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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Lexington County
The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

THE STATE,

Respondent,

v.

NICHOLAS BENJAMIN CHHITH-BERRY,

Appellant.

Appellate Case No. 2019-000352

FINAL BRIEF OF RESPONDENT

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APPELLANT'S QUESTIONS PRESENTED

I. Did the trial judge err in denying Appellant immunity from prosecution pursuant to the Protection of Persons and Property Act where the undisputed evidence showed Appellant satisfied the common law elements of defense of others and the elements of the Act?

II. Did the trial judge err in failing to allow Appellant to present testimony of the deceased's prior shooting of two people four months prior to his death where (1) the evidence established the deceased's character through a specific instance, which was an essential element of Appellant's claim of self-defense as it went directly to Appellant's reasonable fear of the deceased, and (2) the significant probative value of the evidence was not substantially outweighed by the danger of confusing the issues?

III. Did the trial judge err in failing to instruct the jury on the doctrine of imperfect defense of others to allow the jury to consider voluntary manslaughter if it were to determine that Appellant's belief that his brother was in actual danger of losing of his life or sustaining serious bodily was unreasonable as the vicious attack by the deceased on Appellant's brother would have provided the necessary heat of passion based upon sufficient legal provocation?

IV. Did the trial judge err in failing to grant Appellant's motion for a mistrial where the jurors engaged in premature deliberations and the judge's admonishment was a casual reminder for the jurors not to deliberate until all evidence was presented, closing arguments made, and jury instructions given?

STATEMENT OF THE CASE

On May 19, 2014, Appellant Nicholas B. Chhith-Berry murdered James Galloway in Lexington County.[1] Appellant was arrested the same date and charged with Galloway's murder. The Lexington County Grand Jury indicted Appellant on November 3, 2014 for Galloway's murder (Ind. # 2014-GS-32-3244) and possession of a weapon during a violent crime (Ind. # 2014-GS-32-3245). Appellant was represented on the charges by Wayne Floyd, Esquire. The case was prosecuted by Deputy Solicitor Shawn Graham and Assistant Solicitor Alton H. Eargle. Appellant proceeded to a jury trial from December 12-15, 2016 before the Honorable Eugene C. Griffith, Jr., Circuit Court Judge. At the conclusion of the trial, Appellant was found guilty of murder and the weapon charge. Judge Griffith sentenced Appellant to 50 years for murder and 5 years concurrent on the weapon charge. Appellant subsequently filed a motion for a new trial and motion for reconsideration of sentence. Those motions were heard on July 11, 2018, after which Judge Griffith took them under advisement. On March 4, 2019, Judge Griffith issued a written order denying the motion for a new trial but granting the motion for reconsideration of sentence and reduced Appellant's sentence for murder to 40 years. Appellant then filed this direct appeal raising 4 issues. This is the Brief of Respondent. (Trial Transcript; Indictments, Post-Trial Transcript; Order Denying Motion for New Trial and Granting Motion for Reconsideration of Sentence).

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[1] Appellant is referred to throughout the transcript as Nick Berry, not Nicholas Chhith-Berry. Appellant's brother, Adam Berry, is also mentioned throughout the transcript. As a result, Respondent will refer to Appellant throughout this brief as Appellant, Nick Berry, or when appropriate as Nick.

RESPONDENT'S STATEMENT OF FACTS

The Prior Altercation

On Mother's Day, May 11, 2014, Appellant Nick Berry, his brother Adam Berry (hereinafter "Adam"), and Adam's girlfriend Kayla Bass (hereinafter "Bass") drove to Kathy Polk's residence in Lexington County to pick up Bass's child. James Galloway ("Jamie" or "the victim") was the son of Kathy Polk and the father of Bass's child that Appellant, Adam, and Bass were there to pick up. When Appellant, Adam, and Bass arrived, they were intoxicated on alcohol or high on drugs, or both. Adam was driving the vehicle. Bass was in the front seat. Appellant was in the back seat. The victim walked out to the vehicle from his mother's front porch and went to the driver's side window and confronted Adam about picking up Jamie and Bass's child while intoxicated or high on drugs. Jamie told Adam this was the second time he had warned Adam about picking up the child while intoxicated (R. 404-15).

Appellant became angry because he thought Jamie was disrespecting his brother Adam. Appellant Nick Berry got out of the vehicle and walked around the front and up to Jamie and confronted Jamie. Nick Berry stated out loud for Jamie to stop disrespecting his brother. Jamie punched Appellant, and Appellant fell to the ground and urinated on himself. Appellant then withdrew a knife from his pants' pocket, opened the knife, got up off the ground, and threatened Jamie with the knife. Jamie's mother, Kathy Polk, came off of her front porch and confronted Nick Berry and told him to put away his knife, which he did. Nick, his brother Adam, and Bass, then left the victim's residence in Adam's vehicle. (R. 404-15).

The Preparations to Murder the Victim

Later that day, and in the days that followed, Appellant began "texting" friends and associates trying to locate a "burner" and .22 bullets. A "burner" is street language usually

referring to an untraceable gun or possibly a phone. Nick Berry informed several friends or associates that he needed the .22 bullets to take care of "a problem." He informed 1 friend that the problem or person he needed to take care of was the victim Jamie Galloway because Jamie had "snucked him" [sucker punched Nick] in front of his brother Adam. Nick's friends responded that they did not have what he was looking for. One even tried to dissuade him from committing any act of violence. These text messages were admitted before the jury at Appellant's trial. (R. 236-38; 251-298; 431-490; 492-93; See also 404-05; State's Ex. 54 & 55).

Appellant also communicated to Jamie's mother, Kathy Polk, in her presence on a later date, when Jamie was not there, that he [Nick Berry] was going to "take care" of Jamie. Nick also communicated to Bass's mother, in Bass's mother's presence, that the next time Bass's mother saw the victim, Jamie "would not be breathing." "He would be dead." These witnesses also testified at Appellant's trial. (R. 404-28).

On the afternoon and early evening of Jamie's death, May 19, 2014, Appellant was again texting friends or associates asking if they could locate .22 bullets for him. Nick Berry stated he wanted the bullets "fronted" to him and he would pay for the bullets after he took care of a certain problem.[2] After the victim's murder, police found a sawed off .22 caliber rifle in Nick's tote bag at the crime scene, hid in a shed located behind the house where Jamie was murdered. There were no bullets in the back pack with the sawed off .22 rifle. Nick later told police a friend had given him the gun to sell. However, Appellant admitted at trial that the gun was his. Nick Berry was unable to get the .22 bullets before he came into contact with the victim the night of May 19, 2014. (R. 236-38; 251-298; 431-490; 492-93; See also 404-05; State's Ex. 54 & 55).

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[2] Appellant claimed at trial that 1 of these text messages was written by his brother Adam, using Appellant's phone, but admitted his brother did not have a "problem" that needed taking care of.

The Murder of the Victim

On that same date, May 19, 2014, in the afternoon, Appellant, his brother Adam, and Bass drove to a residence belonging to Kaysha Fontenot (hereinafter "Fontenot") in the Pine Ridge area of Lexington County. Like Bass, Fontenot also had a child by the victim Jamie Galloway. Adam and Bass were invited to Fontenot's home, but Appellant was not. Fontenot testified that when the 3 arrived she was not expecting Nick Berry, only Adam and Bass. When Nick, Adam, and Bass arrived at the home, the 3 of them and Fontenot began drinking shots of liquor and mixed drinks in the house. Fontenot testified that the group began talking almost immediately and Bass was upset about something. Nick and Adam left the residence for a short period of time and purchased Xanax. Once they returned to Fontenot's home, the group also smoked marijuana, and Nick took some of the Xanax. Nick admitted after the murder that he had 5 shots of liquor, 2 mixed drinks, 1 and ½ bars of Xanax, and some marijuana before the murder occurred. While there at Fontenot's house, Bass texted another woman, Haley Stone ("Haley"), the mother of 2 of Adam Berry's children, and asked Haley to come over to Fontenot's residence. Haley did come over. However, Haley did not drink anything or take any drugs because she had a child with her. (R. 193-218; 233-34; 243-44; 303-37).

Haley testified when she arrived at Fontenot's home, the group of people there except for herself; Nick, Adam, Fontenot, and Bass were all drunk. She also noticed that Bass was also stoned on Xanax. It also appeared to Haley that Appellant was also on Xanax. (R. 303-37).

While this group of people were at Fontenot's home, Fontenot telephoned the victim. Fontenot and the victim talked and then had some type of disagreement. However, Fontenot then invited the victim to come over to her house. Fontenot testified the victim wanted to come over to her home to see his son. Fontenot did not tell the victim that the 2 men he had the

confrontation with 9 days earlier, Nick and Adam Berry, were at her house along with Bass, the mother of another one of the victim's children. At some point, after ending the phone conversation with the victim, Fontenot notified the others at her home that the victim Jamie Galloway was coming over to the residence to see his 1 year old son. Jamie arrived shortly thereafter with a female friend, Katie Leavitt (hereinafter "Katie"), who was driving her own car. It was now dark and around 9:00 to 10:00 p.m. Haley Stone testified she found it extremely strange that all of the "baby mommas" and "boyfriends" were there at the same house at the same time. (R. 174-90; 193-218; 303-37).

Katie remained in her car at the end of the driveway. She had reservations about the victim getting out of the car because she saw Adam Berry's vehicle in the driveway. The victim told Katie he was just going to see his son and would be right back. Jamie got out of Katie's car and entered Fontenot's house. When he saw Nick and Adam Berry, Jamie stated to Fontenot: "Oh, so this is how it is going to be." Fontenot did not respond. Jamie then went and visited with his 1 year old son in a bedroom. By everyone's account, there were no problems between the victim and Nick Berry or his brother Adam as the victim visited with his son. However, while Jamie was inside the residence, Nick and Adam went out on the porch alone together to smoke. (R. 174-90; 193-218; 303-37).

While the victim was visiting with his son, Fontenot and Bass ended up sitting on the front porch. Fontenot testified that Bass whispered something in Fontenot's ear that infuriated Fontenot so much that Fontenot got up and began yelling at Katie in her car. Fontenot went off the porch, approached Katie saying vulgar things about her, and the 2 women got into a physical fight outside Katie's car in the driveway. Haley Stone testified Bass also joined in the assault on Katie. At the end of the fight, Katie left the residence driving her car leaving the victim stranded

at Fontenot's house. Fontenot testified at this point Appellant's brother Adam, punched Fontenot in the left side of her face for no reason. Fontenot then yelled at Adam: "so now you want to fight me too." Fontenot was then physically attacked by Bass and dragged by her feet across a sidewalk. Fontenot got up and ran in her house, and as she did she told the victim, who was headed out of the house, that Adam had just punched her in the face. Fontenot locked the door to her home and then went into her children's room to check on them and calm herself down. (R. 174-90; 193-218; 303-37).

The fighting between the women was over; however, Bass [Adam's girlfriend and the mother of 1 of the victim's children] began yelling at the victim and eventually got in the victim's face screaming, then slapping him, and then pushing him in the yard. The victim took the abuse and ignored it. Bass continued to assault and curse the victim. The victim stated to Adam to get his girlfriend off of the victim. Adam made no attempt to stop Bass from assaulting the victim. The victim eventually got tired of the abuse and pushed the intoxicated Bass off of him. Bass stumbled and fell to the ground. At that point, Adam, Appellant's brother, stepped into the situation and stated Jamie was not going to push his girlfriend and Adam instigated a fist fight with the victim. (R. 174-90; 193-218; 303-37).

