2015, Appellant was on the porch of 59 W. Estates Road with other individuals, including Stacey Hartzog, Alicia Youmans, Tyeisha Youmans, and Yvette Walker. (R. p. 104, line 18 through 105, line 11; p, 14, lines 14-21; pg. 16). While the group were outside on the porch, Devante Odom (hereinafter "Victim") came to the home. Victim asked to buy a couple of loose cigarettes from Alicia Youmans and soon after "had words" with Appellant. None of the witnesses were able to recall the substance of the argument, and the argument ended with Victim leaving 59 W. Estates and walking up to the intersection of W. Estates Road and E. Lane. (R. p. 17, lines 6-21; p. 19, lines 9-11). Soon after Victim left, Appellant got in his car and drove up to the same intersection, adjacent to his home located at 25 W. Estates. (R. p. 19, lines 3-8).

Appellant drove up to the corner to exchange more words with Victim, and then got out of the car and continued to have words with Victim. He appeared to turn away and head back to his car, but then turned back around and began shooting at Victim with .380 caliber Hi-Point pistol. Victim was struck by Appellant's gunfire four times. Victim ran away toward 550 E. Lane, but fell in his efforts. Although no firearm was recovered, a single .40 caliber casing was

found next to Victim's body, suggesting that he fired his own pistol once in his efforts to escape. (R. p. 58, lines 1-15). Victim died from his wounds shortly thereafter.

Investigation and Evidence Presented at trial

Testimony of Alicia Youmans

Ms. Alicia Youmans, (hereinafter "Alicia") testified that she grew up in the same neighborhood as both Victim and Appellant, and that Victim was a close friend of her brother's. (R. p. 11, line 20 through p. 12, line 5). She testified that she recalls the events of May 23, 2015, when Victim was murdered. (R. p. 12, lines 6-8). She testified that at the time she was on the porch at 59 W. Estates Road. She explained the layout of the area and noted that the two main streets in relation to the murder were W. Estates Road and E. Lane. (R. p. 13-14). Alicia testified that she, her sister Tyeisha Youmans (hereinafter "Tyeisha"), Yvette Walker, Mr. Stacey Hartzog, and Appellant were all at 59 W. Estates Road prior to Victim's arrival. (R. p. 14, lines 14-21; pg. 16). Alicia testified that Victim came up to the house and asked her for a couple cigarettes. (R. p. 16, lines 6-12). She testified that she has known both Appellant and Victim for many years and that she was friendly with both of them. (R. p. 26, line 21 through p. 27, line 9).

A verbal dispute began between Victim and Appellant, but Alicia could not recall what the argument was about. (R. p. 16, line 15 through p. 17, line 4). She testified that the argument ended when Victim walked away, after which Appellant got into his car and drove off. (R. p. 17, lines 5-7).

Alicia testified that both individuals headed toward E. Lane, and that she was able to see them clearly due to the street light on the corner. (R. p. 19-20). She testified that she remained on the porch once Appellant left, but that Tyeisha and Yvette both went inside. (R. p. 20, lines 11-15). Specifically, Alicia testified at trial, "Mr. Payne drove his car up to E. Lane, him and

[Victim] had another verbal dispute or whatever, he got out of his car, they were still arguing or whatever, and he turned to go back to his car. I'm not sure if something was said or what happened, but he – when he turned back around to face Mr. Odom, he began shooting at him." (R. p. 20, lines 19-25).

She then further clarified her testimony by stating that she could see them arguing back and forth before Appellant got out of his car. (R. p. 21, line 12-16). When Appellant exited the vehicle he continued to argue with Victim. Appellant turned to go back to the car but did not get all the way there before turning back around and shooting at Victim. (R. p. 21, line 19 through p. 22, line 5). Alicia testified that Victim then ran away toward 550 E. Lane. (R. p. 22, lines 6-24). Alicia testified that she did not see Victim with a gun. (R. p. 26, lines 1-3). She realized that Victim had been shot when she saw Victim fall to the ground and wave his hand in the air. (R. p. 23, lines 17-23). Alicia testified, and identified via photograph exhibits, that there are multiple streetlights between 59 W. Estates and the location of the shooting; this lighting allowed her to see clearly despite the crime occurring at night. (R. p. 27, line 10 through p. 28, line 13).

Alicia called 911 and reported the shooting, but she did not provide much detail during her first phone call with the dispatch operator. However, she spoke with 911 services again a few minutes later and identified Appellant as the shooter, and described the vehicle and direction Appellant used when driving away from scene of the crime. (R. p. 24, line 2 through p. 25, line 1). Approximately 30 to 45 minutes after the shooting occurred, Alicia did as she was instructed by the dispatch operator and got in touch with one of the responding officer's on the scene and provided a written witness statement. (R. p. 25, lines 2-23; p. 33, lines 14-17).

On cross-examination, Alicia testified that Appellant had started the argument with Victim, and believed that the argument started when Appellant lifted his shirt to display his gun

to Victim as he arrived. (R. p. 29, lines 15-18; p.33, lines 2-10). Defense Counsel identified and introduced Exhibit 1 (Alicia Youmans' written statement) into evidence and had Alicia read her statement aloud. (R. p. 35-36). In doing so, she states:

> On May 23rd, 2015, I was sitting outside at W. Estates talking with Montay Payne when Vante Odom came up walking and asked me for two cigarettes. As I was getting them, he and Montay Payne had some exchanged words. I didn't hear what they were saying. I only heard Vante Odom state to Montay Payne you're going to have to show me you're going to kill me. Devante walked up the road and Montay Payne got into his car and drove up the road. H stopped, they exchanged words. Montay got out of his car swinging his arms. After that they got real close to each other, and that's when Montay Payne pulled out his gun and shot Devante Odom. He jumped back into his car and left.

