STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
The Honorable R. Markley Dennis, Circuit Court Judge

Appellate Case No. 2018-000770

THE STATE, Respondent,

v.

DERRICK LAMAR PORTER, Appellant.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

STATEMENT OF ISSUE ON APPEAL

The trial judge did not err in failing to give additional instructions on self-defense, including (1) "the right to act on appearances," (2) "the relevance of prior difficulties," and (3) "that a person does not have to wait before acting in self-defense," when Appellant, although not entitled to a self-defense charge, was given one, the issue was not preserved, nor were additional instructions requested.

STATEMENT OF THE CASE

Appellant was indicted in November of 2016 for attempted murder and possession of weapon during the commission of a violent crime. Appellant proceeded to a jury trial April 11-12, 2018, in Charleston County before the Honorable R. Markley Dennis. The State was represented by Assistant Solicitors Benjamin Chad Simpson and Daniel Cooper. Grant Smaldone, Esq. represented the Appellant. The jury convicted Appellant. He was sentenced to consccutive terms of thirty years' imprisonment for attempted murder, and five years' imprisonment for the weapons charge. He will serve an aggregate term of 35 years in prison. This appeal follows.

STATEMENT OF FACTS

On April 16, 2016, Appellant Derrick Porter shot Fitzgerald Byas outside a Quick Mart in North Charleston. (R. 60). Before the shooting, Byas had gone into the Quick Mart, while Appellant waited outside the store for two minutes, until Byas came out of the store. (R. 60, State's Exhibit 16). The confrontation began during what appeared to be a friendly conversation that escalated quickly into an argument. (R. 60-61, State's Exhibit 16). Byas attempted to leave by walking to his car, however Appellant followed. (R. 61, State's Exhibit 16). The argument continued ending with Appellant pointing a gun at Byas and pulling the trigger. (R. 61, State's Exhibit 16). Appellant casually walked away from the scene. (R. 61, State's Exhibit 16).

On the day of the incident, Pierra Martin was working at the Unique Beauty Supply which is connected to the Quick Mart. (R. 86). Martin heard a gunshot, went outside, saw Byas and called 911. (R. 87). She approached the car, saw that Byas wasn't moving and blood was coming from his head. (R. 89). She leaned into the car to let the 911 dispatcher know whether Byas was breathing. (R. 89). She testified that Byas was in the front seat with the door open. One of his hands was holding an alcoholic beverage and the other hand was empty. (R. 90-91). Martin did not see a gun in Byas's car or on his person. (R.89-100).

Patrick Norwood, an officer at the North Charleston Police Department, was the first officer on scene. (R. 129). Upon arrival Officer Norwood observed Byas suffering from a gunshot wound. (R.129). Byas was breathing, but only making groaning sounds. (R. 129). Norwood testified that the scene was secured by making sure no weapons were present while waiting for EMS to arrive. (R. 130). Norwood testified that he looked over

the car thoroughly and found no weapons there. (R. 131). EMS arrived on scene a few minutes later. (R. 132).

David Palawasta, a paramedic for Charleston County EMS, arrived on scene, approached the driver's side door and was advised that the scene had been secured. The victim had a pulse and was still breathing. (R.111). EMS decided it was best to get Byas out of car and into ambulance as quickly as possible. (R. 114). Palawasta testified that he assisted from inside the vehicle in moving Byas out of the vehicle. (R.117). Palawasta did not observe a firearm in the car when entering the car. (R. 117). Both of Victim's hands were in his lap. (R. 123). When Palawasta reached for the belt to assist in getting Victim out of the car, he felt a gun and advised those around him. (R. 118). Officer Norwood told Palawasta to remove the gun and place it in the driver's seat under the victim. (R. 121,133, State's Exhibit 7). Palawasta testified that victim was wearing two shirts, both of which were tucked in to his pants and covering the gun. (R.118). Palawasta further stated that it was not until he lifted both shirts that he was able to see the butt of the handle and trigger aspect of the gun. (R. 118). The gun was positioned in the posterior aspect of victim's hip or waist area. (R.119). It took three attempts for Palawasta to remove the gun from the victim's pants after first having to untuck the two shirts. (R. 120).

Surveillance footage from the Quick Mart was collected by Officer Sean Reiter. (R.142-143). Sergeant Ryan Terrell of the North Charleston Police Department gathered surveillance footage from the Unique Beauty Supply. (R.148).

An article was published in *The Post and Courier* on April 17, 2016, with a headline stating that the victim had a gun. (State's Exhibit 35, R. 210-11). The article also

contained information about the type of gun found and named Appellant as the suspect. (R. 211-12).