Haley Stone, the only sober witness present, testified Adam and Jamie then got in a fist fight starting in the front yard that eventually led up on the front porch of the residence. Both men threw punches. (R. 303-37).

Haley testified Adam was the person who started the fight and Jamie threw the first punch to force Adam to back off. However, Adam would not back off once Jamie hit him in the face. Punches were thrown in the front yard by both men. According to Haley, the victim backed up the front porch steps punching Adam as Adam pursued the victim. The victim was

winning the fist fight as the men got up on the front porch and the victim ended up on top of Adam on the corner of the front porch. Haley testified that Adam and the victim were mainly just wrestling at this point, but both men probably threw 2 punches at each other while down on the floor of the front porch. It was at this point, Appellant Nick Berry took his knife out of his front pocket, opened it, approached the victim from behind, and stabbed the victim in the back. The victim fell off of Adam and was not moving. Adam got up and kicked the victim in the head. Appellant Nick Berry then continued to stab the victim a total of 25 times in all. There were 22 stab wounds to the victim's back. There was 1 stab wound under the victim's arm pit that came from behind the victim. There was 1 stab wound to the back of the victim's skull and 1 behind the victim's ear.[3] The pathologist testified 2 of the stab wounds could have resulted in paralysis to the victim within seconds because they struck his spinal cord. The knife wound to the back of the head penetrated the victim's skull. The victim died there on the front porch. He bled to death from the numerous stab wounds. (R. 193-218; 239-49; 259-98; 303-37; 493-508).

Fontenot, did not witness the stabbing, but came out of the front door and found the victim lying on the front porch bleeding profusely. She saw people [Adam, Bass, and Appellant] running around in her yard. She called 911, reported the stabbing and identified Nick Berry as the killer, and attempted CPR on the victim. (R. 193-218; State's Ex. [911 call]).

The Police Investigation

After the deadly assault, Appellant, his brother Adam, and Bass eventually tried to flee from the crime scene in Adam's vehicle. However, they were blocked in by a police officer who was just arriving as Adam and Nick were attempting to drive out of the driveway. Adam

[3] Haley did not see the knife, but she saw Nick Berry come up behind the victim and strike the victim about 20 times real quick in the back while Adam and Nick had the victim down on his stomach on the front porch. Adam then kicked the victim in the head. Haley saw the victim gasp for breath and then blood went everywhere out of the victim's body. (R. 303-37).

got out of his vehicle and complied with the officer's commands. Appellant got out of the vehicle but did not comply with the officer's commands and told the officer to "just shoot me." He was finally arrested in the driveway of Fontenot's residence. (R. 219-28; State's Ex. 5).

The only injuries to Appellant were small cuts to both of his pinky fingers consistent with him having cut himself while stabbing the victim. Appellant's brother also had 1 small cut on his hand consistent with having been cut by Appellant while getting out from under the victim when Appellant was stabbing the victim from behind. Adam also had a busted lip and lost a tooth from the first punch thrown by Jamie in the front yard. Appellant and his brother Adam were both treated and released that day from the hospital. (R. 228-34; 239-49; 431-69).

At the crime scene, police recovered the knife Nick Berry used to murder the victim. It contained the victim's blood [DNA] on it. It did not contain Adam's DNA. However, it did contain the DNA of another minor contributor. (R. 398-99).[4]

Appellant gave multiple statements to police at the scene. Nick Berry first gave police a false name, false age, and birthdate. He also denied he had drank any alcohol or taken any drugs. After finally admitting his real identity, Appellant stated he could not remember what happened. He eventually admitted he had had multiple mixed drinks, shots of liquor, marijuana and Xanax. When asked why he took the Xanax: Appellant stated to an EMT that he took the Xanax: so that he [Appellant] could relax before "he" came over. Nick did not state who "he" was, but he was referring to a 3rd party coming over to Fontenot's residence when he made this statement, not to himself. Appellant also gave another version of the events, in this one he claimed the victim was attacking Nick and his brother Adam with a knife, and that is why Nick had to kill the victim. Nick claimed that he cut his fingers on the victim's knife. (R. 228-36; 239-49; 251-58).

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[4] While the victim's and Adam's DNA standards were submitted to SLED, Appellant's DNA standard was never submitted to SLED. (R. 401).

At the hospital, Appellant was read his Miranda rights and gave multiple false statements about what had occurred at the crime scene. He gave a total of 5 different versions of what happened. These were recorded statements and played for the jury at trial. (R. 251-58; 259-98; State's Ex. 43 & 44 [Recorded statements of Appellant]; R. 431-69).

Appellant first told police his brother Adam was not aware of or "had no idea" about something. He then stopped himself and stated he was talking about a totally different subject, than the crime, when he made this statement about Adam having "no idea." (State's Ex. 43).

Appellant initially claimed the victim kicked in the front door when he first arrived at Fontenot's residence. Appellant then stated that the victim cut his brother Adam with a knife; he [Nick] took the knife away from the victim; and then he [Nick] stabbed the victim 1 time. Nick claimed the victim stabbed his brother and also stabbed him [Nick] before Nick was able to stab the victim 1 time. He said he only stabbed the victim 1 time *in the side*, a quick in and out stab, and told the victim to back off. He then put the knife on the ground and the police arrived. Appellant had no explanation for any other stab wounds to the victim. He denied it was his knife that was used to stab the victim and did not mention Adam and the victim were in a fist fight. (R. 251-98; State's Ex. 43 & 44 [Recorded statements of Appellant]; R. 431-69).

Appellant then changed his story. In this version, the victim had either a knife or a gun and was pistol whipping or stabbing his brother with whatever weapon he had; and so he [Nick] took the weapon away from the victim, and realized it was a knife, and he [Nick] stabbed the victim 1 time. Nick claimed he stabbed the victim *in the back* not the side. Police then stopped the interview, told Nick they were going to interview his brother, and went and interviewed Nick's brother Adam. (State's Ex. 43).

After speaking with Adam, police resumed the interview with Appellant.[5] Nick Berry then claimed the victim had a semi-automatic pistol, a .45 caliber pistol. In this version of events, Nick stated the victim put the .45 to Nick's head and stated he was going to shoot Nick in the face. At this point in the questioning, investigators informed Nick that eyewitnesses at the scene stated the victim did not have a weapon at any time, **and** Nick had previously told investigators in another version that there was no gun used at any time by anyone, including the victim. Appellant then admitted the victim had no gun on this occasion. Instead, Nick then claimed the victim had a gun on Mother's Day, when the victim punched Nick, and claimed the victim then pointed the gun at his head in Kathy Polk's front yard. (State's Ex. 44). Appellant was informed that no one had seen a gun on the victim on Mother's Day, including Adam or Bass. (State's Ex. 44).

Appellant then changed his story again. Nick Berry's final version told to police was that *the victim **and** Appellant* were arguing. Nick could not remember what he and the victim were arguing about. (State's Ex. 44). Nick's brother Adam then jumped on the victim. The victim and Adam then started fighting. The fight went up on the porch and the victim was eventually hitting his brother on the porch and Nick thought the victim had some kind of blade or object because Adam was bleeding so much. Nick admitted he pulled his ["Nick's] own knife and stabbed the victim 1 time. The stab was to the shoulder blade. Appellant could not explain how the victim was stabbed numerous other times. Nick claimed it was self-defense because *the victim* tried to take the knife *away from Nick* and *caused Nick to stab himself 2 times in the hand.* Nick admitted he threw the knife down in the yard in the grass. (State's Ex. 44).

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[5] The first portion of this interview was suppressed by Judge Griffith because Nick Berry was sleepy or drowsy. That portion was redacted. The interview begins with Appellant describing the victim pointing a .45 caliber gun at his head. (State's Ex. 44).

During this interview, when asked why he stabbed the victim, Nick also stated that he stabbed the victim because the victim had "snucked" him [Nick Berry]. (State's Ex. 44). The only time the victim "snucked" Nick Berry was on Mother's Day, May 11th, at the victim's mother's residence when Appellant urinated on himself, which was 9 days before the victim's murder. (State's Ex. 44; R. 404-15). In this portion of the interview, Nick then claimed the victim also "snucked" his brother Adam and that he [Nick] stabbed the victim because the victim had "snucked" his brother and "snucked" Nick. (State's Ex. 44). Nick could not explain how the victim ended up on the floor of the porch. (State's Ex. 44). In all of these interviews, even though he was asked who was present at the crime, Nick never told police that Haley Stone was present and witnessed the murder. (State's Ex. 43 & 44 [Recorded interviews]).

Appellant's cell-phone was seized at the hospital and incident to his arrest. Police subsequently obtained 2 search warrants and obtained Appellant's cell-phone records and text messages from his phone. It was in those records that authorities learned that Nick Berry had been attempting to obtain a "burner" and .22 ammunition to get rid of the victim Jamie Galloway for approximately 10 days leading up to and including the day of the victim's murder. Those records also included an admission by Appellant that he wanted to get rid of the victim because he had "snucked him" in front of his brother on Mother's Day. (R. 236-38; 251-58; 259-98; 431-469; 469-90; 493).

Appellant also spoke to his mother from jail over the telephone and made incriminating statements in a recorded phone call. (R. 259-98; 298-301; 303-07; State's Ex 35 & 36 [jail phone calls]; State's Ex. 37 [redacted jail call]; R. 339-44; 490-92). Haley Stone and Adam Berry can be heard in the background of this phone call at Appellant's mother's residence. Nick Berry admitted in the phone call that the victim had sucker punched him in front of his brother

several days before the murder. But, Nick admitted the victim had not threatened Nick before the murder. Nick Berry stated to his mother that if the victim had not done something he shouldn't have, "he wouldn't have died for nothing." Appellant complained that police had taken his phone as evidence. Appellant stated he stabbed the victim because Appellant was not going to stand there and "watch his brother get his ass kicked." Appellant expressed concern over how he [Nick Berry] would look took others if he [Nick] stood by while his brother lost a fight. Plus, Appellant stated he stabbed and disliked the victim because the victim thought he was "all hard and shit." (State's Ex. 37 [redacted jail phone call]). Appellant stated: "...I fucked that boy up bad." (State's Ex. 37). "Fuck that nigger." (State's Ex. 37).[6] Appellant stated he was glad the victim was dead. When his mother stated to Appellant that no one deserves to be dead, Appellant responded: "That nigger does." (State's Ex. 37).

At trial, Appellant testified and claimed he came to the defense of his brother because he thought his brother was going to be killed by the victim hitting Adam with his fists. Appellant admitted the knife was his knife. He claimed he only remembered stabbing the victim 1 time. After that, he did not remember anything. He claimed he could not remember any of the statements he gave first responders, police, or investigators. (R. 567-619).

Appellant also called as a witness Michael Sulier, who killed Appellant's brother Adam in retaliation for Jamie Galloway's murder several months before Appellant's trial. Sulier alleged that Adam Berry told Sulier before Sulier killed Adam that he [Adam] participated in the murder of the victim Jamie Galloway by also stabbing the victim several times. However, Sulier was impeached by the State that he had written a letter to this same effect prior to his guilty plea to murder in an attempt to reduce the sentence he would have to serve for Adam's murder, i.e.