(R. p. 35, lines 11-25). Alicia admits on cross-examination that her written statement does not include details about a gun being in a waist band or that Appellant lifted his shirt to show his gun. (R. p. 36, lines 4-7; p. 37, lines 9-12). She also acknowledged that she did not provide any information about the shooter to 911 services when she called the first time. (R. p. 39, lines 6-10).

On re-direct, Alicia agreed that she had just watched one of her friends kill another friend, and she agreed that during the first call, the 911 dispatch operator told her that help was coming and to hang up the phone. (R. p. 41, lines 11-15; p. 41, lines 1-8). Alicia missed the initial call-back from the dispatch operator, but quickly called her back and provided the information regarding Appellant's involvement in the crime. (R. p. 41, line 16 through p. 42, line 3). She confirmed that she even had to step away from the crowd of people before she could speak with the 911 operator to give the requested information. (R. p. 42, lines 4-8). Alicia testified that she spoke with the police in person that night at her home, despite not wanting to,

because she felt like it was what she had to do, and what she needed to do. (R. p. 42, lines 11-20).

Testimony of Brandy Williams

Brandy Williams (hereinafter "Ms. Williams") was barbequing with her family on May 23. (R. p. 46). She testified that she heard between seven and nine gun shots. (R. p. 46, lines 19-21). Ms. Williams testified that she was third to find the victim, with the first two being a larger set woman and small framed male – she did not know either individual. She noticed that victim had a wound to his upper left side and did not see a weapon near Victim. (R. p. 46-47; p. 49, lines 2-5). Ms. Williams testified that when she arrived the other individuals stated, "they didn't know who shot him, said somebody got out the car, shot him, and they got back in the car and they left, and they didn't know which direction he went or the person went, they just know it could have been like a black or blue Chevy Impala." (R. p. 47, lines 16-21). Ms. Williams testified that she was certified in CPR and performed CPR on Victim for approximately thirty minutes with the assistance of another bystander. (R. p. 48, lines 15-20; p. 49, lines 14-21). She did not see a weapon near Victim during her assistance. (R. p. 49, lines 2-5). On cross-examination, Ms. Williams testified that it was 30 minutes before EMS arrived and that, as time progressed, as many as 10-15 people were around the body. (R. p. 49-50).

Testimony of Investigator James Andrew Chavis

Investigator Chavis was the on-call investigator for Barnwell County Sheriff's office at the time of the shooting. (R. p. 52). He testified that the Victim had already been taken to the hospital by the time he arrived. (R. p. 53, lines 1-3). When he arrived, he met with road deputy responding officer, Sergeant Johnson, and then began processing the scene, which included

photographing the scene and marking evidence. (R. p. 53, lines 1-25).[1] He also commented that his job would include speaking with witnesses. (R. p. 54, lines 22-25).

Investigator Chavis identified Exhibit 8 as six .380 caliber shell casings which were found in the yard at the crime scene. (R. p. 56, lines 4 through p. 57, lines 13). He testified that all six casings were found close together within a 6-8 foot area, and all were located on the 550 E. Lane side of the road or in the edge of the front yard of 550 E. Lane. (R. p. 57, lines 12-25). Investigator Chavis testified that Exhibit 10 was a .380 projectile that was removed from Victim's body during autopsy. (R. p. 61, lines 15-19). Investigator Chavis also identified Exhibit 9, a .40 caliber casing, and testified that it was found near where Victim had been laying. (R. p. 58, lines 1-15).

On cross-examination, Investigator Chavis agreed that without the photographs from the crime scene, he was giving an estimation as to exactly where the .40 caliber round was recovered. (R. p. 63, lines 6-11). He also confirmed that he asked Officer Scott Peterson to speak with Alicia Youmans, as he was tied up processing the crime scene. (R. p. 66, lines 15-17). Investigator Chavis agreed that the crime scene remaining open for thirty minutes prior to arrival of law enforcement left open the opportunity for contamination, but testified that there were no bullet casings collected from the yard or street-side of the corner of W. Estates road and E. Lane. (R. p. 67, lines 3-7; p. 67, lines 14-21).

[1] Deputy Chavis testified that he was later made aware that the photographs taken at the crime scene were lost, and Deputy Chavis could not explain how this happened. (R. p. 55, lines 12-25).

Testimony of Scott Peterson

Chief investigator Scott Peterson testified that he was not working on the night of May 23, 2015, but was called out to the crime scene to help with crowd control. However, by the time he arrived the crowd had dispersed, so he offered his help with the investigation. (R. p. 91-92) Investigator Peterson assisted Sergeant Johnson and recalls speaking to people at the Payne residence located at 25 W. Estate Road. (R. p. 93, lines 5-8). Appellant was not present at the time. (R. p. 96, lines 17-21). He also conducted the interview with Alicia Youmans and took her written statement. (R. p. 93, line 18 through p. 94, line 8). Investigator Peterson testified that he asked her to tell him what she saw, tell him everything, and then asked her if she'd provide a written statement, which she did. (R. p. 94, lines 1-8). The oral statement was recorded by video camera via Investigator Peterson's body-cam. (R. p. 94, lines 9-13). He identified Exhibit 1 as Alicia's written statement from that night. (R. p. 94, lines 21-25). Investigator Peterson testified that the oral conversation with Alicia lasted approximately ten minutes and that there were details discussed verbally that were not put in the written statement; he commented that this was normal. (R. p. 95, lines 3-14; 99, lines 16-21). He testified on cross-examination that he did not seek a supplemental statement from Alicia. (R. p. 100, line 15 through p. 101, line 5).