Appellant turned himself in May 9, 2016. (R. 168). Jerry Jelico, an investigator with the North Charleston Police Department, interviewed Appellant. (R. 172). Jelico testified that during the interview, Appellant confessed to firing his 9mm gun once at ~~victim~~. (R. 185). Appellant claimed it was self-defense, that he saw a gun on the victim and gave further details about the type of gun it was. (R. 185-186). Jelico testified that even with his knowledge of guns, there would be no way to identify the type of gun by just the butt of the gun. (R. 203-204).

At trial, Appellant claimed self-defense and the jury was charged on self-defense with no objections to the charge by defense counsel. (R. 325). The jury found Appellant guilty of both attempted murder and the weapons charge. (R. 327-328).

STANDARD OF REVIEW

"In reviewing jury charges for error, [the Court of Appeals] must consider the circuit court's jury charge as a whole in light of the evidence and issues presented at trial." State v. Adkins, 353 S.C. 312, 318, 557 S.E.2d 460, 463 (Ct. App 2003). "When reviewing a jury charge for error, an appellate court considers the charge as a whole; the charge must be prejudicial to the appellant to warrant a new trial." State v Stukes, 416 S.C. 493, 498, 787 S.E.2d 480, 482 (2016). "But an instruction must be erroneous and prejudicial to warrant reversal" State v. Bowers, 428 S.C. 21, 28, 832 S.E.2d 623, 627 (2019). "'An appellate court will not reverse the trial [court's] decision regarding a jury charge absent an abuse of discretion.'" State v. Washington, 424 S.C. 374, 394, 818 S.E.2d 459, 469 (Ct. App 2018) (citing State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010)). "The law to be charged to the jury is determined by the evidence presented at trial." State v. Gaines, 380 S.C. 23, 31, 66 S.E.2d 728, 732 (2008). "If there is any evidence in the record from which it could reasonably be inferred that the defendant acted in self-defense, the defendant is entitled to instructions on the defense, and the [circuit court's] refusal to do so is reversible error." State v. Day, 341 S.C. 410, 416-417, 535 S.E.2d 431, 434 (2000). "In charging self-defense, the trial judge should consider the facts and circumstances of the case and fashion an appropriate charge." State v. Santiago 370 S.C. 153, 160, 634 S.E.2d 23, 27 (Ct. App. 2006).

ARGUMENT

The trial judge did not err in failing to give additional instructions on self-defense, including (1) "the right to act on appearances," (2) "the relevance of prior difficulties," and (3) "that a person does not have to wait before acting in self-defense," when Appellant, although not entitled to a self-defense charge, was given one, the issue was not preserved, nor were additional instructions requested.

Appellant argues the trial judge erred in denying Porter's request to give additional instructions on self-defense, including (1) "the right to act on appearances," (2) "the relevance of prior difficulties," and (3) "that a person does not have to wait before acting in self-defense." The trial judge did not and cannot err in denying Appellant's request because no request for the additional instructions was made. Initially, the State notes that this issue is almost entirely unpreserved for appellate review because the only charge requested by Appellant on which the trial judge could rule was the prior difficulty charge. Second, even if this issue was preserved, the trial judge did not err by not giving additional instructions on self-defense because additional instructions were not requested and Appellant was not entitled to a self-defense charge. Further, even if Appellant was entitled to a self-defense charge, he was not entitled to the additional jury charges.

Error Preservation

In order for an issue to be preserved for appellate review, it must have been: (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004). "Issues not raised and ruled upon in the trial court will not be considered on appeal." State v. Dunbar 356 S.C. 138, 142, 587 S.E.2d 691, 693-694 (2003). "If a party fails to properly object, the

party is procedurally barred from raising the issue on appeal." State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005). "All requests for legal instructions to the jury shall be submitted at the close of the evidence or at such earlier time as the trial judge shall reasonably direct. All requests must include accurate citation to authorities relied upon." Rule 20(a), SCRCrimP. "Notwithstanding any request for legal instructions the parties shall be given the opportunity to object to the giving or failure to give an instruction before the jury retires, but out of the hearing of the jury. Any objection shall state distinctly the matter objected to and the grounds for objection. Failure to object in accordance with this rule shall constitute a waiver of objection." Rule 20(b), SCRCrimP. When discussing jury charges, the defense attorney asked for self-defense charge of prior difficulties. (R. 257). The trial judge ruled that he would not charge prior difficulties based upon the fact that nothing was presented during trial about prior difficulties between Appellant and victim. (258). He did however, give a self-defense charge to which defense counsel made no objections, therefore depriving the trial judge of the opportunity to rule on the issue and rendering it improper for review by this court. (R. 325). Defense counsel stated that there were no exceptions or additions to the jury charge when asked, therefore because there was no objection, the argument was not preserved for appellate review.