[6] Although, Appellant repeatedly used this racial epithet to describe the victim, everyone involved in this case was Caucasian, including the victim, witnesses, and Nick and Adam Berry.

Sulier alleged the victim Adam provoked his own murder. Sulier also claimed on the witness stand that he acted alone in Adam's murder; however, he was then was forced to admit that he had written a letter and posted on-line that others were also involved in the murder of Adam Berry in addition to himself. Sulier also admitted that he obtained the murder weapon used to kill Adam the day before Adam's murder, i.e. showing pre-meditation, which undercut Sulier's claim that Adam provoked his own murder. (R. 543-560).

Appellant did not call his brother's girlfriend, Bass, as a witness at trial. It was Bass who was present on May 11th when the victim chastised her, Adam, and Nick for picking up the victim's child while intoxicated. Bass was also present the same day when the victim punched Appellant and he urinated on himself, 9 days before the victim's murder. Bass was also present, on separate occasions, when Appellant threatened the victim's life in front of the victim's mother and Bass's mother. Bass also rode with Appellant and his brother to Fontenot's home on the day of the victim's death, and it was Bass who was angry when they arrived there. It was Bass who texted Haley Stone and asked her to come over to Fontenot's residence. It was Bass who instigated the conflict between Fontenot and Katie in the driveway which led Katie to leave resulting in the victim being stranded at Fontenot's. And, it was Bass who then attacked the victim and who caused the fight between Adam and the victim, shortly before the victim was murdered by Appellant. (R. 174-90; 193-218; 303-37).

The jury deliberated approximately 30 minutes before reaching a verdict on both indictments. Appellant was convicted of both murder and possession of a weapon during a violent crime.

Appellant's Issue I.

Did the trial judge err in denying Appellant immunity from prosecution pursuant to the Protection of Persons and Property Act where the undisputed evidence showed Appellant satisfied the common law elements of defense of others and the elements of the Act?

What Occurred Below

Pre-trial, Appellant moved to suppress his statements made to police. A Denno[7] hearing was held and the court took testimony from the police officers, first responders, and investigators who questioned Appellant at the scene and at the hospital. Judge Griffith heard the statements Appellant made about the killing at the scene and at the hospital, including taking a break to listen to the recorded statements. (R. 16-61, Court's Ex. 1 & 2 [Recorded Statements]). After hearing another pre-trial issue,[8] Judge Griffith then took more testimony on the issue of the admissibility of Appellant's statements to police. And, after hearing argument, ruled preliminarily that Appellant's statements were free and voluntary and would be admissible before the jury, subject to some possible redactions of prejudicial information. (R. 90-105).

Appellant then moved pre-trial for immunity from prosecution pursuant to the Protections of Persons and Property Act. S.C. Code Ann. Section 16-11-410, *et. seq*. (R. 105-33). Judge Griffith conducted a pretrial hearing pursuant to State v. Manning, 418 S.C. 38, 791 S.E.2d 148 (2016), and heard Appellant's motion for immunity pursuant to Subsection C of S.C. Code Ann. Section 16-11-440.[9] (R. 105-60). Testimony was presented at the hearing only from Appellant. (R. 106-58). The State thoroughly cross-examined and impeached Appellant. (R. 117-54). At

[7] Jackson v. Denno, 378 U.S. 368 (1964).

[8] Appellant also moved pretrial to admit testimony from Michael Sulier, who murdered Adam Berry after the victim's murder but before Appellant's trial. The court took proffered testimony from Sulier and heard argument on whether his testimony was admissible. (R. 61-90).

[9] Subsection (A) of Section 16-11-440 has no application here. *See* Curry, 406 S.C. at 370, 752 S.E.2d at 266 (the presumption of subsection (A) does not apply if the victim has an equal right to be in the dwelling or residence); Manning, 418 S.C. 38, 791 S.E.2d 148 (similar).

the conclusion of its cross-examination, the State indicated it could cross-examine Appellant further on his recorded statements to police, but rather than do so, directed the court to those statements which Judge Griffith had already heard pre-trial in the Denno hearing. (R. 154). At the conclusion of the hearing, Judge Griffith denied the motion for immunity pursuant to the Act. (R. 158-60). Judge Griffith found Nick Berry's version of the events at and during the murder was not credible. (R. 158-60). Therefore, he denied immunity as the fact finder finding Appellant had failed to meet his burden of proof under the Act to prove he was entitled to immunity by a preponderance of the evidence. (R. 158-60).

The Evidence Presented at the Pre-trial Hearing

At the "stand your ground" hearing, Appellant called only himself as a witness. (R. 106-58). He offered no other evidence in support of his claim that he was entitled to immunity under the Act. (R. 105-60). Appellant testified that on the date in question he, his brother Adam, and Bass traveled to Fontenot's house. Once there, they began drinking, smoking marijuana, and doing drugs. Nick Berry admitted he had several shots of liquor and 4 or 5 mixed drinks. He also had 1 and ½ bars of Xanax and smoked some marijuana. While at the house, someone stated that the victim was coming over to Fontenot's to see his son. Once the victim arrived, the victim saw his son. Initially, there were no problems between any of the men. At some point, some of the women started fighting each other and then 1 of the women got into it with the victim. A fight then started in the front yard between Nick's brother Adam and the victim. According to Nick Berry, the victim hit Adam and Adam tried to hit the victim but was unsuccessful. Nick testified the victim then punched his brother Adam over and over in the yard with Adam backing up trying to protect himself. Nick testified the fight went up on the porch and the victim continued to punch Adam into a corner of the porch. Then the victim was on top

of Adam punching him and Adam was protecting himself from the punches but was getting hit. Nick claimed he told the victim to stop but he would not. Nick testified he pulled a knife and stabbed the victim 1 time in the shoulder blade, the victim flinched as if he felt the stab wound, and the victim fell off of his brother but was still moving. Nick believed he dropped the knife at this point. He did not remember stabbing the victim any more, only 1 time in the shoulder blade. He testified his brother got up off the ground and he and his brother then had the victim cornered on the porch and they began to hit and kick the victim together. Nick testified he could not remember anything after that. He did not know how the victim was stabbed 25 times. He said his brother could have done it, but he did not know. He just could not remember. (R. 106-58).

On cross-examination, Nick Berry admitted that on May 11th, at another location, Nick, his brother Adam, and Bass went to pick up Bass's son at the victim's mother's home. The victim came out to the car and was complaining to Nick's brother about picking up the child while drunk or high on drugs. According to Nick, the victim spat in his brother's face. Nick stated his brother rolled up his car window. Nick admitted he got out of the car and confronted the victim face to face, and Nick claimed the victim beat him up punching him several times until he was down on the ground and kicking him. Nick admitted he pulled a knife on the victim, but claimed it was to make the victim stop beating him up. Nick admitted the victim's mother could have ended this altercation, but he didn't remember. (R. 106-58).

Nick was then asked a series of questions about his actions over the next several days where he sought to purchase a "burner" [a disposable gun] and .22 bullets. Nick testified he could not remember trying to buy a gun or trying to buy bullets to solve or take care of a problem, even though there were written text messages showing he did exactly that. He also could not remember threatening the victim's life several times to 3rd parties such as the victim's

mother and Bass's mother. Nick also testified he could not remember others trying to dissuade him from using a gun to resolve his problems or dispute with the victim, even though there were text messages to this effect. (R. 106-58).

When the Solicitor questioned Nick about the date in question, and about the fight in the front yard between Nick's brother Adam and the victim, Nick again repeatedly could not remember details of what occurred in the yard. (R. 106-58).

Nick also could not remember anything after he stabbed the victim 1 time in the shoulder blade. He could not explain how the victim was stabbed 24 more times with the same knife Nick used to stab the victim in the shoulder blade. He couldn't remember if he stabbed the victim 24 more times or if his brother picked up the knife and stabbed the victim 24 more times. He did admit after he stabbed the victim 1 time, in the shoulder blade, the victim got off his brother, and he and his brother then began hitting and kicking the victim in the corner. (R. 106-58).

When asked about the various inconsistent statements he gave after the killing, Nick again claimed he could not remember. He could not remember what he told the first officer on the scene. He could not remember what he told the EMS first responder. He could not remember what he told another officer, that he claimed the victim attacked he [Nick] and his brother [Adam] with a knife. He basically could not remember anything. (R. 106-58).

Nick Berry did not present any of the other eyewitnesses to the killing of the victim at the "stand your ground" hearing. He did not call Bass, Fontenot, or Stone. (R. 105-60). He did not present any physical evidence from the crime scene. (R. 105-60). He did not call any of the officers who investigated the case or the pathologist. (R. 105-60). He did not call any of the detectives who questioned him at the hospital or introduce any of his recorded statements. (R. 105-60).

Judge Griffith, who heard and witnessed Nick Berry's testimony, found after hearing the testimony that Appellant was not credible. He found Nick Berry was not credible in his claim that he could not remember what happened after the first stab to the victim's shoulder blade and he was also not credible when he testified he could not remember certain facts about what occurred in the yard before the 1st stab wound was inflicted. Judge Griffith found there was no explanation from Nick Berry why the victim was stabbed numerous additional times after the first stab, and this was inconsistent and not credible as to the claim of defense of others. Judge Griffith found that Nick's Berry's testimony was not credible as to the events surrounding the victim's death, and since that was the only evidence presented at the hearing, Nick Berry had failed to prove by a preponderance of the evidence that he was entitled to immunity under the Act. (R. 158-60).

The case then proceeded to trial with presentation of all of the evidence in the case. Witnesses who were present during the killing of the victim did testify in the trial. The State also called officers who investigated the case and interviewed Nick Berry. Additionally, the pathologist who performed the autopsy also testified. At the conclusion of the trial, the jury found Nick Berry guilty of murder beyond a reasonable doubt.

ARGUMENT I.

Judge Griffith did not err in denying Appellant immunity from prosecution because as the fact finder Judge Griffith found Appellant's testimony regarding how the killing occurred was not credible; therefore, Appellant failed to meet his burden of proof by a preponderance of the evidence.

Appellant argues Judge Griffith erred in declining to find he was entitled to immunity under S.C. Code Ann. Section 16-11-440 (C) because based on his testimony alone there was evidence he acted in defense of others. Judge Griffith did not err because he saw and heard Appellant's testimony and determined it was not credible; therefore, he appropriately found

Appellant failed to prove by a preponderance of the evidence that he was entitled to immunity under the Act.

Standard of Review

A claim of immunity under the Act requires a pre-trial determination using a preponderance of the evidence standard, which this Court reviews under an abuse of discretion standard. State v. Jones, 416 S.C. 283, 290, 786 S.E.2d 132, 136 (2016)(quoting State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013)). An abuse of discretion occurs when a circuit court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. Id. "In other words, the abuse of discretion standard of review does not allow this Court to reweigh the evidence or second guess the [circuit] court's assessment of witness' credibility. State v. Oates, 421 S.C. 1, 13, 803 S.E.2d 911, 918 (Ct. App. 2017); State v. Douglas, 411 S.C. 307, 316, 768 S.E.2d 232, 237-38 (Ct. App. 2014).