Investigator Peterson testified that to his knowledge no one else actually saw what happened; Alicia Youmans was the only eye-witness. (R. p. 96, lines 15-25). He confirmed the testimony of Investigator Chavis, noting that the shell casings were located on the side of the road adjacent to 550 E. Lane. (R. p. 97, lines 10-15).

Investigator Peterson recalled that Appellant turned himself in to law enforcement in Allendale about one week after the incident. (R. p. 96, lines 6-14). He testified that during the

week before Appellant turned himself in, he did not call to inform police that he was defending himself. (R. p. 101, lines 12-17).

Testimony of Officer Brian Johnson

Officer Johnson testified that he believes he was the first officer to respond to the scene. (R. p. 142, line 7-9). He testified that there were at least twenty people at the scene when he arrived, and described the scene as "chaotic". (R. p. 142, line 10-23). He testified that initially there was some confusion about exactly where the crime scene was. (R. p. 143, lines 2-6). He testified that he talked to some people that were sitting on a porch on an adjacent property, but that they did not see anything. (R. p. 143, lines 23-25).

Officer Johnson testified that he spoke back with dispatch, and dispatch gave him the name of Alicia Youmans as an eye-witness. Officer Johnson called Alicia Youmans and then asked Investigator Peterson to contact her and obtain a statement. (R. p. 144, lines 1-6).

Officer Johnson agreed that he had information in his preliminary investigation which demonstrated that Tyeisha Youmans was on the scene; he believed that this information came from Jerome Creech. (R. p. 144, lines 9-16). He testified that he did not get a chance to speak with Tyeisha as the case was ultimately handed over to the investigators. (R. p. 145, lines 7-12). He testified that Jerome Creech was also identified as a potential witness, and a brief discussion with him suggested that Tyeisha and one other female were actually beside Victim immediately prior to the shooting occurring. (R. p. 146, lines 8-16). Officer Johnson was unaware if anyone else followed up with Mr. Creech. (R. p. 146, lines 17-18).

Testimony of Tyeisha Youmans (Defense case-in-chief)

Tyeisha Youmans (hereinafter "Tyeisha") testified that she recalls the events of May 23rd, 2015. (R. p. 104, lines 12-14). She testified that she was at 59 W. Estates with her sister Alicia,

Stacey Hartzog, Appellant, and her Aunt Yvette. (R. p. 104, line 18 through 105, line 11). She testified that Appellant was calm and in a good mood, and had driven to the residence that evening. (R. p. 107, lines 1-9). (R. p. 108, lines 13-17).

Tyeisha testified that she did not know anything about Appellant lifting his shirt to show a firearm when Victim arrived. However, she also testified that she did not notice Victim's arrival until she heard Appellant and Victim "having words" with each other. (R. p. 111, lines 7-10; p. 109, line 6 through p. 110, line 14). She heard Appellant and Victim arguing, but could not remember what was said in the argument and commented that it only lasted a couple of minutes. (R. p. 109, lines 20-23; 110, lines 15-19). Tyeisha testified specifically, "I mean, they wasn't necessarily arguing, arguing, but they was just having words back and forth." (R. p. 110, lines 10-14).

Tyeisha recalled hearing Victim say he was going to walk down the road – to the top of the road to the intersection of E. Lane and W. Estates Road). (R. p. 110, line 22 through p. 111, line 2). She testified that Appellant then got back into his car, and she assumed he intended to go home, which was next door to where they were. (R. p. 111, lines 18-25). She testified that Victim was at the top of the road and that Appellant had walked into the road (E. Lane) after driving back to his home. Tyeisha testified that Victim and Appellant appeared to continue having words with each other. (R. p. 113, lines 2-15).

At this point, Tyeisha testified that she saw Appellant swing at Victim in an effort to punch him. (R. p. 113, lines 18-21). She testified that Victim moved back to avoid getting hit, but then pulled out his gun. According to Tyeisha, Appellant backed up with his hands gesturing like he did not want to fight, but was still having words with Victim. (R. p. 114, lines 21-24). She testified that she could see the gun in Victim's hand and described it as "kind of bright". (R.

p. 114, line 8-18). Tyeisha testified that Appellant turned to head back to 25 W. Estates, and Victim trailed behind him some, which suggested to her that they were still having words. (R. p. 114, line 24 through p. 115, line 9). She testified that Appellant reached his yard before shots were fired. (R. p. 115, lines 12-18). On cross-examination, Tyeisha testified that all of this began in the road and then moved to the grass of the yard of 25 W. Estates; she then described it as being toward the driveway that comes out into E. Lane (R. p. 131, line 5-132, line 4).

Tyeisha testified that Victim shot at Appellant, and Appellant turned back around to face Victim and shot back. (R. p. 129, lines 17-25). She testified that Victim fired first, but Appellant started firing immediately after, noting that it was "consecutive". (R. p. 117, lines 5-6). Regarding how she knew Victim fired first, she testified, "Cause I could see, like, whenever he fired, I could see it coming from, like, his direction – like, whenever he was shooting the gun." (R. p. 117, lines 8-12). She testified that in the middle of the shooting, Victim turned to run behind two trailers located on E. Lane to get away. (R. p. 117, lines 18-22; 118, lines 6-15). When Appellant stopped shooting he got into his car and left. (R. p. 118, lines 21-24). She testified that she thought Victim had run between the trailers, but he had fallen to the ground and that she could hear him gasping for air. (R. p. 118, lines 21-24). She testified that she viewed the shooting from the 59 W. Estates address. (R. p. 121, lines 6-10). On cross-examination, she maintained that she could hear Victim gasping for air, despite agreeing that 59 W. Estates was approximately 100 yards away. (R. p. 126, line 11 through p. 127, line 12).