Appellant was not entitled to a self-defense charge.

A self-defense charge is only required when the evidence supports it. State v. Slater, 373 S.C. 66, 69, 644 S.E.2d 50, 52 (2007). A person is justified in using deadly force in self defense when (1) defendant is without fault in bringing on the difficulty, (2) the defendant actually believed he was in imminent danger of losing his life of sustaining

serious bodily injury, or he was actually in such imminent danger, (3) if the defense is based upon the defendant's actual belief of imminent danger, a reasonable prudent man of ordinary firmness and courage would have entertained the same belief; and (4) the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance. State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984). Although the trial judge gave a self-defense charge here, the evidence in this case did not warrant it. "Upon request a defendant is entitled to a jury instruction on self-defense if had produced evidence tending to show the four elements." State v. White, 425 S.C. 304, 311 821 S.W.2d 523, 527 (Ct. App 2018). "An accused who provokes or initiates an assault cannot claim self-defense unless he both withdraws from the conflict and communicates his withdrawal by word or act to his adversary." State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999). The court in State v. Williams, held that the defendant was not "without fault" in bringing on the difficulty, and could not assert the defense of self-defense with respect to a murder charge. State v. Williams, 427 S.C. 246, 830 S.E.2d 904 (2019). The court in State v. Santiago held that a self-defense charge was not warranted because defendant was not on his property, therefore he had a duty to retreat. State v. Santiago, 370 S.C. 153, 162, 634 S.E.2d 23, 28 (Ct. App 2006). Further, the court held that the trial judge did not err in refusing to charge self-defense because there were many opportunities to retreat resulting in the absence of at least one of the elements of self-defense. Id. At a minimum this case lacks two elements of self-defense. There was evidence introduced that Appellant waited for Byas outside of the Quick Mart for two minutes. (R. 60, State's Exhibit 16). The confrontation began by what appeared to be a friendly conversation that

escalated into an argument. (R. 60-61, State's Exhibit 16). Byas attempted to leave by walking to his car, however Appellant followed. (R. 61, State's Exhibit 16). The evidence proves the Appellant was not without fault and that he had the means to avoid the danger, the first and fourth elements of self defense.

In denying defense's motion for directed verdict the judge stated:

> I further would find that there is specific evidence that shows the reasonable inference to be drawn which would defeat and disprove, which the state is required to do, self-defense; and that is who brought on the harm or who brought about the altercation. Clearly we note that there was an argument. But clearly the victim left. And it was in a matter of -- and we know there is – they are not on somebody – they are not on—he is not on his own property, so there is a duty to leave if you can do so safely. There was no threat of anything at that particular point. All he had to do was turn around and walk back to his car. So those two elements are clearly established as to who brought on the altercation and therefore would defeat self-defense.

(R. 249).

The only evidence introduced concerning Appellant's belief that he was in imminent danger was Appellant statement in the interview with Jelico that he saw a gun at victim's side and fired in self-defense. (R. 191-192). No evidence was produced toward the third element of self-defense regarding an objective standard for imminent danger. In fact, the State produced three witnesses who testified no firearm could be seen in the car or on the victim, leading to the conclusion that a reasonable person in the same situation would not have felt they were in imminent danger. (R. 89-131). None of the elements of self-defense were met, therefore Appellant was not entitled to a self-defense charge.

Appellant was not entitled to the additional self-defense charges.

Despite the fact that Appellant was not entitled to a jury charge on self-defense, the trial judge gave the jury charge anyway. (R. 318-319). Even if Appellant was entitled to the self-defense charge, he was not entitled to the additional charges.

In State v. Fuller, the court held that it was error to charge the Davis charge of self-defense as an exclusive charge when defendant's counsel repeatedly asked for additional charges. State v. Fuller 297 S.C. 440, 377 S.E.2d 328 (1989). The Davis charge is as follows:

> Self-defense is a complete defense. If established you must find the defendant not guilty. There are four elements required by law to establish self-defense in this case. First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger. Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury that to act as he did in this particular instance. If however, the defendant was on his own premises he had no duty to retreat before acting in self-defense. These are the elements of self-defense.