Law / Analysis

"[T]he General Assembly did not intend," to require the circuit court "to accept the accused's version of the underlying facts" in determining a motion for immunity under the Act. Oates, 421 S.C. at 13, 803 S.E.2d at 918; (quoting Curry, 406 S.C. at 372, 752 S.E.2d at 266). In accordance with South Carolina Supreme Court' and Court of Appeals' jurisprudence, the burden of proof of establishing entitlement to immunity under the Act rests upon the party asserting the right to immunity, the appellant, and the burden of proof is by a preponderance or greater weight of the evidence. Curry, 406 S.C. 364, 752 S.E.2d 263; State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011). This same jurisprudence makes the trial court, not the jury, the finder of facts of when the burden of proof has been met for the entitlement of immunity from prosecution under the Act. State v. Marin, 404 S.C. 615, 745 S.E.2d 148 (Ct. App. 2013) (S.C.

Code Ann. Section 16-11-440(A), does not contain any substantive provisions of law to be charged to the jury, but rather, it is a procedural subsection under which the circuit court may grant immunity from prosecution before a trial begins if the court finds the defendant acted lawfully in self-defense), *affirmed as modified on other grounds*, 415 S.C. 475, 783 S.E.2d 808 (2016). Unlike the constitutional right that a defendant is presumed innocent until the government has established a defendant's guilt beyond a reasonable doubt, the Act does not provide a presumption of immunity. But rather, a defendant must establish his entitlement to immunity by proof of the greater weight of the evidence. Curry, *supra*; Duncan, *supra.* Preponderance of the evidence is evidence which, as a whole, shows that the fact sought to be proved is more likely true than not true. *See Blacks Law Dictionary* 1064 (5th Ed. 1979). If after considering all of the evidence presented, the weight of the evidence remains even or if it tips even or so slightly in favor of the government, then the defendant has failed to meet his burden of proof and is not entitled to immunity under the Act. Curry; Duncan.

As the fact finder, necessarily, the trial court [Judge Griffith] must determine the credibility of the witnesses who have testified at an immunity hearing under the Act, including the defendant. The abuse of discretion standard does not allow an appellate court to reweigh the evidence or second-guess the circuit judge's assessment of a witness' credibility. State v. Douglas, 411 S.C.307, 316, 768 S.E.2d 232, 238 (Ct. App. 2014), *cert. dismissed as improvidently granted*, 416 S.C. 627, 788 S.E.2d 686 (2016). Credibility simply means believability.

Judge Griffith found that here, Appellant's testimony was not credible. (R. 158-60). This finding is fully supported by the record. (R. 106-58).

Appellant could not remember significant facts about how the victim was killed. Appellant claimed he blacked out and only stabbed the victim 1 time. Appellant claimed he stabbed the victim 1 time in the shoulder blade. The victim was stabbed 25 times. Appellant could not explain how or give credible reason why the victim was stabbed 24 more times including 2 times in the spine and 1 time in the back of the skull and 1 time behind an ear. The victim died from the numerous stab wounds he received to his back and skull. Appellant could not remember significant events that occurred in the front yard before his brother and the victim ended up on the front porch. His memory also became convenient when discussing what occurred in the days leading up to the victim's murder. Appellant could not remember texting friends and trying to locate a "burner" and .22 bullets to "take care of" the victim, indicating his malice toward the victim. Appellant could not remember conversations in which he threatened the victim's life in the days leading up to the victim's murder. Appellant could not remember any statements he made to police whether at the scene or at the hospital. Almost on every critical point, especially those that proved murder and disproved his claim of defense of others, Appellant could not remember or recall facts or events. (R. 106-58).

Appellant also admitted he was intoxicated at the time of the offense, calling into question any of his recall of certain facts. Appellant admitted he had imbibed several mixed drinks, several shots of liquor, marijuana, and 1 & ½ bars of Xanax before the murder occurred. As a result, Appellant's credibility was in question from the start.

Under South Carolina law, flight is also evidence of guilt. State v. Beckham, 334 S.C. 302, 315, 513 S.E.2d 606 (1999)("Evidence of flight has been held to constitute evidence of guilty knowledge and intent."); State v. Thompson, 278 S.C. 1, 292 S.E.2d 581(1982)(evidence of flight shows guilty knowledge, intent, and that defendant sought to avoid apprehension)

overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); State v. Ballenger, 322 S.C. 196, 200, 470 S.E.2d 851, 854 (1996)(flight is some evidence of guilt); State v. Walker, 366 S.C. 643, 654-55, 623 S.E.2d 122, 127-28 (Ct. App. 2005)(Flight from prosecution is evidence of guilt.); State v. Crawford, 362 S.C. 627, 608 S.E.2d 886 (Ct. App. 2005); State v. Byers, 277 S.C. 176, 177-178, 284 S.E.2d 360, 361 (1981); State v. Grant, 275 S.C. 404, 407, 272 S.E.2d 169, 171(1980)(attempts to run away have always been regarded as some evidence of guilty knowledge and intent); State v. Al-Amin, 353 S.C. 405, 413, 578 S.C. 32, 36-37 (Ct. App. 2003)(flight from prosecution is evidence of guilt), *overruled on other grounds* State v. Broadnax, 414 S.C. 468, 779 S.E.2d 789 (2015). Appellant and his brother attempted to flee the scene and were only unsuccessful in this attempt to flee because they were blocked in leaving the driveway by the first responding officer.

Further, at the pre-trial hearing, Appellant admitted he threw away the knife before attempting to leave the scene. "The attempted destruction of evidence is regarded as a relevant incriminating circumstance." Beckham, 334 S.C. 302, 513 S.E.2d 606 (referencing State v. Epes, 209 S.C. 246, 39 S.E.2d 769 (1946)); Al-Amin, 353 S.C. 405, 578 S.C. 32 (the attempted destruction or concealment of evidence is relevant incriminating evidence); State v. Wells, 162 S.C. 509, 161 S.E. 177 (1931)(similar).[10]

Judge Griffith, did not abuse his discretion, in determining Appellant's testimony was not credible and Appellant had not proven defense of others and entitlement to immunity under the Act by a preponderance of the evidence. Oates, 421 S.C. at 13, 803 S.E.2d at 918; Douglas, 411

[10] Although not mentioned by Judge Griffith in his holding that Appellant's testimony was not credible and Appellant had not met his burden of proof to show entitlement to immunity under the Act by a preponderance of the evidence, Appellant had given numerous false statements to police and first responders about the killing that Judge Griffith had already heard in the Denno hearing and which were referred to by the Solicitor in his cross-examination of Appellant during the "stand your ground hearing." Appellant's testimony was simply not credible in any respect.

S.C. at 316, 768 S.E.2d at 237-38. As a result, this appellate ground has no merit and must be denied.

Appellant's Issue II.

> Did the trial judge err in failing to allow Appellant to present testimony of the deceased's prior shooting of two people four months prior to his death where (1) the evidence established the deceased's character through a specific instance, which was an essential element of Appellant's claim of self-defense as it went directly to Appellant's reasonable fear of the deceased, and (2) the significant probative value of the evidence was not substantially outweighed by the danger of confusing the issues?

The Actual Issue

During the trial, Appellant sought to introduce specific details of a prior incident the victim was involved in which occurred on January 9, 2014, before the victim's murder on May 19, 2014, which details Appellant did not know about. The State objected on the ground that Appellant, by his own admission, did not know about those specific details. (R. 161-62; 517-22). During his case in chief, Appellant proffered the testimony of a bartender, Orville Edwards, who was a victim and witness to the prior incident involving the victim. (R. 523-30). After hearing Edwards' proffer, Judge Griffith denied admission of Edwards' testimony. Appellant now alleges on appeal that Judge Griffith abused his discretion in not admitting Edwards' testimony. (IBOA).

What Occurred Below Relevant to this Issue

At the pre-trial "stand your ground" hearing, under oath, Appellant testified that on the day of the victim's death, he was afraid of the victim for 3 reasons: (1) the victim had beat him up about 10 days earlier [the Mother's Day incident]; (2) he knew the victim's reputation for violence, including the fact that the victim had 2 prior attempted murders, "he shot two people"; and (3) the victim was much bigger than Appellant. (R. 111-12; 115-16). Appellant later clarified number (2) above, "...I just knew he had - - he was known to have guns and shoot

people. That's - - I didn't know that for a fact about whether he had or anything." (R. 116, ll. 19-21). Appellant testified the victim bragged to him about shooting the 2 people. The victim **did not** tell him that he had been jumped by several men and that was why he shot the 2 men in the prior incident. And, the victim told Appellant the reason he came back to the scene of the prior incident was just so he could shoot 2 people. (R. 117-54).

As stated under the previous ground, Appellant testified at the pre-trial hearing that on May 19, 2014, his brother Adam got into a fight with the victim Jamie Galloway and was losing the fight. Appellant testified he stabbed the victim with his [Appellant's] knife because he was afraid the victim was going to beat his brother to death with his fists. (R. 107-17). "All I wanted him to do was just stop hitting my brother." (R. 117, ll. 4-5).

After Judge Griffith denied immunity under the Act, pre-trial, the State moved *in limine* to take up *in camera* whether Appellant would be allowed to ask State's witnesses or other witnesses about what they knew about the prior incident involving the victim on January 9, 2014 in the Vista in Columbia, S.C., where the victim was charged with attempted murder. (R. 160-62). The State conceded that during the trial Appellant could introduce anything he knew about the prior incident including the charges, but the details of what other witnesses knew about the prior incident, that Appellant did not know, was not relevant to the victim's state of mind on the date of the murder or Appellant's reasonable apprehension of fear. (R. 160-62). The court and the parties agreed that prior to questioning any witness about the prior January 9, 2014 incident, Judge Griffith would hear an *in camera* proffer of the testimony and then rule on whether the evidence was admissible. (R. 160-62).[11]

[11] Two State's witnesses testified *in camera* on this issue; Katie Leavitt and Kaysha Fontenot. However, neither actually witnessed the prior incident on January 9, 2014, and only knew the victim had been charged with 2 counts of attempted murder. Both testified they did not know his

Haley Stone then testified *before the jury* including that the victim was someone you did not want to get in a fight with. (R. 321; 333). She was not asked *in camera* about anything.

Tonya Sue Griffin, Bass's mother, testified *before the jury* that the victim was wearing an ankle monitor and she told Appellant, Adam, and Bass they could go to the police and have the victim picked up after the Mother's Day assault because the victim was wearing an ankle monitor.[12] (R. 416-17). Griffin testified the victim was much bigger than Appellant. (R. 422). Victim's mother, Kathy Polk, also testified the victim punched Appellant and knocked Appellant to the ground on Mother's Day, and the victim was much larger than Appellant. (R. 404-414).

During the trial, the State introduced Appellant's recorded statements to police and published them. (State's Ex. 43 & 44). In his 1st recorded statement, Appellant told police **the victim already had 2 or 3 attempted murders**. (State's Ex. 43). Appellant also told police the victim was known to be on "meth" and "you know" how people on meth act. (State's Ex. 43). Appellant also told police the victim had a record of abusing women. (State's Ex. 43). In his 2nd recorded statement, Appellant told police the victim put a gun to Appellant's face on a previous occasion. (State's Ex. 44).