Tyeisha testified that she went to where Victim fell and was one of the first few people to reach him. (R. p. 119, lines 9-17). She testified that Victim's gun was right beside him when she arrived. (R. p. 119, lines 18-23). Tyeisha testified that she stayed for approximately 10-15

minutes, did not stay long enough to see CPR being performed on Victim, and was not familiar with Brandy Williams. (R. p. 119, line 24 through p. 120, line 13; 121, lines 3-5).

On cross-examination, Tyeisha admitted to giving inconsistent sworn testimony about whether she saw someone administering CPR. (R. p. 124, lines 11-19). Ms. Tyeisha Youmans' pretrial testimony was read aloud by the Solicitor: "People was walking around the body?" "It was, like, a few people around, I know I was one of them, who was right there close to him. "It was probably, like, two other people, because one other person was trying to put some pressure on his wounds." "And the other one, she was trying to do CPR." (R. p. 125, line 18 through p. 126, line 3). She agreed that her earlier testimony indicated that someone was performing CPR while she was present. (R. p. 126, lines 4-9).

Tyeisha testified that she left just before the police arrived, did not tell the police what she claimed she saw, did not tell anybody what she saw happen, and did not tell anyone what she saw until meeting with the parties' attorneys a month before trial. (R. p. 133, line 12 through p. 134, line 3). She testified that she and Appellant were very close to each other, that she visited him in prison, spoke with him on the phone while he was incarcerated, and that their conversations would end with "I love you". (R. p. 134, line 4-22). She admitted that she did not have that sort of relationship with Victim. (R. p. 134, lines 23-25). She testified that despite her alleged knowledge of the incident, and the contradiction of the murder charges against Appellant that she could provide, she did not go to police because she did not want to get involved in it. (R. p. 135, lines 1-12). Tyeisha testified that she found out that defense counsel wanted to speak with her when he texted her and called her, but she had no idea how he obtained her contact information. (R. p. 136, line 22 through p. 137, line 7).

Testimony of Demontay Payne

Appellant testified that he lived at 25 W. Estates (testimony demonstrated that Appellant lived with his grandmother). (R. p. 147, lines 19-20; p. 154). He testified that he was sitting down with Tyeisha Youmans, Alicia Youmans, and Yvette Walker on May 23, 2015, at 59 W. Estates. (R. p. 149, lines 2-12). Appellant testified that he was listening to the girls talk, and had driven over from 25 W. Estates about 20 minutes earlier when Victim walked up and asked to buy two cigarettes from Alicia Youman. (R. p. 150, lines 5-23; p. 151, lines 15-18). Appellant testified that he remembers Alicia going into the house to get the cigarettes. (R. p. 152, lines 5-6).

Appellant testified that Victim said something to him, but he could not remember what was said, only that they then engaged in an argument. (R. p. 152, lines 10-14). Appellant testified specifically that he was calm during the exchange. (R. p. 152, line 20-24). He testified that Victim never received his cigarettes, and that the girls told him to leave; after which Victim walked up to the top of the road beside Appellant's yard, at the corner of E. Lane and W. Estates. (R. p. 153, lines 4-17). Appellant testified that the girls told him "not to follow" Victim, and he said he was not going to. He then claimed that he left and drove home next door to his grandmother's house, where he lives. (R. p. 154, lines 9-24).

Appellant testified that as he was getting out of the car when Victim came toward him and shot at him. (R. p. 155, lines 3-11). He testified that he saw Victim coming, they exchanged words, and then Victim fired at him. *Appellant explicitly testified that he fired back in self-defense.* (R. p. 155, lines 12-24). *He testified specifically that he was backing up while shooting, was not paying attention to where he was shooting, and does not recall how many times he fired.* (R. p. 156, lines 5-21). On cross-examination, Appellant reiterated the manner and reason for

which he shot at victim, stating "When you're backing up not looking, you can't see who you're shooting at or what you're shooting , you just know you're shooting to get someone away from you or anything that's firing at you away." (R. p. 164, lines 15-20).

Appellant testified that Victim's gun was chrome and black. He did not see where Victim ran to (as he was looking back running away). However, he did see Victim on the ground as he jumped into his car and pulled off. (R. p. 157, lines 2-8). Appellant testified that he drove off because he was scared. (R. p. 157, lines 6-8). Appellant testified that he turned himself in to Allendale Police Department the day after he learned of his arrest warrant. (R. p. 157, line 11 through p. 158, line 20). He testified that he had no other recourse than to fire back as he did. (R. p. 159, lines 6-15).

During cross examination Appellant admitted that in prior statements he testified that he knew Victim had a gun on him, as he saw the bulge in the side of Victim's pants. (R. p. 160, lines 15-20). Appellant testified that despite the argument leading to him shooting Victim just 5 minutes later, he could not recall the topic of their argument. (R. p. 160, line 24 through p. 161, line 6). Appellant claimed that he was calm, and that Victim was out of control. (R. p. 161, lines 16-18). Appellant was asked: if he was calm and Victim had left, why did the girls need to tell him not to follow Victim? Appellant was unable to provide a reasoned response, and stated simply "because he went to the top of the road and stayed there." (R. p. 161, line 23 through p. 162, line 4).

During cross-examination, the distance between Victim and Appellant at the time of the shooting was described in the courtroom by the distance between Assistant Solicitor. Miller and

Appellant, but not made clear for the record. (R. p. 165, lines 13-24).[2] Appellant testified that he did not get hit, and does not recall the car being hit either. (R. p. 166, lines 2-13).