State v. Davis 282 S.C. 45, 317 S.E.2d 452 (1984). The current appeal can be distinguished because unlike Fuller, where additional charges were repeatedly requested, only a prior difficulties instruction was requested and no objection was made later when the charge was presented to the jury without the prior difficulties instruction. (R. 325).

Right to Act on Appearances

In regards to the right to act on appearances, although not requested by defense counsel, it was charged to the jury. "The defendant has the right to act on appearances even though the defendant's belief may be -- may have been mistaken. It is for you to decide whether or not the defendant's fear of imminent danger or death or serious bodily injury was reasonable and would have been felt by an ordinary person in the same situation." (R. 319).

Prior Difficulties

In this case, defense counsel only requested prior difficulties as an additional charge. "A self-defense charge is only required when the evidence supports it." State v. Slater, 373 S.C. 66, 69, 644 S.E.2d 50, 52 (2007). The trial judge ruled that no evidence was presented to the issue of prior difficulties between Appellant and Victim. (R. 249). Appellant also relied on the decision in State v. Nichols, where the court held that the trial judges self-defense charges were inadequate because he only instructed common law self-defense and refused to give further instructions on (1) the right to act on appearances (2) relevance of prior difficulties (3) that a person does not have to wait before acting in self-defense. State v. Nichols, 325 S.C. 111, 481 S.E.2d 121 (1997). The current case can be distinguished from Nichols. First, in Nichols, three additional instructions were requested by defense counsel. Id. Here, only prior difficulties was requested. Further in Nichols, the prior difficulties were between the victim and the appellant including victim previously pointing a rifle at appellant. Here, although there was some discussion of

someone in victim's family having issues with someone in Appellant's family, no evidence was presented at trial of difficulties between victim and Appellant.

Right Not to Wait

"[The accused doesn't have to wait until his assailant gets the drop on him, he has the right to act under the law of self-preservation and prevent his assailant (sic) getting the drop on him." State v. Rash, 182 S.C. 42, 50, 188 S.E. 435, 438 (1936). "Once the right to fire in self-defense arises, a defendant is not required to wait until his adversary is on equal terms or until he has fired or aimed his weapon in order to act." State v. Starnes, 340 S.C. 312, 531 S.E.2d 907 (2000). The current case is distinguished because the right to fire in self-defense never arose. Pierra Martin, who called paramedics, testified that she was in the car and never saw a gun. (R. 89-100). Patrick Norwood, the first officer on scene, testified that he searched the entire vehicle to secure the scene and never saw a gun. (R. 117). David Palawasta, the paramedic who removed victim from the car, testified that he did not see a gun anywhere upon entering the vehicle. (R. 117). He testified that it wasn't until he assisted in removing the victim from the car by picking victim up by the belt that he felt the gun in victim's pants, and only saw the gun after untucking two shirts from victim's pants. (R. 118-119). Further, Victim tried to leave multiple times, while Appellant continuously followed him. Victim walked away from Appellant by going into the Quick Mart, while Appellant waited for him for two minutes outside the store. (R. 60). Victim then tried to leave again by walking to his car, but Appellant followed. (R. 61). The right to fire in self-defense never arose because Appellant was the aggressor and brought the situation on himself.

Accordingly even if the issue were properly preserved, the trial judge did not err in failing to give additional charges on self-defense because Appellant was not entitled to a basic self-defense charge much less the additional self-defense charges of the right to act on appearances, prior difficulties, and right not to wait. Therefore, this court should affirm the sentence.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgments and convictions of the lower court should be affirmed.

Respectfully submitted,

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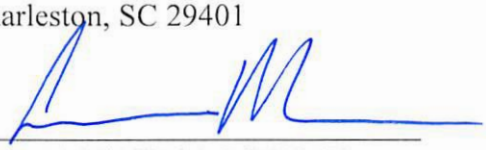
BY: 
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July 21, 2020

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Respondent 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."

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PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Brief of Respondent on counsel of record for the Appellant by electronic mail to the address listed for counsel in AIS, and subsequently by depositing one copy of the same in the United States mail, postage prepaid, addressed to David Alexander, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.
This 21st day of July, 2020.

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Attachments: Porter Derrick - BOR cover letter to David Alexander (02330951xD2C78).PDF
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Dear Mr. Alexander,
Attached to this email is the State's Brief of Respondent and our cover letter addressed to you. This brief will be filed with the court later today through AIS One Drive.
Please acknowledge receipt of this email and the attachments by return email.
Thank you.
Sincerely,
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