STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Eugene C. Griffith, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

NICHOLAS BENJAMIN CHHITH-BERRY,

APPELLANT

APPELLATE CASE NO. 2019-000352

FINAL BRIEF OF APPELLANT

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

STATEMENT OF ISSUES ON APPEAL

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 November 3, 2014, a Lexington County grand jury indicted Appellant for murder (2014-GS-32-3244) and possession of a weapon during the commission of a violent crime (2014-GS-32-3245). R. 756 – R. 757; R. 758 – R. 759. The state, represented by David Shawn Graham and Alton H. Eargle, Jr., called the case to trial before the Honorable Eugene C. Griffith, Jr., and a jury on December 12-15, 2016. R. 1. H. Wayne Floyd represented Appellant. R. 1.

The jury began deliberating at 3:50 p.m. R. 687, ll. 5-8. The court returned to the record at 4 p.m. R. 687, l. 9. Although two questions from the jury were marked as court's exhibits, there was no indication in the transcript that the jurors received responses to their inquiries. R. 687, ll. 10-11; R. 754; R. 754. The questions included a request for the jury instructions in written form and a request for a laptop in order to listen to recordings. R. 754; R. 754. The jury then returned to the courtroom at 4:14 p.m., twenty-four minutes after it began deliberating. R. 687, ll. 16-17. The jury found Appellant guilty of murder and possession of a weapon during the commission of a violent crime. R. 688, ll. 2-8. Judge Griffith sentenced Appellant to fifty years imprisonment for murder and five years imprisonment for the weapon. R. 695, ll. 12-16; R. 760; R. 761.

On December 22, 2016, Appellant filed a motion for new trial and reconsideration of sentence. R. 725. On July 11, 2018, Judge Griffith heard the motions. R. 697. During the hearing, defense counsel noted that at the time of the incident, Appellant "was only 17 years of age." R. 717, ll. 6-8. Citing Miller v. Alabama, 567 U.S. 460 (2016), defense counsel explained that a court is "not supposed to give a life sentence to someone under 18." R. 717, ll. 9-11. Although defense counsel did not request an individualized sentencing hearing as required pursuant to Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014), counsel argued Appellant's sentence of fifty years was the equivalent to a life sentence. R. 717, l. 19 – R. 718, l. 11. Specifically, defense counsel

asked the judge to "reconsider the length of his sentence and shorten it to 30 years." R. 718, ll. 9-11.

At the conclusion of the hearing, Judge Griffith took the matters under advisement. R. 720, ll. 8-14. On March 4, 2019, Judge Griffith issued a written order denying the motion for new trial and granting the motion for reconsideration. R. 728. Judge Griffth reduced Appellant's sentence for murder to forty years imprisonment. R. 728; R. 762.

On March 5, 2019, Appellant served his notice of appeal. This brief follows.

ARGUMENT

I. The trial judge erred 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.

Standard of review

"A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which [the appellate court] reviews under an abuse of discretion standard of review." State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013). "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." State v. Jones, 416 S.C. 283, 289, 786 S.E.2d 132, 136 (2016).

Relevant facts

Prior to trial, Appellant moved for immunity from prosecution pursuant to the Protection of Persons and Property Act. R. 722. In May 2014, Appellant was seventeen years old, weighed approximately 115 pounds, and stood almost five feet and four inches tall. R. 107, ll. 5-11. On May 11, 2014, Jamie Galloway, who was much bigger than Appellant, punched Appellant and beat him up. R. 108, ll. 3-5 (describing the deceased as close to 200 pounds); R. 111, ll. 13-15; R. 115, ll. 13-16; R. 115, ll. 17-18; R. 123, ll. 6-11. When Appellant went to the ground, Galloway started kicking him. R. 123, ll. 14-15. As a result, Appellant was terrified of Galloway. R. 111, ll. 10-15; R. 115, ll. 9-16. Additionally, Appellant was aware that Galloway was on bond for "a few attempted murders" because he had shot two people, about which he had bragged to Appellant. R. 111, ll. 16-21; R. 115, ll. 19-25; R. 116, ll. 19-21; R. 119, ll. 2-6; R. 120, ll. 1-5.