On cross-examination, Appellant was asked "when did you have the verbal confrontation with [Victim] in the middle of E. Lane?" Appellant responded he did not remember, but confirmed that it happened. (R. p. 167, lines 7-15). He testified just moments later that he was not sure if the argument on E. Lane actually happened or not. (R. p. 167, lines 22-24). He likewise testified that he could not remember the content of the argument or the topic of the argument. (R. p. 167, lines 16-21). He also testified that he does not remember swinging at Victim. (R. p. 167, lines 13-15). Ultimately, concerning the argument which occurred at E. Lane, Appellant testified "I don't remember if it happened or not. It was two years ago." (R. p. 167, lines 16-24). Appellant admitted that he was carrying a gun on him that night, a .380 Hi-Point, likely had it in his pocket, and claims he was carrying it because he had received threats from other individuals he use to hang out with. (R. p. 168, lines 1-18). At the end of Appellant's cross-examination, Appellant testified that he did not know of a problem between he and Victim prior to the shooting, and conceded only that Victim "probably had a hostile – hostile feeling about me." (R. p. 168, line 20 through p. 169, line 4).

[2] This examination began when the Assistant Solicitor asked how far away Victim was when he fired his weapon. Appellant responded "He probably had been a little farther than you, a little father than you." Appellant then again confirms that he fired while running away. The record lacks any reference to how far away the Assistant Solicitor was. – Unless the Assistant Solicitor was standing *immediately* in front of Appellant on the witnesses stand, this testimony would conflict with the forensic testimony wherein the stippling on Victim suggested that his left chest gunshot wound was received from a distance of 18inch to 2 feet away. (R. p. 165-166).

Forensic Evidence

Testimony of Tyler Sturkie

Mr. Sturkie is a SLED forensic scientist in the trace evidence department. (R. p. 69, lines 2-7). Mr. Sturkie testified that he conducted the test for the gun shot residue lifts taken from Victim's hands. (R. p. 69, lines 9-10). The tests for both of Victim's hands were positive for gunshot residue. (R. p. 74, line 5-12). Mr. Sturkie testified that gunshot residue tests can be positive in one of three ways: either the hand tested fired the weapon, was in close proximity to the weapon, or touched an object that had gunshot residue on it. (R. p. 74, lines 15-19).

Testimony of James Green

SLED forensic firearms examiner, James Green, concluded that only Hi-Point Firearms could match the rifling characteristics from Exhibit 10, and that all of the shell casings identified as Exhibit 8 were fired from the same gun. (R. p. 82, lines 11-17; p. 88, lines 1-7). Mr. Green also testified that the information accompanying Exhibit 9 (the .40 S&W caliber casing) indicated that it was recovered from beside victim's body. (R. p. 89, lines 20-24).

Testimony of Dr. Janice Ross

Dr. Ross performed Victim's autopsy and found evidence of four gunshot wounds. (R. p. 179, line 22 through p. 180, line 13). One gunshot struck the upper left chest, from front to back at a slightly downward angle, and exited the left back; this gunshot also presented "soot and stippling around it, which means that the barrel of the gun was closer to [Victim's] skin that the other wounds". (R. p. 182, lines 10-14; p. 184, lines 2-7). Dr. Ross estimated that based on the soot and stippling, the gunshot occurred between 18 inches and two feet. (R. p. 185, lines 16-24). The second gunshot entered through the right arm and traveled through to the right chest. (R. p. 182, lines 15-21). The third gunshot entered the left lower back, striking the aorta and pancreas,

and was recovered from underneath the left abdomen. (R. 182, line 24 through p. 183, lines 3). The fourth gunshot entered from the back right calf and exited out the front of the right calf. (R. p. 183, lines 4-6).

ISSUES AS THEY WERE PRESENTED AT TRIAL

With consent of the parties, and for purposes of witness scheduling, the trial court took up discussion of requested jury charges before the conclusion of evidence. Defense counsel requested a charge for voluntary manslaughter, arguing that he believed, "there's been testimony, numerous testimony, about – of course it's a jury issue, about interaction between the two, and we would ask that you consider allowing the voluntary manslaughter charge." (R. p. 171, line 17-21). The state objected, arguing that there was no sufficient legal provocation for the lesser included offense. (R. p. 171, lines 9-16). Defense counsel also requested a self-defense charge which included language that once an individual is justified in shooting he may continue to shoot until the threat has ended. (R. p. 170, lines 21-25). This particular charge request was not objected to by the State at trial. The trial court requested law on the voluntary manslaughter issue and recessed for lunch.

Despite the court's requests, defense counsel did not provide any case law supporting its requests for voluntary manslaughter, and only provided cursory argument for the charge, admitting that while the Appellant could not recall the content of the initial argument at 59 W. Estates, there was testimony that it was "somewhat confrontational and not cordial." (R. p. 172, lines 2-13; p. 172, line 21 through p. 173, line 4). The trial court disagreed, finding no basis to charge sudden heat of passion, noting that Appellant testified that he does not remember if the subsequent argument and swinging even happened due to the two years that had passed since the shooting. (R. p. 173, lines 5-13). The trial court concluded that it was a question of law for the

court to determine whether the charge should be given, and in reliance upon *State v. Cook*, the court found no evidence to warrant the charge. (R. p. 174-175). The Court agreed to charge the jury on self-defense, but declined to include the language about "firing until you quit." (R. p. 172, lines 14-20; p. 176).

ARGUMENT

I. Was the trial judge correct in declining to provide a voluntary manslaughter jury charge when Appellant (1) did not testify that he acted under the heat of passion during the shooting, (2) testified that he fired his gun in self-defense, (3) demonstrated that he could not recall whether or not an argument ensued immediately before the gunfire, and (4) could not recall the topic of the possible argument, if an argument occurred at all?