When, Appellant began his case in chief, he proffered the testimony of Orville Edwards. Edwards testified he was a bartender at a bar, the East End, in the Vista of Columbia, S.C. On January 9, 2014, a woman came into the bar claiming that her boyfriend had assaulted her in the

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reputation for violence. (R. 183-90; 209-12, 218). Judge Griffith ruled they could not be asked about the January 9th incident because they did not see it; all they actually knew was the victim had pending charges or indictments. (R. 213-18). *See* State v. Murphy, 216 S.C. 44, 56 S.E.2d 736 (1949)(prior conviction of victim for murder is not reputation evidence); State v. Dill, 48 S.C. 249, 26 S.E. 567 (1897)(defense is allowed to introduce victim's reputation for violence, known to the defendant; but indictment against victim for murder was not reputation).

[12] Appellant then stated to Tonya Griffin that they did not need the police, and the next time Griffin saw the victim he would be dead. (R. 416-17; 421-22; 426).

parking lot. Edwards said he went outside and met a man he believed to be the victim Jamie Galloway and asked him to leave the area. He testified the victim left and Edwards was later informed Galloway had returned. Edwards testified he and 2 men went outside and walked up to the victim. He admitted he had no legal authority to do this and that the men confronted the victim. He testified that at some point the victim pulled a gun and shot him in the leg and shot another man with him in the chest and fired into the crowd of people outside. However, on cross-examination Edwards admitted he did not call police when the man he alleged was the victim returned to the area. Instead, he and 2 men, without any legal authority went outside and confronted the man he believed to be the victim in the parking lot. There was also a crowd of people outside watching. Edwards did not initially see a gun, but someone in the crowd yelled: "he has a gun" and the 3 men, including Edwards, grabbed the victim. Edwards admitted after they grabbed the victim there was a struggle and Edwards punched the victim multiple times. Edwards did not know if the other 2 men punched the victim, but they could have, because it turned into just a "big brawl." Edwards at first denied, then admitted, that the victim went to the ground in "the brawl", and it was when the victim got up or was getting up off the ground that he shot Edwards in the knee and shot his friend. (R. 523-30).

After the proffer, the State also informed the court it had another witness under subpoena who would testify the incident did not occur as Edwards represented to the court. Appellant did not proffer the testimony of any other victim or witness of the prior incident. (R. 531).

After hearing the proffer of Edwards' testimony, including the direct and cross-examination, Judge Griffith ruled he had already admitted evidence that: (1) the victim was out on bond for 2 counts of attempted murder; (2) Appellant knew the victim was out on bond for several counts of attempted murder; (3) the victim was wearing an ankle monitor at the time of

the incident on trial; (4) the victim had assaulted Appellant on Mother's Day; and (5) the victim was someone that one would not want to pick a fight with. (R. 530-32). Judge Griffith found however that the details of the prior incident on January 9, 2014 from the bartender were confusing and would confuse the jury and were too far removed in time and occasion from the incident involving Appellant to be admissible under State v. Day, 341 S.C. 410, 535 S.E.2d 431 (2000)., *which Judge Griffith had carefully reviewed*, and other cases which had followed Day. (R. 530-32). However, Judge Griffith ruled evidence of the fact that the victim had 2 pending charges for attempted murder was admissible, and **those details of the prior incident Appellant was aware of were also admissible**, because the Appellant knew about those charges and those particular facts. (R. 530-32).

As a result, when Appellant testified, the jury heard additional testimony from Appellant himself that the victim was charged with attempted murders before his death and Appellant knew of those 2 pending charges for attempted murder on the date of the incident and what Appellant knew about certain facts underlying those charges. (R. 579). Appellant testified before the jury that on the date of the victim's death Appellant knew the victim had already shot 2 people in the past with a gun. (R. 578). Appellant also testified the victim beat Appellant up on Mother's Day at Polk's residence, and the victim was twice Appellant's size. (R. 569-71). Appellant testified he was so afraid of the victim that on Mother's Day, after the victim beat him up, Appellant urinated on himself. (R. 579-79). As a result of these factors, Appellant testified he was afraid of the victim, i.e. Appellant had a reasonable apprehension of fear of the victim, on the date of the victim's death. (R. 570-71). Appellant testified before the jury that he stabbed the victim because he thought the victim was going to beat his brother to death **with his fists**, because the victim was so big. (R. 578, see also 569-83; & 583-619). Appellant did not testify before the

jury that he stabbed the victim because he thought the victim was going to pull a gun. (R. 569-619). He denied the victim had a knife or a gun. (R. 569-619). Importantly, Appellant was not prohibited by the court from testifying before the jury about anything Appellant knew on the date of the victim's death about **either** the victim's reputation for violence **or** any specific acts of violence committed by the victim.[13]

Appellant also argued the same evidence, the fact that the victim was out on bond for 2 attempted murders and had shot 2 people, in closing argument. (R. 631). The prosecutor also mentioned the same evidence in his closing argument. (R. 657). And, the jury was instructed on the same, i.e. consideration of the victim's reputation for or prior acts of violence in determining whether the defendant acted lawfully in defense of a third person or in self-defense. (R. 677).

Appellant now argues that Judge Griffith erred in not admitting the testimony of the bartender, Orville Edwards, as to the details and facts of the January 9, 2014 incident which details Appellant knew nothing about on the date of the victim's death. (IBOA). Judge Griffith did not err but appropriately followed the evidentiary law of South Carolina. Day, *supra*.

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[13] As previously noted, Appellant had testified at the "stand your ground" hearing that he knew the victim carried guns and the victim had bragged to him about shooting 2 people. Appellant also testified the victim told him he went back to the bar on January 9, 2014, just to shoot some people. Appellant did not testify to these details before the jury. However, he was not prohibited from doing so by Judge Griffith. He simply chose not to. He also chose not to ask or call any witness to testify to the victim's reputation for violence. Appellant testified before the jury he stabbed the victim because he thought the victim was going to beat his brother to death with his fists. **(R. 569-83; 584-619).**

ARGUMENT II.

Judge Griffith did not err in not allowing a witness to present the details of the victim's involvement in a prior shooting on January 9, 2014, because Judge Griffith allowed in evidence the facts of the same prior shooting that Appellant was aware of and which could have directly affected Appellant's reasonable fear of the victim; it was only facts which Appellant was not aware of at the time of the victim's death that Judge Griffith would not allow another witness to testify to, which was the appropriate ruling; regardless, failure to admit the details of the prior incident was harmless beyond a reasonable doubt where the prior incident and what Appellant knew of it was before the jury and uncontested.

Standard of Review

The admission or exclusion of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion and prejudice to the accused. State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011); 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. Brockmever, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013). "Whether a specific instance of conduct by the deceased is closely connected in point of time or occasion to the homicide so as to be admissible is in the trial judge's discretion and will not be disturbed on appeal absent an abuse of discretion resulting in prejudice to the accused." State v. Day, 341 S.C. 410, 420, 535 S.E.2d 431, 436 (2000).

Law/Analysis

Rule 404(a)(2), SCRE, provides, in pertinent part:

> Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except ...[e]vidence of a pertinent trait of character of the *victim* of the crime offered by the accused, or by the prosecution to rebut the same...

(emphasis added). Further, Rule 404(b), SCRE, states:

> Evidence of other crimes, wrongs, or acts is not admissible *to prove the character of a person in order to show action in conformity therewith.* It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.

(emphasis added). Moreover, Rule 405, SCRE, addresses the following methods of proving character:

> (a) Reputation or Opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation, or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.
>
> (b) Specific Instances of Conduct. In cases where character or a trait of character is an *essential element* of a charge, claim, or *defense*, proof may also be made of specific instances of that person's conduct.

(emphasis added). However,

> [i]n the murder prosecution of one pleading self-defense against an attack by the deceased, evidence of other *specific instances of violence* on the part of the deceased are not admissible unless they were directed against the defendant, or if directed against others, were so closely connected at point of time or occasion with the homicide as reasonably to indicate *the state of mind of the deceased at the time of the homicide, or to produce reasonable apprehension of great bodily harm.*

State v. Day, 341 S.C. 410, 419-20, 535 S.E.2d 431 (2000)(emphasis added); State v. Mekler, 368 S.C. 1, 626 S.E.2d 890 (Ct. App. 2005), *affirmed on other grounds*, 379 S.C. 12, 664 S.E.2d 477 (2008)(same); State v. Douglas, 411 S.C. 307. 324, 768 S.E.2d 232, 242 (Ct. App. 2014)(exact same).[14] Whether in a homicide case a specific instance of conduct by the deceased is so closely connected in point of time or occasion to the crime so as to be admissible is in the

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[14] This has been the rule both before and after the adoption of the SCRE. State v. Day, 341 S.C. 410, 420, 535 S.E.2d 431, 436 (2000); State v. McCray, 413 S.C. 76, 92-95, 773 S.E.2d 914 (Ct. App. 2015); State v. Douglas, 411 S.C. 307, 768 S.E.2d 232, 242 (Ct. App. 2014); State v. Mekler, 368 S.C. 1, 626 S.E.2d 890 (Ct. App. 2005); State v. Brown, 321 S.C. 184, 467 S.E.2d 922 (1996); State v. Amburgey, 206 S.C. 426, 34 S.E.2d 779 (1945); State v. Hill, 129 S.C. 166, 123 S.E. 817 (1924); State v. Moody, 94 S.C. 26, 78 S.E. 737 (1913); State v. Andrews, 73 S.C. 257, 53 S.E. 423 (1906); State v. Thrailkill, 71 S.C. 142, 50 S.E. 551 (1905); State v. Dill, 48 S.C. 249, 26 S.E. 567 (1897).

trial judge's discretion and will not be disturbed on appeal absent an abuse of discretion resulting in prejudice to the accused. State v. Day, 341 S.C. 410, 420, 535 S.E.2d 431, 436 (2000); State v. Brown, 321 S.C. 184, 467 S.E.2d 922 (1996); State v. Douglas, 411 S.C. 307. 324, 768 S.E.2d 232, 242 (Ct. App. 2014).

Appellant argues Judge Griffith erred in not allowing the testimony of the bartender of the details of the victim's shooting of 2 other individuals outside a bar in the Vista on January 9, 2014, which specific details Appellant knew nothing about. Appellant is wrong.

First of all, Judge Griffith admitted the prior incident which occurred on January 9, 2014, i.e. that the victim had shot 2 people and was charged with 2 counts of attempted murder and was out on bond for those charges and wearing an ankle monitor. Judge Griffith admitted the following testimony and evidence during the trial from both the State and from Appellant:

(1) Specific instances of violent conduct of the victim;

(2) The victim was out on bond for 2 counts of attempted murder;

(3) The victim was wearing an ankle monitor because he was out on bond for 2 counts of attempted murder;

(4) The victim had shot 2 people with a gun in the incident the victim was out on bond for;

(5) the victim was someone you would not want to fight with;

(6) the victim had assaulted Appellant approximately 10 days before the victim's murder;

(7) Appellant knew of specific instances of violent conduct of the victim;

(8) Appellant was aware the victim was out of bond for 2 counts of attempted murder;

(9) Appellant knew the victim was wearing an ankle monitor because the victim was out on bond for 2 counts of attempted murder;

(10) Appellant knew the victim had shot 2 people with a gun;

(11) The victim "thought he was all hard and shit;"

(12) The victim had a record for assaulting women;

(13) The victim was on methamphetamine.