Appellant's brother, Adam, was dating Kayla Bass. R. 109, l. 14. Bass wanted to visit Kaysha Fontenot; therefore Appellant, Adam, and Bass went to Fontenot's house during the middle of May 2014. R. 109, ll. 11-24. Haley Stone was visiting Fontenot as well. R. 110, ll. 14-16. Appellant was drinking alcohol – about five shots and a few drinks. R. 118, ll. 16-19. He also consumed one and a half bars of Xanax. R. 118, ll. 20-21.

Approximately an hour after Appellant arrived at Fontenot's house, Galloway arrived. R. 110, ll. 21-23. Initially, Bass, Fontenot, and Katie, who had driven Galloway to Fontenot's house, fought. R. 112, ll. 4-5; R. 112, ll. 13-18; R. 130, ll. 14-19. Appellant grabbed one of the women and told them to stop fighting. R. 112, ll. 5-6; R. 130, ll. 23-25. Galloway also pulled one of the women away. R. 130, ll. 20-21. Fortunately, the fighting among the women stopped. R. 112, ll. 5-6.

However, Galloway took off his shirt, showing his desire to fight, and punched Adam. R. 112, ll. 11-12; R. 112, ll. 24-25; R. 131, ll. 8-15; R. 131, l. 22 – R. 132, l. 1. Galloway continued swinging at Adam. R. 112, l. 25 – R. 113, l. 2; R. 133, ll. 1-21. Eventually, Adam, who was backing up, fell to the ground. R. 113, l. 2; R. 134, ll. 1-25. Adam tried to get away from Galloway, but he managed to get trapped in the corner of the porch. R. 113, ll. 3-8; R. 134, l. 1 – R. 136, l. 23. Adam fell to the floor of the porch, and Galloway continued his relentless assault. R. 113, ll. 5-8; R. 113, ll. 10-13; R. 137, 15-18. Fearing for his brother's life, Appellant stabbed Galloway once in the shoulder blade with his pocketknife. R. 113, ll. 8-9; R. 113, ll. 14-16; R. 116, ll. 4-6; R. 116, ll. 10-14; R. 138, ll. 12-15. Appellant explained that he was defending his brother, Adam. R. 114, ll. 2-9; R. 114, ll. 17-19. "[B]lood [was] leaking from [Adam's] face." R. 114, ll. 3-4. Adam was "trapped on the porch" while Galloway beat him down. R. 114, ll. 8-9.

Galloway collapsed to the side, which allowed Adam to stand up at that point. R. 113, ll. 17-19; R. 144, ll. 3-5. Adam and Appellant then began striking Galloway. R. 113, ll. 20-22; R. 144, ll. 13-17. Appellant was unable to remember what happened after the two began hitting Galloway. R. 113, ll. 17-24.

After hearing Appellant's testimony, the judge ruled on the request for immunity from prosecution pursuant to the Protection of Persons and Property Act. Judge Griffith had "a problem with the immunity question" because Appellant's "testimony was consistent up until he took the one blow against [Galloway] and then it's very vague and his memory is very, very, very vague from that point forward." R. 158, ll. 8-12. Thus, the judge surmised that Appellant's "proof doesn't get clear by a preponderance of the evidence that he needed to continue to defend his brother." R. 158, ll. 12-14. The judge thought "he failed to meet his burden of proof of proving he would be entitled to immunity because he only has recollection of one blow that he took to assist his brother if that's the case." R. 158, ll. 18-22. Based upon Appellant's inability to recall what happened after he stabbed Galloway, the judge determined it was "a factual question." R. 159, l. 2.