Appellant argues that the trial court erred in denying its request for a voluntary manslaughter charge to the jury on the grounds that there was evidence to support the charge. Specifically, Appellant alleges that there was "undisputed" evidence of a heated argument immediately prior to the shooting, evidence that Victim pulled a gun and shot at Appellant first, and that the judge erroneously based his decision not to give the charge upon Appellant's failure to recall the content of the argument. Appellant's reliance on these points is misplaced for a number of reasons.

Evidence of a "heated argument" immediately before the shooting is most certainly *disputable*, as is the circumstances for which Victim fired his own pistol, and the trial court recognized that Appellant could not even be certain whether an argument occurred at all, to say nothing of his inability to recall the content of the "possible" argument. Moreover, the testimony of witnesses who heard the first "argument" were reluctant to describe it as anything serious, and no one testified that the argument carried the requisite intensity that might support a heat of passion killing. Appellant's own testimony demonstrated explicitly that he only shot back in self-defense, did so to try and get Victim away from him, could not recall the topic of argument,

could not recall if further argument occurred immediately before the shooting, and was retreating and shooting blindly as he attempted to get away. Appellant's claim is meritless as there is simply no evidence to establish that the trial court abused its discretion in failing to find the requisite heat of passion upon legal provocation for voluntary manslaughter.

Voluntary manslaughter is the unlawful killing of another human being in a sudden heat of passion, brought upon by sufficient legal provocation. *State v. Walker*, 324 S.C. 257, 260, 478 S.E.2d 280, 281 (1996). This heat of passion must carry such sway that it would produce an "uncontrollable impulse to do violence." *State v. Cole*, 338 S.C. 97, 102, 525 S.E.2d 511, 513 (2000). It is true that our Supreme Court has ruled that self-defense and voluntary manslaughter are not mutually exclusive, but likewise our Court has found that a self-defense case can lack the necessary evidence to support voluntary manslaughter. *State v. Starnes*, 388 S.C. 590, 698 S.E.2d 604, 608–09 (2010). "Whether a voluntary manslaughter charge is warranted turns on the facts." *Id.* at 597. As a result, the basis for sufficient legal provocation can be difficult to discern, and has led to our courts' frequent struggle to delineate it from evidence sounding in self-defense. *Id.* at 597-598. Our courts have held than unprovoked attack can constitute sufficient legal provocation for a heat of passion killing, but they have also found that a defendant's fear alone is insufficient to satisfy an entitlement to voluntary manslaughter. The evidence must demonstrate that the fear manifested itself in an uncontrollable impulse to do violence. *Id.* at 598-599.

Our courts have also found that mere words, no matter how opprobrious, are insufficient to establish legal provocation without being accompanied by some overt, threatening act which could have produced the necessary heat of passion that would result in an uncontrollable impulse to do violence. *State v. Lowry*, 315 S.C. 396, 399, 434 S.E.2d 272, 274 (1993). A jury instruction

for voluntary manslaughter is only proper if there is evidence to demonstrate *both* a sudden heat of passion *and* sufficient legal provocation under the circumstances presented. *State v. Cole*, 338 S.C. 97, 102, 525 S.E.2d 511, 513 (2000); *State v. Byrd*, 323 S.C. 319, 322, 474 S.E.2d 430, 432 (1996). These elements demonstrate that a voluntary manslaughter charge is only proper if there is evidence to demonstrate that a defendant was subject to a sudden heat of passion, and based on the circumstances, was reasonably put into such a state by sufficient legal provocation. It is the actual heat of passion itself that Appellant neglects to address and satisfy.

There are numerous instances where despite the defendant's request for voluntary manslaughter instructions, the facts of the case lacked evidence showing heat of passion and rendered self-defense as the only proper instruction. First, in *State v. Cole*, the Court concluded that there was "no evidence presented that Appellant was overcome by a sudden heat of passion as would produce an "uncontrollable impulse to do violence." On the contrary, by Appellant's own testimony, he shot at the men to scare them away. The Court found that "Appellant's testimony appears designed to support a charge of self-defense, not heat of passion." *State v. Cole*, 338 S.C. 97, 102, 525 S.E.2d 511, 513 (2000). In *Niles*, our Court recognized that the Appellant's own testimony did not establish that he was overtaken by a sudden heat of passion, but rather that he did not want to hurt victim, shot with his eyes closed, and only wished to scare victim away. As such, his testimony satisfied a self-defense instruction, but not a voluntary manslaughter instruction. *State v. Niles*, 412 S.C. 515, 522–23, 772 S.E.2d 877, 880–81 (2015). Chief Justice Toal's concurring opinion in *State v. Childers* noted that the defendant's own narrative was instructive, and demonstrated that he harbored no criminal intent whatsoever. The facts demonstrated that defendant was shot at first and defendant used his own gun to return fire, and "retreated from the property while firing multiple times over his shoulder." *State v. Childers*,