Judge Griffith admitted this evidence because **these were the facts Appellant was aware of at the time of the incident for which Appellant was on trial.** The jury heard this evidence not only from Appellant, but also from witnesses for the State, and from Appellant's own statements to police admitted in evidence. (R. 416-17; State's Ex. 43 [1st statement]; State's Ex. 44 [2nd statement]; R. 578). What Judge Griffith held was not admissible was the testimony of the bartender regarding *the specific details* of the shooting outside the bar in the Vista, on January 9th, *of which Appellant was unaware*. This was not an abuse of discretion.

In the present case, it is undisputed that the prior incident on January 9, 2014 was not directed against Appellant. Appellant was not even there. As a result, in keeping with prior precedent, the facts of the prior incident are not admissible unless they are so closely connected in time or place to the present incident in order to: (1) reasonably show the state of mind of the victim on the date of his murder, or (2) show a reasonable basis for fear of the victim by the Appellant. Day, 341 S.C. at 419-20, 535 S.E.2d 431; Meckler, 368 S.C. 1, 626 S.E.2d 890; Douglas, 411 S.C. at 324, 768 S.E.2d at 242.

The details of the prior incident do not show victim's state of mind on May 19th

First, the details of the prior incident of January 9, 2014, as related by the bartender, do not reasonably show the victim's state of mind on May 19, 2014 in any way whatsoever. Haley Stone, the only sober witness on May 19th, testified the victim and Adam were in a fist fight. The victim did not pull a gun and shoot anyone. The victim was not attacked by a group of men, dragged to the ground, and pull a gun and shoot anyone. (R. 303-37). Appellant's sworn version of events before the jury was similar. (R. 569-19). He testified the victim and Adam were in a fist fight. He testified the victim was punching Adam with his fists, and he was afraid the victim would kill Adam with his fists because the victim was bigger than his brother.

Appellant testified he stabbed the victim because he was afraid the victim would beat his brother to death with his fists. (R. 569-619). He did not see the victim pull a gun. He did not testify he was afraid the victim would pull a gun. (R. 569-619). As a result, the facts of the prior incident on January 9, 2014 in the Vista as related by the bartender do not reasonably show *the victim's state of mind* on May 19, 2014, the date of his death. Day, 341 S.C. at 419-20, 535 S.E.2d 431; Douglas, 411 S.C. at 324, 768 S.E.2d at 242; State v. McCray, 413 S.C. 76, 92-95, 773 S.E.2d 914, 923-924 (Ct. App. 2015)(testimony of 2 witnesses regarding prior incident of the victim were "situation specific" and unrelated to victim's state of mind at the time of the homicide). Further, even if the fact that the victim had shot 2 people with a gun previously could show the victim's state of mind on the date of his death, the incident itself was admitted before the jury. The jury knew the victim had shot 2 people with a gun, was charged with 2 attempted murders, and was out on bond for those charges.

The court admitted the facts of the prior incident Appellant knew of

As to the 2nd exception, Appellant completely ignores that Judge Griffith admitted in evidence the fact that the prior incident occurred and that Appellant knew about the prior incident, because it could form the basis of Appellant's reasonable apprehension of fear of the victim. Day, *supra*; Meckler, *supra*; Douglas, *supra*.[15] It was undisputed at trial, that Appellant

[15] Appellant argues in his brief that Day and Meckler require admission of the bartender's testimony because the prior incidents in those cases were 4 months and 3 months before the murders. Appellant is wrong. Both cases are distinguishable from this case. Further, time alone is not dispositive regarding admissibility of a prior incident. McCray, 413 S.C. at 92-95, 773 S.E.2d at 923-924. In Day, the prior incident was admissible because the defendant was seeking to show at trial that the victim was acting under the same drug induced paranoia on the date of his death, as in the prior incident, showing both the victim's state of mind on the date of his death and the defendant's reasonable apprehension of fear. In Meckler, the defendant was improperly not allowed to testify about a prior incident she was aware of and witnessed involving the victim and the person she was defending on the date of the killing, where it caused her reasonable apprehension of fear of the victim and again showed the victim's state of mind on

knew the victim had shot 2 people with a gun and the victim was out on bond for 2 counts of attempted murder and wearing an ankle monitor. These facts were introduced by both the State and Appellant, discussed in closing arguments by both sides, and the court instructed the jury on this evidence and its purpose. Judge Griffith also admitted other evidence of why Appellant feared the victim including the prior assault on Mother's Day *and* the difference in sizes of Appellant and the victim. Appellant was not prohibited from introducing any other evidence of what he knew about the victim, including what he knew about the prior incident that could have caused a reasonable apprehension of fear of the victim. He simply chose not to testify to it.

The details of the prior incident could not have formed Appellant's apprehension of fear

What Judge Griffith excluded was the testimony of the bartender of the details of the prior incident of January 9, 2014 of which Appellant knew nothing about, because those details could not have formed the basis for Appellant to have a reasonable apprehension of fear of the victim. Appellant admitted in his pretrial testimony **and** before the jury that the only thing he knew about the prior incident was the victim shot 2 people with a gun and was charged with 2 attempted murders. These facts were before the jury and undisputed. What the jury didn't hear was a group of men with no lawful authority grabbed and tackled the victim on January 9, 2014, punched him, struggled over a gun with him, and the victim shot 2 of those men. Additionally, the State had a witness under subpoena who was going to testify the prior incident did not even happen the way the bartender claimed. Judge Griffith did not abuse his discretion in not admitting the details of the prior incident, which Appellant knew nothing about and could not

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the date of his death. In the present case, as discussed above, *the details of the prior incident* do not establish the victim's state of mind on the date of his death, **and** Appellant was not prohibited from testifying regarding the facts he knew of the prior incident which could have caused him to form a reasonable apprehension of fear of the victim, and those facts were admitted before the jury and not disputed.

have formed a basis for Appellant's reasonable apprehension of fear of the victim. State v. Day, *supra*; State v. Meckler, *supra*. *See also* State v. Douglas, 411 S.C. 307, S.E.2d (Ct. App. 2014)(admission of testimony of police officers of details of victim's prior violent behavior that defendant did not know about was harmless given the other testimony and evidence of the victim's prior violent behavior that the defendant did know about that was admitted); Hayes v. Jones, 2014 W.L. 1119460 (E.D.N.C. 2014)(*not reported in F.Supp.3d*)(since petitioner did not know about victim's prior violent crime conviction it was not admissible to prove petitioner's state of mind at the time of the homicide); State v. Corn, 307 N.C. 79, 85, 296 S.E.2d 261, 266 (N.C. 1982)(since appellant did not know about victim's prior conviction it was not admissible as to appellant's state of mind and it was clearly not reputation evidence).

Appellant, by his own admission, was not aware of the details surrounding the incident on January 9, 2014. He was not aware the bartender and 2 other men had come out of a bar and confronted the victim and grabbed him and took him to the ground. He was not aware the bartender punched the victim with his fists several times during the brawl. Nor was he aware that as the victim was struggling to get up off the ground and free from the 3 men who attacked him, the bartender was shot in the leg and another person was shot in chest. Since *these particular details* were not known by Appellant, *these details* could not have caused Appellant to form an apprehension of fear of the victim. See Rule 405(b), SCRE. The facts of this prior incident **that Appellant was aware of**; i.e. that the victim had shot 2 people with a gun, was charged with 2 attempted murders arising out of the incident, and was out on bond for 2 attempted murders wearing an ankle monitor, were admitted before the jury and uncontested by the State. The particular facts that could cause Appellant to form an apprehension of fear of the

victim were admitted in evidence. SCRE 405(b). As a result, Judge Griffith did not abuse his discretion.

Further, Judge Griffith was correct. Admitting the bartender's testimony could have confused the jury and the issues in the case. Rule 403, SCRE. If the bartender had been allowed to testify, the jury would have heard the victim was confronted by 3 men and a large crowd, outside a bar, before this prior shooting. The 3 men who confronted the victim were not police officers. The 3 men grabbed the victim and took him to the ground. The victim was punched by the bartender multiple times. The victim did not pull a gun until there was a struggle with 3 other men. The bartender testified there was a struggle over the gun and the bartender was shot in the leg and another individual was shot in the chest. Hearing from the bartender, the jury in Appellant's case could very well have believed the victim was not at fault in the incident *or* would have been unsure the victim was guilty of attempted murder. Plus, the State was prepared to call in rebuttal, a witness who would testify the incident did not even occur as the bartender contended. There would have been a trial within a trial over whether the victim was at fault in the prior incident or not. *See* United States v. Wellons, 32 F.3d 117, n. 3 (4th Cir. 1994)(even if evidence was admissible under Rule 405(a) it was properly excluded under Rule 403 because of its likelihood to confuse the jury and misdirect the jury from the issues before it)(citing United States v. Waloke, 462 F.2d 824, 830 (8th Cir. 1992)(upholding exclusion, pursuant to Rule 403, of extrinsic evidence, offered by the defendant, of collateral matters relating to the victim's character, where such evidence was properly admissible under Rule 405(a))[16]; United States v. Piche, 981 F.2d 706 (4th Cir. 1992)(Fed. Rule of Evid. 405(b) "possesses the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume

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[16] *Abrogated on other grounds*, Byrd v. United States, 138 S.Ct. 1518 (2018).

time.")(quoting Rule 405 Advisory Committee's Note), *superseded on other grounds*, United States v. Ziadeh, 104 Fed. Appx. 869 (4th Cir. 2004); State v. Lyles, 379 S.C. 328, 665 S.E.2d 201 (Ct. App. 2008)(in murder prosecution, evidence victim and key witness for the prosecution had used or sold drugs was irrelevant to the facts of case, where there was no evidence drugs played any part in the commission of any crime charged; there was no probative link between the proffered testimony (that drugs were offered for sale outside of the apartment several months before the shooting, and that a small quantity of partially-smoked marijuana was found near the victim), and pending charges. By insinuating a State's witness was a drug dealer and drugs were present next to the victim, such evidence could unfairly impugn the character of the victim and the witness; the risk of confusion or misdirection required an analysis under Rule 403, SCRE, and given the tenuous probative link, the prejudicial effect outweighed any value the evidence may have held).

What the jury heard in Appellant's trial was what Appellant knew about the prior incident and what could have formed the basis for Appellant's apprehension of fear of the victim. Day, *supra*. The victim had shot 2 people with a gun, was charged with 2 counts of attempted murder, was out on bond for those charges, and wearing an ankle monitor. The jury also heard the other evidence Appellant claimed to have caused his reasonable apprehension of fear of the victim, including the prior assault on Mother's Day and the victim's size in relation to Appellant. Finally, Appellant was not prohibited from testifying about anything else that he knew about the victim that might have caused his reasonable apprehension of fear of the victim. As a result, Judge Griffith did not abuse his discretion in excluding the testimony of the bartender as to the alleged details of the prior incident of which Appellant knew nothing about on the date of the

victim's death and could not have formed the basis for a reasonable apprehension of fear. Day, *supra*.

Finally, Appellant testified before the jury that he stabbed the victim because he thought the victim was going to beat his brother to death with his fists. (R. 569-83). Appellant did not testify before the jury that he thought the victim was going to pull a firearm, so he stabbed him. (R. 569-83). In fact, Appellant admitted under oath that the victim did not have a gun but was beating his brother with his fists. (R. 569-83). As a result, the details of the prior incident on January 9, 2014 could not have shown the victim's state of mind on May 19, 2014. State v. Day, *supra*. And, those details did not contribute to Appellant's reasonable apprehension of fear of the victim. Day, *supra*; Meckler, *supra*. What was important was what Appellant knew on the day of the crime, that the victim had previously tried to kill 2 people, which was before the jury. Judge Griffith did not abuse his discretion. Id.