Defense counsel argued that Appellant's inability to remember what happened after the initial blow was inconsequential to the question of immunity. R. 159, ll. 5-11. Thereafter, defense counsel went through the elements of self-defense, and argued how Appellant satisfied each of them. R. 159, l. 12 – R. 160, l. 5.

> [T]he question is whether he was without fault in bringing on the difficulty. … [T]hat's been covered. Whether he believed he was in imminent danger or his brother was, and … he covered that. Whether a reasonably prudent man would entertain the same belief, and … that's clear from the difference in sizes, the fact that he knew about Mr. Galloway's violent nature, that he would - - that one man would strike a fatal blow to save himself or someone else, and … that's what he did. Now whether or not he continued to strike him or whether someone else struck

him, the question is whether they had the right to, and … that's covered - - all those points are covered.

R. 159, l. 15 – R. 160, l. 5.

The judge disagreed with trial counsel, opining that the statute required one "to prove more past the initial blow." R. 160, ll. 6-12. Later, the judge revealed even more about his decision to deny immunity. He explained that the evidence went "both ways." R. 512, ll. 23-24. Thus, he determined it was "a factual question." R. 512, ll. 24-25.

Discussion

In 2006, the South Carolina General Assembly adopted the Protection of Persons and Property Act. S.C. Code Ann. § 16-11-410, et seq. The General Assembly explained its intent was to "codify the common law Castle Doctrine which recognizes that a person's home is his castle and to extend the doctrine to include an occupied vehicle and the person's place of business." S.C. Code Ann. § 16-11-420(A). "The General Assembly [found] that it is proper for law-abiding citizens to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves and others." S.C. Code Ann. § 16-11-420(B). The General Assembly recognized "that persons residing in or visiting this State have a right to expect to remain unmolested and safe within their homes, businesses, and vehicles." S.C. Code Ann. § 16-11-420(D). Finally, the General Assembly explained "that no person or victim of crime should be required to surrender his personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack." S.C. Code Ann. § 16-11-420(E).

To effectuate its intent, the General Assembly created a statute providing for immunity from prosecution to "[a] person who uses deadly force as permitted by the provisions of this article or another applicable provision of law." S.C. Code Ann. § 16-11-450(A).

> A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60.

S.C. Code Ann. § 16-11-440(C). "A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard." State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013). The judge must "sit as fact-finder at this hearing, weigh the evidence presented, and reach a conclusion under the Act." State v. Cervantes-Pavon, 426 S.C. 442, 451, 827 S.E.2d 564, 569 (2019).

Recently, the Supreme Court explained that it had interpreted "another applicable provision of law" found within section 16-11-450(A) to include the common law of self-defense. State v. Glenn, 429 S.C. 108, 117, 838 S.E.2d 491, 496 (2019) (citing State v. Scott, 424 S.C. 463, 473, 819 S.E.2d 116, 120 (2018)). "This means a defendant may seek immunity from prosecution under the Act by 'demonstrating the elements of self-defense to the satisfaction of the trial court by a preponderance of the evidence.'" Id. at 118, 838 S.E.2d at 496 (quoting Curry, 406 S.C. at 372, 752 S.E.2d at 267). During the pretrial hearing, a defendant must set out "a valid case of self-defense," excluding the duty to retreat prong, "and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity." State v. Curry, 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013).

The Court explained that "a trial court should first consider whether the defendant has proved the elements of self-defense by a preponderance of the evidence." Glenn, 429 S.C. at 118, 838 S.E.2d at 496. "If the defendant has failed to meet the elements of reasonable fear or the duty to retreat, the court should then determine whether section 16-11-440(A) or (C) is applicable." Id. Where section 16-11-440(C) is applicable, "it replaces the duty to retreat element required to

establish self-defense." Id. "In determining whether a defendant satisfies section 16-11-440(C), the circuit court must analyze whether, at the time of the incident, he was engaged in an unlawful activity and was attacked in another place where he had a right to be." Id.