373 S.C. 367, 374–76, 645 S.E.2d 233, 237 (2007) (Toal, J, Concurring).

In *State v. Starnes*, our Court found that "manslaughter should not be charged simply because a defendant claiming self-defense testifies he was afraid." *State v. Starnes*, 388 S.C. 590, 597, 698 S.E.2d 604, 608 (2010). Our Supreme Court took considerable efforts to distinguish evidence of fear and how it should be evaluated in terms of voluntary manslaughter. Therein, our Court conceded that fear can serve as the basis for voluntary manslaughter, but ruled that inquiry does not stop with the conclusion that fear existed. *Id.* at 598. "Succinctly stated, to warrant a voluntary manslaughter charge, the defendant's fear must manifest itself in an uncontrollable impulse to do violence." *Id.* at 598-99. Lastly, and the authority cited by the trial court in Appellant's case, *Cook v. State* notes that "whether or not the facts constitute a sudden heat of passion is an appropriate question for the court." *Cook v. State*, 415 S.C. 551, 557, 784 S.E.2d 665, 668 (2015) (citing *State v. Niles*, at 522). Similar to the case at hand (if evidence supporting defendant is to be believed), defendant *Cook* attempted to walk away from Victim, but Victim cut him off. Our Court concluded that the fact the defendant was trying to walk away does not suggest he was incapable of cooling off or controlling his actions. *Id.* Likewise, the Court reasoned that Cook's own statement did not indicate he lacked control over his actions. As such the case was rendered either a murder, or self-defense. *Id.* As in *Cook*, a voluntary manslaughter charge under the circumstances of Appellant's case would encourage compromised verdict that would undermine the fundamental fairness of the trial. *Id.* at 559.

The trial court's reliance upon and application of *Cook v. State* to the circumstances presented in Appellant's case was proper. In Appellant's case there are conflicting testimonies abound, but none satisfy the factual requirements needed to warrant a voluntary manslaughter charge, specifically that a heat of passion existed. The state's witness, Alicia Youmans, testified

that an argument, however brief began on the porch of 59 W. Estates, and after a few minutes continued in the E. Lane intersection. The argument ended when Appellant seemed to walk away, only to turn around and begin firing at Victim. Here, there is insufficient legal provocation, as the testimony showed nothing more than verbal argument before Appellant shot Victim. It should be noted that the forensic evidence supports this testimony as the Victim attempted to run away between nearby trailers from the shooting, *and the sole .40 caliber round was found beside his body, not at the location in which he was shot at.* This evidence would suggest that he did not attempt to shoot back until well after being shot. It's also supported by the fact that Victim was struck four times, one occurring within a range of *at most* two feet, and Appellant was not shot at all.

Regardless of credibility, there is also evidence from Tyeisha Youmans. She testified that the initial argument at 59 W. Estates was not particularly heated, and chose to describe it as "having words". She also could not recall the subject matter of the dispute. She testified that from a distance, it appeared as though Appellant and Victim continued their dispute and that Appellant swung at Victim. Victim pulled out a gun which prompted Appellant to walk away with his hands up indicating he did not wish to fight. She testified that Victim followed Appellant to his yard, shot once at Appellant, and only after being shot at did Appellant turn back around and shoot back in self-defense. While she testified that Appellant shooting back was "consecutive", based upon her testimony Appellant did not act first. Under this evidence, we have absolutely no testimony to demonstrate the content of the argument or the reasoning for Appellant returning fire. While under this version of facts, there are both words and an overt threatening act, i.e. arguably sufficient legal provocation, there is still absolutely no context or evidence to determine that the necessary heat of passion existed; there is no evidence to

demonstrate that Appellant was out of control. In fact, it would appear the opposite, as under this version of facts, Appellant still maintained sufficient control to put his hands up and walk away from the altercation. Our Court has made it clear that both elements are necessary to warrant the charge, and the testimony from Tyeisha is lacking evidence of heat of passion.

Lastly, most significantly, and regardless of credibility, is the testimony of Appellant himself. Appellant testified that he could not recall whether a subsequent argument at the E. Lane intersection occurred, nor could he recall the subject matter of the dispute in the first place. Moreover, Appellant testified that he fired back in self-defense, and gave no indication whatsoever that his actions were a result of a heat of passion and an uncontrollable impulse to do harm. Appellant's specific testimony states, "When you're backing up not looking, you can't see who you're shooting at or what you're shooting, you just know you're shooting to get someone away from you or anything that's firing at you away." (R. p. 164, lines 15-20). Such testimony demonstrates that he was not overtaken by a desire to do harm to Victim, but was firing to get Victim away from him, and could not be sure if he was even firing at Victim during his retreat. In culmination, Appellant was asked if problems existed between he and Victim, and his *only response* was that he believed Victim probably harbored a hostile feeling toward him. (R. p. 168, line 20 through p. 169, line 4).

If any gray area remained at all as to whether the *lack of detail* in Tyeisha's testimony regarding heat of passion might create enough gray area to consider a voluntary manslaughter charge, the testimony of Appellant filled in the blanks with absolute clarity. The trial court was correct in finding that Appellant's testimony left no doubt as to the heat of passion element, wherein he ruled from the bench that Appellant's in ability to remember any subsequent argument or the content of the dispute demonstrated a lack of heat of passion, and that in this

case there is likewise no indication that Appellant's fear manifested itself in an uncontrollable impulse to do violence. (R. p. 173, line 5 through p. 174, line 25).

This case, as was concluded by the trial court, is a either a self-defense case or a murder case, but it does not support voluntary manslaughter. (R. p. 174, lines 16-18). Given the evidence presented and the precedent relied up, the trial court did not err in denying the voluntary manslaughter charge, as there is no evidence demonstrating the shooting was committed in a sudden heat of passion.

II. Did the trial judge commit prejudicial error in refusing to instruct the jury as requested with language that Appellant, if deemed to be acting in self-defense, is justified to continue shooting until the apparent danger has ceased when Appellant's own defense theory demonstrated that he did not know whether he had shot victim and was firing behind his back while attempting to run away, and where such an instruction would constitute an charge on the facts?