Harmless Error

Regardless, any error in failing to admit the specific details of the prior incident as related by the bartender was harmless and could not be prejudicial. Appellant testified before the jury that he was aware the victim had been charged with 2 counts of attempted murder and the details of those 2 charges that he, Appellant, was aware of. (R. 578). Appellant told the jury the victim had shot 2 people with a gun. (R. 578). Appellant was not prohibited from relating any other detail of the prior incident or the victim that he knew about on the day of the murder. Appellant's statement to police, which was played for the jury, states the victim was charged with several counts of murder. (State's Ex. 43). Bass's mother testified before the jury that the victim was *wearing an ankle monitor* at the time of the Mother's Day incident, and she informed Bass and Appellant they should contact police regarding the victim striking Appellant on

Mother's Day because he was out on bond (R. 416-17). It was undisputed by the State that the victim was out on bond for 2 counts of attempted murder and was charged with shooting 2 people in that incident. The defense argued this evidence in closing argument. (R. 631). The prosecutor also mentioned the same evidence in his closing argument. (R. 657). And, the trial court instructed the jury on the same, i.e. consideration of the victim's reputation or prior acts of violence in determining whether Appellant acted lawfully in defense of a third person or in self-defense. (R. 677). There was no prejudice to Appellant from the bartender in the Vista not being allowed to testify to *the details of the prior incident* that Appellant did not know about. *See* State v. Douglas, 411 S.C. 307, S.E.2d (Ct. App. 2014)(admission of testimony of police officers of details of victim's prior violent behavior that defendant did not know about was harmless given the other testimony and evidence of the victim's prior violent behavior that the defendant did know about that was admitted).

Further, Appellant was better off without the details of the prior incident. If the bartender had been allowed to testify, the jury would have heard the victim was confronted or surrounded by 3 men and a large crowd outside a bar before this shooting. The 3 men who confronted or surrounded the victim were not police officers. The 3 men grabbed the victim and took him to the ground. The bartender punched the victim several times. The bartender testified it was a "brawl." The victim did not pull a gun until the men assaulted him. The bartender testified there was a struggle for the gun and the bartender was eventually shot in the leg and another individual in the chest. Hearing from the bartender, the jury in Appellant's case could very well have believed the victim was not at fault in the incident *or* would have been unsure the victim was guilty of attempted murder. Instead, what the jury heard in Appellant's trial, was what Appellant actually knew, the victim had shot 2 people with a gun and was charged with 2 counts of

attempted murder, was out on bond for 2 counts of attempted murder, and was wearing an ankle monitor because of the prior incident. The failure to admit the bartender's testimony, was harmless. This appellate issue has no merit and must be denied.

Appellant's Issue III.

> Did the trial judge err in failing to instruct the jury on the doctrine of imperfect defense of others to allow the jury to consider voluntary manslaughter if it were to determine that Appellant's belief that his brother was in actual danger of losing of his life or sustaining serious bodily was unreasonable as the vicious attack by the deceased on Appellant's brother would have provided the necessary heat of passion based upon sufficient legal provocation?

What Occurred Below

After the presentation of evidence by both sides, the judge held a charge conference. Appellant had provided written requests to charge. (R. 620-21). While reviewing the submissions, the judge considered Number 4. (R. 624). The requested instruction provided:

> If you find that the Defendant believes he or another person was in danger of serious injury or death and believes that deadly force was necessary to avoid this danger but that you also find that either of these beliefs was not reasonable then you should consider whether the threat constituted adequate legal provocation as that term is used in defining the crime of Voluntary Manslaughter.

R. *(Def.'s Req. Charge #4). After considering it, Judge Griffith declined to give the instruction. After the jury was instructed on the law, Appellant renewed his request. (R. 685). He explained that the judge did not cover the concept of mistaken belief in the need for deadly force. (R. 685). Judge Griffith indicated that he "thought [he] did." (R. 685, ll. 9-10). He included it "in the second element" of self-defense. (R. 685, ll. 12-14). He instructed the jurors regarding the reasonable belief of the person who defended another. (R. 685, ll. 14-22). Appellant clarified that the purpose of the instruction was to inform the jury that if the defendant believed a person was in danger of serious harm and was mistaken as to that belief, then the jury could consider the

conduct to be evidence of legal provocation for analyzing voluntary manslaughter. (R. 685-86). Judge Griffith refused to provide this instruction to the jury as it was not a correct statement of the law. (R. 686, 11. 4-6).

During the motion for new trial, defense counsel reiterated his request for an instruction regarding how to analyze "a failed self-defense claim." (R. 703, ll. 3-9; see also R. *(MNT)). Defense counsel argued the jury charge would have assisted the jurors in understanding the interplay among murder, voluntary manslaughter, and self-defense. According to defense counsel, the proposed jury charge provided instruction "on if [the jurors] don't feel it was self-defense, they could still use the possibility of an imperfect self-defense on the question of whether or not it was murder or voluntary manslaughter." (R. 703 - 704). He elaborated: "And we specifically requested the charge just in case the jury did not believe that self-defense charge was perfected." (R. 704). The prosecutor thought the court "made the right ruling at the time," "..the charge [was not] appropriate under the law and the facts of the case." (R. 704, ll. 13-16). Judge Griffith acknowledged controlling case law required him to tailor the self-defense charge to the facts presented, which he did. (R. 704). He stood by his decision not to provide the requested instruction because it was not a correct statement of the law. (R. 704-705).

ARGUMENT III.

Judge Griffith could not have erred in failing to instruct the jury on the doctrine of imperfect self-defense reducing murder to manslaughter, because South Carolina does not recognize the doctrine of imperfect self-defense and a trial judge must charge the current and correct statement of the law.

Standard of Review

"In criminal cases an appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." Clark v.

Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Id.

Law / Analysis

"[T]he trial judge is required only to charge the current and correct law of South Carolina." State v. Taylor, 356 S.C. 227, 231, 589 S.E.2d 1, 3 (2003)(citing Cohens v. Atkins, 333 S.C. 345, 509 S.E.2d 286 (Ct. App. 1998)). Appellant alleges Judge Griffith erred [abused his discretion] in failing to charge the jury on imperfect self-defense. Appellant is wrong.

South Carolina has not adopted imperfect self-defense. State v. Sams, 410 S.C. 303, 315, 764 S.E.2d 511, 517 (2014). Imperfect self-defense is not the law in South Carolina. State v. Finley, 277 S.C. 548, 551, 290 S.E.2d 808, 809 (1982)("the theory of 'imperfect self-defense,' which reduces murder to manslaughter 'is not the law of South Carolina.'")(cited in Sams, 410 S.C. at 315; 764 S.E.2d at 517). Therefore, Judge Griffith could not have erred [abused his discretion] in declining to instruct the jury on imperfect self-defense [Defendant's requested instruction #4] because it was not a current and correct statement of the law of South Carolina. Taylor, 356 S.C. at 231, 589 S.E.2d at 3(the trial judge is only required to charge the current and correct law of South Carolina); Finley, 277 S.C. at 551, 290 S.E.2d at 809(the trial judge did not err in refusing to charge the jury on the "theory of imperfect self-defense" as that is not the law of South Carolina); Sams, 410 S.C. at 315, 764 S.E.2d at 517, (South Carolina has not adopted the "theory of imperfect self-defense" reducing murder to manslaughter); State v. Scott, 414 S.C. 482, 488, 779 S.E.2d 529, 532 (2015)(recognizing the holding in Sams that South Carolina has not adopted imperfect self-defense); Ivey v. Catoe, 36 Fed. Appx. 718, n. 8 (4th Cir. 2002)(*Unpublished*)(South Carolina does not recognize the doctrine of imperfect self-

defense)(citing Finley, 277 S.C. at 551, 290 S.E.2d at 809); *see also* State v. Wiggins, 330 S.C. 538, n. 18, 500 S.E.2d 489, n. 18 (1998)(explaining the holding in Finley); Taylor v. Warden at Allendale, 2014 W.L. 4716443 (D.S.C. 2014)(*Unpublished*)(counsel was not ineffective in failing to request imperfect self-defense jury instruction as that is not the law of South Carolina)(quoting Finley, 277 S.C. at 551, 290 S.E2d at 809). As a result, this appellate ground has no merit and must be denied.

Further, as the Court recognized in Sams, *supra* and Scott, *supra*, even if South Carolina were to at some future day adopt imperfect self-defense as the law, which it has not done, it is of no moment to Appellant's case as it "...would, at most, entitle him to an instruction on voluntary manslaughter, which he already received." Scott, 414 S.C. at 488, 779 S.E.2d at 532 (quoting Sams, 410 S.C. at 316, 764 S.E.2d at 517, (citations omitted)). Judge Griffith fully charged the jury on the lesser included offense of voluntary manslaughter. (R. 670-72). As a result, there is no merit to this appellate ground and it must be denied. Scott, *supra*; Sams, *supra*.

Appellant's Issue IV.

> Did the trial judge err in failing to grant Appellant's motion for a mistrial where the jurors engaged in premature deliberations and the judge's admonishment was a casual reminder for the jurors not to deliberate until all evidence was presented, closing arguments made, and jury instructions given?

What Occurred Below

After the jury was selected, Judge Griffith gave the jury preliminary instructions what their role and duties would be in the case. He also instructed the jury they were not to discuss or deliberate about the case until the end of the trial after all of the witnesses and evidence had been admitted. (R. 12-15). He also instructed the jury again before opening statements not to discuss the case during the trial when the jury was on recess or during a break. (R. 166-67). And, Judge

Griffith instructed the jury when they went on a lunch break that they could not discuss the case. (R. 236). Judge Griffith instructed the jury again when they went on a break that they could not discuss the case. (R. 301-02). And, Judge Griffith instructed the jury when they went home at night that they could not discuss the case. (R. 338).

During the state's case-in-chief, Judge Griffith appointed a foreperson of the jury. (R. 428, ll. 12-21). While sending the jurors to lunch, Judge Griffith instructed the jurors as follows:

> We're still taking testimony, we're still hearing evidence. You-all are not allowed to discuss the case in any fashion among one another even on breaks. I kind of caught wind of that. I don't know what was being discussed, but you can't do it because there's more witnesses coming, we don't have all the parts it takes to decide on whether it's the case or not, there's more to it. But it's important, it's part of your oath. You need to follow the instructions of the Court and my instructions are to not discuss the case until you get all of the testimony, all the evidence in the record and my instructions on the law because I haven't told you what the law is; that the law says this, this and this. I haven't given it to you yet, and that's important.
>
> So don't discuss the case. You can talk about the weather, you can talk about Mr. Mills, you can talk about him, whatever you like, but not about the case.

(R. 429, ll. 2-18). There was no objection by Appellant. (R. 429-696). Appellant did not move for a mistrial on this basis. (R. 429-696). Appellant did not ask for an *in camera* hearing to examine each juror. (R. 429-696). No additional information exists in the trial record as to what Judge Griffith was told by the bailiff. (R. 429-696). The trial continued with the next witness called. No motion for a mistrial was ever made regarding this issue either before or after the jury returned their verdict and Appellant was sentenced. (R. 429-696).