Furthermore, when considering whether the defendant was in a place where he had a right to be as required by the Act, the trial court must consider proximate cause or a causal connection to the incident. Id. "[T]o bar a victim of crime from claiming immunity based on a hyper-technical reading of the statute would lead to absurd results when his presence in the place he was attacked had no relation to the incident itself." Id. Additionally, "a proximate cause analysis must also be applied to the unlawful activity element of subsection (C)." Id.

Appellant was entitled to immunity under the Act because he satisfied the elements of defense of others and section 16-11-440(C). The trial judge erred in finding otherwise. As an initial matter, the judge erred in denying immunity because the evidence "went both ways" and "was a factual matter." As the Court made clear, the judge must "sit as fact-finder at this hearing, weigh the evidence presented, and reach a conclusion under the Act." State v. Cervantes-Pavon, 426 S.C. 442, 451, 827 S.E.2d 564, 569 (2019). Judge Griffith refused to sit as fact-finder in the case denied immunity because he determined the facts presented were susceptible to going "both ways."

Self-defense & defense of others

To establish self-defense, four elements must be present: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief, or if the defendant was actually in imminent danger, the

circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life; and (4) the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in the particular instance. State v. Hendrix, 270 S.C. 653, 657-658, 244 S.E.2d 503, 505-506 (1978); see also State v. Davis, 282 SC. 45, 46, 317 S.E.2d 452, 453 (1984).

Additionally, not only does the Act contemplate immunity when a person acts in defense of another, but the defense of others is a common law doctrine that falls within the ambit of "another applicable provision of law" found within section 16-11-450(A). "Under the theory of defense of others, one is not guilty of taking the life of an assailant who assaults a friend, relative, or bystander if that friend, relative, or bystander would likewise have the right to take the life of the assailant in self-defense." State v. Long, 325 S.C. 59, 64, 480 S.E.2d 62, 64 (1997); see also Douglas v. State, 332 S.C. 67, 73, 504 S.E.2d 307, 310 (1998). When a person acts in defense of another, the person "is in the same situation and upon the same plane as those who act in defense of themselves." State v. Hewitt, 205 S.C. 207, 207, 31 S.E.2d 257, 258 (1944). Only those facts "which excuse the killing in defense of self likewise excuse a killing in defense of [another]." Id.; see also, State v. Harvey, 110 S.C. 274, 96 S.E. 399, 400 (1918) (noting that "[w]hile a man may take life in defense of himself or another, yet the slayer, or the person in whose behalf the slayer strikes, must not only be without fault in provoking the difficulty, but there must be a necessity to kill"); State v. Norris, 253 S.C. 31, 38, 168 S.E.2d 564, 567 (1969) (holding "[t]he right of the father to defend his daughter is coextensive with the right of the daughter to defend herself").

> The right of one to justify a slaying on the ground that it was necessary in defense of another person stands upon the same plane or footing as, and is coextensive with, the right of the person to whose aid he or she goes, under the existing circumstances of the particular occasion; or as is sometimes stated, the right to justify killing in

> defense of another depends upon the same conditions as would be necessary to excuse such other person under the plea of self-defense.

40 Am.Jr.2d Homicide § 168 (2014). In other words, "[t]he right is commensurate with self-defense, and every fact requisite to excuse a killing in the defense of self must be present in order to excuse a killing in defense of another." Id.

The defense of others imposes the "alter ego" rule, meaning "an intervenor who used deadly force to defend a person not entitled to use deadly force himself would be held criminally liable." Marco F. Bendinelli, James T. Edsall, Defense of Others: Origins, Requirements, Limitations and Ramifications, 5 Regent U. L. Rev. 153, 153 (Spring 1995).[1] "'[A] person is justified or excused in killing in defense of another person when, *and only when*, the circumstances are such that the latter would be justified or excused if *he* had committed the homicide in his own defense.'" Id. at 158 (quoting Lovejoy v. State, 15 So.2d 300, 301 (Ala. Ct. App. 1943)) (emphasis in the original). When a person interferes in a difficulty on behalf of another, "he may lawfully do in another's defense what such other might lawfully do in his own defense *but no more*; he … is subject to the same conditions, limitations, and responsibilities as the person defended." Id. (quoting Lovejoy, 15 So.2d at 301) (emphasis in the original). South Carolina adopted the alter ego rule in 1906. State v. Cook, 78 S.C. 253, 59 S.E. 862 (1906).