Appellant argues that the trial court erred in declining to give its precise requested self-defense instruction which included language that the Appellant, if deemed to be shooting in self-defense was entitled to continue shooting until the threat had ended. While Respondent argues that the trial court's exclusion of this particular portion of the self-defense charge was not in error, as such a charge was not necessary under the facts and would otherwise constitute a charge upon the facts in violation of the South Carolina Constitution, the most convincing argument demonstrates that the issue is ultimately harmless in consideration of the facts presented at trial.

a. If the trial court's denial of the "shoot until you stop" language was in error, it is harmless error in light of the facts of the case.

"When considering whether an error with respect to a jury instruction was harmless, we must 'determine beyond a reasonable doubt that the error complained of did not contribute to the verdict.'" *State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014) (quoting *State v. Kerr*, 330 S.C. 132, 144–45, 498 S.E.2d 212, 218 (Ct.App.1998). "'In making a harmless error

analysis, our inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered.'" *Id.* The issue of a defendant justifiably firing multiple times at their assailant only becomes relevant if there is a reasonable concern that the jury would interpret a defendant's continued discharge of a weapon as somehow detracting from his otherwise self-defending acts. This concern only arises in circumstances where the defendant is actually aware that he has shot the assailant or otherwise reduced the assailant's threats, but leaves unanswered the question of whether danger still exists. As this is not the circumstance presented by Appellant's case, any error by the trial court was harmless.

Succinctly put, the number of shots fired by a defendant in self-defense only matter to the jury if the facts demonstrate that the defendant knew whether the first of his shots had successfully ended or reduced the threat. If Appellant's self-defense testimony is to be believed, then likewise would the jury believe the context in which the shots were fired. Appellant specifically testified at trial that after Victim shot at him he fired back in self-defense, was backing up while shooting, was not paying attention to where he was shooting, and does not recall how many times he fired. (R. p. 155, lines 12-24; p. 156, lines 5-21). These points were reiterated on cross-examination, wherein Appellant testified, "When you're backing up not looking, you can't see who you're shooting at or what you're shooting, you just know you're shooting to get someone away from you or anything that's firing at you away." (R. p. 164, lines 15-20). Appellant also testified that he did not see Victim on the ground until he was driving away. (R. p. 157, lines 2-8).

Under these circumstances, the number of shots is irrelevant, as all were fired under the alleged initial threat posed by Victim, and Appellant, if believed, was retreating and unaware of

whether the first shots had any effect on the perceived threat. Moreover, the self-defense charge given by the trial court encompasses the leniency for which Appellant requested the additional charging language. In instructing on the second element of self-defense, the trial court instructs the jury that defendant must actually be in imminent danger or believe he is in imminent danger, and that consideration should be given to the physical condition and characteristics of the defendant and the assailant. (R. p. 230-231). Under the circumstances presented, if Appellant is believed, there is no evidence or testimony which demonstrated that Appellant continued to shoot Victim after knowingly eliminating the threat or incapacitating Victim. As this is the only factual scenario for which the additional charge language is applicable, the facts do not warrant the charge. There can be no prejudice to Appellant under the circumstances, as the requested charge was ultimately irrelevant to the case facts.

Appellant's requested charge is simply irrelevant in light of the factual scenario painted by the defense in support of self-defense. They argued to the jury that Victim fired first and Appellant fired back blindly while running away. The number of shots is irrelevant as there is nothing to demonstrate that the initial perceived threat had changed before the shooting ceased.

b. Appellant's requested charge is impermissible under the South Carolina Constitution.

South Carolina, by constitutional prohibition, does not permit a court to give jury instructions based on the facts of a case. S.C. Const. art. V, § 21. Moreover, the trial court was within its discretion to deny the charge based on the parameters guiding proper jury instructions.

"Judges shall not charge juries in respect to matters of fact, but shall declare the law." S.C. Const. art. V, § 21. "[T]he trial court is required to charge only the current and correct law of South Carolina." *Sheppard v. State*, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004). "The law to be charged must be determined from the evidence presented at trial." *State v. Knoten*, 347 S.C.

296, 302, 555 S.E.2d 391, 394 (2001). "Generally, the trial judge is required to charge only the current and correct law of South Carolina." *State v. Zeigler*, 364 S.C. 94, 106, 610 S.E.2d 859, 865 (Ct. App. 2005). "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." *Id.* Here, the charge was a current and correct statement of the law the elements of self-defense. "An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion. To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." *State v. Commander,* 396 S.C. 254, 270-71, 721 S.E.2d 413, 422 (2011). "Failure to give requested jury instructions is not prejudicial error where the instructions given afford the proper test for determining the issues." *State v. Dickey*, 394 S.C. 491, 512, 716 S.E.2d 97, 108 (2011). "The substance of the law is what must be charged to the jury, not any particular verbiage." *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011). This issue was most recently addressed in *State v. Otts*. Therein, our Court found that it was in error to give instruction on defense of others at the request of the State. The Court's ruling demonstrated that it is improper to give jury instruction which comments upon either party's theory of the case. See *State v. Otts*, 424 S.C. 150, 155, 817 S.E.2d 540, 543 (Ct. App. 2018), reh'g denied (Aug. 16, 2018), cert. granted (Dec. 13, 2018), cert. dismissed as improvidently granted, No. 2018-001671, 2019 WL 1783684 (S.C. Apr. 24, 2019).

Under the circumstances presented, if Appellant's version of facts is believed, there is nothing within the record which would bring into question his shooting multiple times during retreat. If the court were to instruct specifically on his right to do so, it may constitute a charge upon the facts impermissible under Article V of the South Carolina Constitution.

CONCLUSION

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

Respectfully submitted,

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July 1, 2019.

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Barnwell County
The Honorable Doyet A. Early, III, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

Demontay Markeith Payne,

APPELLANT

Appellate Case No. 2017-002014

CERTIFICATE OF COMPLIANCE

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

This 1st day of July, 2019.

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