What Occurred After the Trial

In his written post-trial motion for a new trial, Appellant argued for the first time that the trial judge should have granted his [alleged] motion for a mistrial when the alleged premature deliberations took place. (Post-Tr. Motion). However, as shown above, a motion for mistrial was

never made regarding this issue. (R. 429-696). In fact, no objection was raised by Appellant either. (R. 429-696). At the oral argument on the post-trial motion for a new trial, Appellant alleged Judge Griffith erred in denying the [alleged] motion for mistrial he claimed he made during the trial. However, again, the record shows no mistrial motion was made during the trial based on premature jury deliberations. No objection was raised either. (R. 429-696). Judge Griffith denied the motion for a new trial. (R. 697-720; Order Denying Motion for New Trial).

Appellant fails to mention anywhere in his brief, that he did not make a motion for a mistrial at any time during the trial on the basis of premature jury deliberations. (IBOA). Appellant also fails to mention anywhere in his brief that he did not object when the issue was mentioned by Judge Griffith; he did not request the trial court to *voir dire* the jurors; or, that he did not object to the curative instruction given by Judge Griffith. (IBOA).

ARGUMENT IV.

Judge Griffith did not err in failing to grant Appellant's motion for a mistrial because Appellant did not make a motion for a mistrial or even object to alleged premature deliberations; the issue is not preserved for appellate review; and, the issue cannot now be raised by bootstrapping the issue in a post-trial motion; regardless, Appellant has failed to demonstrate prejudice.

Appellant argues on appeal that Judge Griffith erred in not granting his motion for a mistrial due to premature jury deliberations. Judge Griffith could not have erred in failing to grant a motion for mistrial because there was no motion for mistrial made or even an objection. Nor did Appellant request Judge Griffith *voir dire* the individual jurors or object to the curative instruction. (R. 429-696). As a result, this issue is not preserved for appellate review. State v. Aldret, 333 S.C. 307, 312, 509 S.E.2d 811, 813 (1999); State v. Vang, 353 S.C. 78, 85, 577 S.E.2d 225, 228 (Ct. App. 2003).

The South Carolina Supreme Court recognized in State v. Aldret, 333 S.C. 307, 312, 509 S.E.2d 811, 813 (1999), a timely objection must be made for purposes of preserving an issue for appeal, and in the case of premature deliberations, an attorney must make an on the record objection at the attorney's first opportunity to do so. Aldret, 333 S.C. at 312, 509 S.E.2d at 813 (citing State v. Sullivan, 310 S.C. 311, 426 S.E.2d 766 (1993)(We have routinely held that a party must object at the first opportunity to preserve an issue for review), State v. Williams, 303 S.C. 410, 401 S.E.2d 168 (1991)(same) *and* Taylor v. Medinica, 324 S.C. 200, 479 S.E.2d 35 (1996)(A contemporaneous objection is required to preserve an issue for appellate review.)). In Aldret, the appellant became aware of the premature deliberations before the verdict but failed to make a motion for a mistrial, an objection, or request the court *voir dire* the jury panel at the earliest available opportunity, waiting until after the verdict to raise the issue in a motion for a new trial. As a result, the Supreme Court held the issue was not preserved for appellate review. Id. at 312, 509 S.E.2d at 813 (citing as *c.f.* United States v. Nance, 502 F.2d 615 (6th Cir. 1974)(where counsel discovered during jury's deliberations that it had prematurely deliberated, but where counsel waited until after verdict to raise issue of premature deliberations, court held he was barred from raising issue on motion for a new trial).[17]

Likewise, this Court followed suit in State v. Vang, 353 S.C. 78, 85, 577 S.E.2d 225, 228 (Ct. App. 2003) finding the issue was not preserved for appellate review when an objection was not raised at the first opportunity the attorney knew of alleged premature deliberations. Vang, 353 S.C. at 85, 577 S.E.2d at 228 (citing Aldret, 333 S.C. at 312; 509 S.E.2d at 813). This Court stated as follows:

[17] *See also* State v. Taylor, 399 S.C. 51, 731 S.E.2d 596 (Ct. App. 2012)(issue may not be raised for the first time in a post-trial motion; it is not preserved for appellate review)(citing Dixon v. Dixon, 362 S.C. 388, 608 S.E.2d 849 (2005).

> Vang, who is Asian, contends that the questioning between the judge and the foreperson revealed a potential jury bias against Asians and the judge should have individually questioned the jurors to determine if any bias existed. Vang also contends the judge should have questioned each juror individually to determine if the jury was participating in premature jury deliberations. Vang argues that the judge's failure to question the jurors after the note is error and entitles him to a new trial. We disagree.
>
> This issue is not preserved. When the trial judge re-entered the courtroom he stated, "I have shared with the attorneys the impressions I have of the *in camera* matter. I have stated that I would permit them to have the transcription read back. Both have indicated to me that they are satisfied with what I have communicated to them and they do not desire any further inquiry related to [the *in camera* matter]. Vang's counsel failed to object to this ruling and counsel did not request individual questioning of the jurors at this time. Thus the issue is not preserved for our review. *See* State v. Aldret, 333 S.C. 307, 312, 509 S.E.2d 811, 813 (1999)(to preserve an issue of juror misconduct for appellate review a party must object at the first opportunity at trial).

Vang, 353 S.C. at 85, 577 S.E.2d at 228. *See also* State v. Smith, 338 S.C. 66, 525 S.E.2d 263 (Ct. App. 1999)(finding where appellant did not request of trial court *voir dire* of juror on the issue of juror misconduct, the issue was waived on appeal)(citing Aldret).

Here, Appellant was aware of the alleged premature deliberations when Judge Griffith spoke to the jury on pages 470-471 of the Trial Transcript. He raised no objection. He did not move for a mistrial. He did not ask for the trial court to *voir dire* the members of the jury panel. He did not object to the trial court's curative instruction. (R. 429-696). He did not raise this issue until his post-trial motion for a new trial. Therefore, this issue is not preserved for appellate review. Aldret, 333 S.C. at 312; 509 S.E.2d at 813; Vang, 353 S.C. at 85, 577 S.E.2d at 228.

Lack of Prejudice

Further, Appellant failed to demonstrate any prejudice from the alleged premature deliberations.[18] Even assuming for the sake of argument that premature jury deliberations have

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[18] Though the parties use the term "premature deliberations," it is unclear what is actually meant in either scope or substance. The record reflects only that the judge received a non-specific

occurred does not require automatic reversal. Aldret, 333 S.C. at 313-324, 509 S.E.2d at 814. A defendant must still demonstrate prejudice from premature deliberations to be entitled to a new trial. Id. at 313-314, 509 S.E.2d at 814; Smith, 338 S.C. at 74-45; 535 S.E.2d at 267-68. The burden is on the Appellant to demonstrate the premature deliberations affected the verdict. Aldret at 315-16, 509 S.E.2d at 815. A new trial is not warranted absent evidence showing discussions shaped the final deliberations or improperly influenced jurors or prejudiced the defendant. Id., at 314; 509 S.E.2d at 814 (numerous citations omitted).

In State v. Yarborough, 363 S.C. 260, 609 S.E.2d 592 (Ct. App. 2005), this Court remanded the case on the issue of premature jury deliberations and instructed the trial court to follow the procedure set forth in Aldret on remand. The trial court considered an affidavit of a juror, however, the affidavit made no allegation of premature deliberations. Because the defendant failed to produce any other affidavit, this Court held he made no showing to the trial court that premature deliberations occurred, and thus, the trial court did not err by refusing to require the personal appearance of jurors and to hold an evidentiary hearing. Id.

Here, at the post-trial motion for a new trial, Appellant did not offer 1 single affidavit of any juror that premature deliberations prejudiced the verdict in Appellant's case. *Compare*

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report from a bailiff regarding discussions or talk about the case. (See R. 429, l. 5-6; R. 702, ll. 11-13). An allegation of premature deliberations does not equate with proof of the same, much less that if they occurred that they resulted in prejudice. *See generally* State v. Aldret, 333 S.C. 307, 314, 509 S.E.2d 811, 814 (1999)(setting out the following cases and parentheticals: "Stockton v. Com. of Va., 852 F.2d 740 (4th Cir.1988) [citation omitted] (unrealistic to think jurors will never comment to each other on any matters related to trial); United States v. Piccarreto, 718 F.Supp. 1088 (W.D.N.Y.1989)(given length and nature of trial, it is not surprising a juror may make some comments as trial progresses; new trial is not warranted absent evidence showing such discussions shaped final deliberations or improperly influenced jurors or prejudiced defendants)"); *see also* Id., at 315, 509 S.E.2d at 815 (noting 1st step is to determine "if, in fact, such premature deliberations occurred" then the court determines whether such "deliberations were prejudicial"). However, for convenience in discussion, Respondent will continue to use the phrase "premature deliberations."

Ethier v. Fairfield Memorial Hospital, 429 S.C. 629, 842 S.E.2d 325 (2020)(holding party had met its burden to prove prejudice from premature deliberations where juror affidavits submitted and testimony of jurors presented at post-trial hearing proved jurors actually relied on pre-trial deliberations and those deliberations effected or changed the verdict). That did not occur here. Appellant did not offer 1 affidavit or subpoena 1 juror to the post-trial hearing. (R. 697-721). Appellant merely argues that based on the jury's length of deliberations, its' request for the court's instructions in writing, and its' request for a CD player, that premature deliberations must have had an impact on the verdict. This is mere speculation on Appellant's part with absolutely no sworn testimony or evidence to support it. (R. 697-721).[19]

Further, during the trial of the case, the jury had heard Appellant's recorded statements, including his last statement in which he admitted he stabbed the victim because the victim had "snucked him" in the past and the knife was Appellant's. The jury also heard Appellant's phone conversation with his mother in which he stated he stabbed the victim because he was afraid of how he [Appellant] would appear if he did not take up for his brother and he did not like the victim because the victim thought he was "all hard and shit." The jury had heard the testimony of the only sober witness, Haley Stone, that Appellant's brother and the victim were engaged in a fistfight that was mostly wrestling, and Appellant jumped in striking the victim about 20 times in the back. The jury heard the pathologist testimony during the trial that the victim was stabbed 25 times in the back or back of the skull and bled to death from the knife wounds to his back. And, the jury saw and heard the text messages from Appellant to others in the days leading up to and on the day of the victim's death in which Appellant was trying to purchase "a burner" and/or .22 bullets to kill the victim. Appellant's claim that the length of deliberations was affected by

[19] Additionally, the request for the CD player and the court's instructions in writing can be construed as proof that the jury was deliberating and considering evidence.

premature deliberations is merely speculative. As a result, even if this issue was preserved for appellate review, Appellant has failed to produce evidence demonstrating prejudice. Aldret.

CONCLUSION

For the above stated reasons, Appellant Nick Berry's convictions and sentences for murder and possession of a weapon during a violent crime must be affirmed.

Respectfully Submitted,

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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Lexington County
The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

THE STATE, Respondent,

v.

NICHOLAS BENJAMIN CHHITH-BERRY, Appellant.

Appellate Case No. 2019-000352

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 14th day of October, 2020.

s/ J. Anthony Mabry
J. ANTHONY MABRY
Senior Assistant Attorney General

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