In State v. Sales, 285 S.C. 113, 328 S.E.2d 619 (1985), the South Carolina Supreme Court examined the defense of others instruction as it applied to the defendant in a criminal case. Sales' sister and her boyfriend were fighting in their shared home over the boyfriend's use of grocery money to buy liquor. The boyfriend hit the sister in the face with an iron poker. Sales' nieces ran

[1] Although many jurisdictions have abandoned a strict adherence to the alter ego rule, they have done so only to "allow exculpation based upon the intervenor's reasonable belief that his defensive action was required." Marco F. Bendinelli, James T. Edsall, Defense of Others: Origins, Requirements, Limitations and Ramifications, 5 Regent U. L. Rev. 153, 159-160 (Spring 1995).

to his home and begged him to help sister. Sales found sister at her home holding her face. When sister and boyfriend began to struggle over a heavy object, Sales separated the two. The boyfriend then swung the heavy object at Sales. A fight between Sales and the boyfriend ensued. The boyfriend died. The Court held the trial judge properly instructed the jury that, "under the law of self-defense, a person may not only take the life in his own defense but also in defense of a relative," and "that the right to intervene to protect the relative is subject to the same limitations as the right of self-defense." However, the judge instructed the jury on the duty to retreat, which the Court found to be in error. Instead, Sales had no duty to retreat because sister had no duty to retreat from her home and Sales assumed the rights and limitations of the person he acted to protect. Id. at 114-15, 328 S.E.2d at 619-620.

An individual who provokes or initiates an assault may not assert self-defense. State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999). "Any act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars his right to assert self-defense as a justification or excuse for a homicide." Id.

In State v. Dickey, 394 S.C. 491, 716 S.E.2d 97 (2011), the South Carolina Supreme Court analyzed Dickey's claim that he was entitled to a directed verdict because the evidence showed he was exercising his right to self-defense as a matter of law. Dickey was a security guard at Cornell Arms apartments. Dickey, 394 S.C. at 495, 716 S.E.2d at 98. Two men were guests of residents of the apartment complex. Id. When the men refused to leave, Dickey, in his role as security guard, intervened. Id. at 495, 716 S.E.2d at 99. Dickey contacted the police, and the men decided to leave. Id. at 496, 716 S.E.2d at 99. When the men walked outside, Dickey walked behind them so that he could tell the police where the men had gone. Id. The men turned toward Dickey, made threats, and advanced toward Dickey. Id. at 496-497, 716 S.E.2d at 99. Dickey pulled his gun,

but one of the men continued to advance. Id. at 497, 716 S.E.2d at 100. When the man reached under his shirt, Dickey feared the man had a weapon. Id. In response, Dickey fired his gun, killing one of the men. Id.

Analyzing the first element of self-defense, the Court held Dickey was not at fault in bringing about the harm. Id. at 499, 716 S.E.2d at 101. The Court recognized "a business proprietor's right to eject a trespasser from his premises." Id. The Court explained that "[i]f the proprietor is engaged in the legitimate exercise in good faith of his right to eject, he would in such case be without fault in bringing on the difficulty, and would not be bound to retreat." Id. at 499-500, 716 S.E.2d at 101. The Court concluded that Dickey was exercising his right to eject trespassers in good faith, as the agent of the apartment complex and, as a matter of law, he was not at fault for bringing on the difficulty because he had not brandished his gun, had followed the men outside only to alert the police to their whereabouts, and had not used threatening or words or posture. Id. at 500-501, 716 S.E.2d at 101-102.

In State v. Light, 378 S.C. 641, 650, 664 S.E.2d 465, 469 (2008), the Court held a defendant's statement that it was either "her or me" after the defendant took the gun from the victim established that the defendant believed he was in imminent danger. The Court determined this belief was reasonable in light of the defendant's testimony that in the preceding weeks the victim had been acting jealous, had followed him, and told him that if she caught him with another woman it was "going to be messy." Id.

Also, in Hendrix, 270 S.C. at 659-660, 244 S.E.2d at 506, the Court held the second and third elements of self-defense were easily met as "the conclusion that he was actually in immediate danger of losing his own life was inescapable." When the deceased arrived at the scene, he walked toward defendant who leveled a shotgun at the deceased and told him to "back off." Id. at 660, 244 S.E.2d

at 506. The deceased then retrieved his shotgun and returned to confront the defendant. Id. Although some witnesses testified the deceased never pointed his gun at the defendant and others testified he did, the Court concluded that under *any* version of the evidence "it [was] clear that an actual, imminent danger confronted the [defendant] a danger which, unless met with an immediate response, held the promise of death for the [defendant]." Id.

Once the right to fire in self-defense arises, a defendant is not required to wait until his adversary is on equal terms or until he has fired or aimed his weapon in order to act." State v. Starnes, 340 S.C. 312, 322, 531 S.E.2d 907, 913 (2000) (citing State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978)). "Similarly, the accused doesn't have to wait until his assailant gets the drop on him, he has the right to act under the law of self-preservation and prevent his assailant [from] getting the drop on him." Id. (citing State v. Rash, 182 S.C. 42, 50, 188 S.E. 435, 438 (1936)). "[I]f it is apparent, or reasonably apparent his assailant is taking steps to get the drop on him, he must take steps first to prevent such assailant from getting the drop on him." Rash, 182 S.C. at 42, 188 S.E. at 438.

Furthermore, an individual has the right to act on appearances. State v. Starnes, 340 S.C. 312, 531 S.E.2d 907 (2000); see also State v. Jackson, 277 S.C. 271, 87 S.E.2d 681 (1955). The Court held the trial judge erred in failing to instruct the jury that the defendant had the right to act on appearances concerning one of the shootings. Starnes, 340 S.C. at 320, 531 S.E.2d at 912. In Starnes, one of the potential drug buyers, Wellborn, pointed a gun at the defendant, cursed him, and questioned where he was going. Id. The Court held the defendant was not entitled to a charge on the right to act on appearances concerning Wellborn because his claim to self-defense arose from an *actual* threat. Id. However, concerning the shooting of the other potential buyer, Champlin, the Court held the defendant was entitled to an appearances charge. Id. at 321, 531 S.E.2d at 912. The pertinent fact

noted by the Court was that "[i]mmediately prior to the shooting, [the defendant] observed Champlin hold a gun to [another]'s head and threaten to shoot him, apparently because the intended drug deal, which [the defendant] had arranged, had gone awry." Id. The Court held the defendant was entitled to an appearances charge even though the defendant did not testify that he thought he saw a weapon in Champlin's hand at the time of the shooting. Id.; see also State v. Scott, 424 S.C. 463, 472-473, 819 S.E.2d 116, 120 (2018) (explaining that what the defendant "knew in the heat of the moment" controlled whether the defendant was in actual imminent danger or reasonably believed he was).

Additionally, "when a person is justified in firing the first shot, he is justified in continuing to shoot until it is apparent that the danger to his life and body has ceased." Hendrix, 270 S.C. at 661, 244 S.E.2d at 507. In Douglas v. State, 332 S.C. 67, 72-73, 504 S.E.2d 307, 309-10 (1998), the Court noted the judge had charged that if the defendant was justified in firing the first shot he was justified in continuing to shoot until any danger to his life and body had ceased.

Turning first to the defense of others, as required by the Supreme Court, Appellant satisfied each element of the defense. In order to evaluate Appellant's ability to exercise defense of others, it is necessary to examine whether Adam, Appellant's brother, was entitled to exercise self-defense. First, Adam was not at fault in bringing on the difficulty. The evidence showed Galloway struck Adam first. According to the undisputed evidence, Galloway removed his shirt, showing a willingness to fight. He then punched Adam in the face. Thus, Adam was not the initial aggressor and was not at fault in bringing on the difficulty.

Second, Adam was in actual imminent danger of losing his life or sustaining serious bodily injury or actually believed he was in such danger. Appellant's undisputed testimony showed Galloway was steadily punching Adam. Although Adam was defending himself with an occasional punch, he spent most of his time trying to block Galloway's fists and retreat from the onslaught.

Appellant saw Adam was bleeding profusely from his face as he endured Galloway's assault. Galloway was enormous, especially in comparison to Adam and Appellant. Thus, a reasonable inference – and the only inference to be gleaned from the undisputed testimony – was that Adam was in actual imminent danger of losing his life or sustaining serious bodily injury or actually believed he was in such danger.

Third, to the extent Adam's fear was based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. Galloway's unrelenting barrage of punches to Adam, particularly to his face, would lead a reasonably prudent man to believe he was in imminent danger of losing his life or sustaining serious bodily injury. To the extent Adam was in actual fear of imminent danger, the circumstances required a man of ordinary prudence, firmness, and courage to strike back in self-defense. Galloway was beating Adam ruthlessly and single-mindedly. Galloway attacked Adam in the front yard showing he had little regard for anyone else, including the laws governing our society. In light of Appellant's knowledge of Galloway's prior attempt to kill two people and Galloway's brutal assault on Adam, a reasonably prudent man in the same situation would have struck back in self-defense.

Judge Griffith expressed a "problem with the immunity question" because Appellant was unable to show he "needed to continue to defend his brother" after the first blow. This finding ignored controlling case law. "[W]hen a person is justified in firing the first shot, he is justified in continuing to shoot until it is apparent that the danger to his life and body has ceased." State v. Hendrix, 270 S.C. 653, 661, 244 S.E.2d 503, 507 (1978).

Appellant was entitled to immunity under the Act where the undisputed evidence showed he stabbed Galloway in defense of his brother, Adam, who was entitled to the protections afforded by the common law doctrine of self-defense. The judge's findings to the contrary require reversal.

Protection of Persons and Property Act

The South Carolina Supreme Court affirmed a grant of immunity in State v. Jones, 416 S.C. 283, 786 S.E.2d 132 (2016). Jones and her boyfriend, Eric Lee, shared a residence. Id. at 287, 786 S.E.2d at 134. On the evening of November 1, 2012, Jones and Lee were involved in a physical altercation. Id. Jones left the residence and returned when she had "cooled down." Id. at 288, 786 S.E.2d at 134. While Jones gathered her things, Lee yelled at her and followed her around. Id. at 288, 786 S.E.2d at 135. Jones grabbed a knife for protection. Id. Lee grabbed Jones, shook her, and told her it was over. Id. Believing Lee was going to hit her again, Jones grabbed the knife out of her shirt and stabbed him once in the chest. Id. Although Jones initially left Lee, she and a friend shortly returned to the residence and took Lee for help. Id. However, Lee later died at the hospital. Id.

The Court found there was "nothing in the record to suggest that Jones was at fault in bringing on the difficulty" where she attempted to leave the apartment before the first altercation, returned to the apartment to gather her belongings, and called her friends to pick her up. Id. at 301-302, 786 S.E.2d at 142. Jones told police that she believed Lee "was going to hit her again and that had she not acted as she did, then she would have been killed." Id. at 302, 786 S.E.2d at 142. In Jones, 416 S.C. at 288, 786 S.E.2d at, 135, the Court held Jones' belief that she was in imminent danger of losing her life or sustaining great bodily injury was reasonable in light of Lee having punched her earlier in the night and in Lee grabbing Jones and shaking her immediately prior to the stabbing. Id.

This Court affirmed a grant of immunity in State v. Douglas, 411 S.C. 307, 768 S.E.2d 232 (Ct. App. 2014).[2] Douglas and his friend, Charles Smith, had spent the day on the golf course drinking. Id. at 312, 768 S.E.2d at 236. After leaving the golf course, the two went to Douglas' home

[2] This Court granted certiorari on November 5, 2015. However, on July 13, 2016, this Court dismissed the petition as improvidently granted. State v. Douglas, 416 S.C. 427, 788 S.E.2d 686 (2016).

and continued drinking. Id. at 313, 768 S.E.2d at 236. Smith found a bottle of Douglas' anti-anxiety medicine and began teasing Douglas about it. Id. When Douglas grew angry, Smith "snapped" and "went crazy." Id. Smith grabbed Douglas by his arms and threw him against the refrigerator. Id. When Douglas fell to the floor, Smith got on top of him and struck him in the eye. Id. at 314, 768 S.E.2d at 236. Although Douglas told Smith to leave, Smith refused, but did go into another room. Id. Douglas crawled to his bed and got a pistol from the nightstand. Id. Douglas, returning to the kitchen, again told Smith to leave. Id. Instead, Smith advanced toward Douglas. Id. Douglas lifted the pistol to scare Smith. Id. When Smith was two feet away, Douglas fired the pistol. Id. A bullet hit Smith, and he died within minutes. Id.

This Court held Douglas proved by a preponderance of the evidence that he reasonably believed shooting Smith was necessary to prevent great bodily injury to himself, and that he acted in self-defense. Id. at 319, 768 S.E.2d at 239. The physical evidence was consistent with Douglas' testimony, showing that Smith was in close proximity when the pistol was fired. Id. at 319-320, 768 S.E.2d at 239. This Court noted that Douglas was injured in the altercation prior to the fatal shot, and that in light of Smith's lack of serious injury, Douglas' believe that Smith was about to inflict serious bodily injury upon him if he did not act to protect himself was reasonable. Id. at 320, 768 S.E.2d at 240. This Court also considered evidence that several years prior to the shooting, Smith assaulted Douglas by slamming him against a wall and choking him. Id. Further, this Court found that after Smith attacked Douglas and Douglas retreated to his bedroom, his "reappearance at the kitchen's threshold with a loaded pistol by his side was lawful, as he had a right to defend his home and demand that Smith leave." Id.

Even if this Court were to determine that Appellant is not entitled to immunity under the Act pursuant to his satisfaction of the elements of the defense of others, Appellant was entitled to

immunity under the Act because he satisfied the elements section 16-11-440(C). The trial judge erred in finding otherwise. First, both Adam and Appellant were in a place where they had a right to be. Adam and Appellant were visiting the homeowner. It was undisputed that Galloway punched Adam first. Therefore, Adam was attacked. As discussed supra, Galloway's vicious assault would lead any reasonable person to believe it was necessary to meet force with force. Appellant admitted that he was consuming alcohol underage and abusing prescription drugs at the time. However, the state did not argue – and could not argue – that Appellant's illegal conduct was the proximate cause of Galloway's death. In fact, Appellant's illegal use of alcohol and prescription drugs was not even connected to Galloway's unprovoked and merciless attack on Adam. Therefore, Appellant satisfied each of the elements of the immunity statute as well. The trial judge erred in denying immunity to him.

II. The trial judge erred 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.

Standard of review

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) ("quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.; see also State v. Brockmeyer, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013). "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).

Relevant facts

Prior to trial, the state moved in limine to exclude testimony about Galloway's two attempted murder charges. R. 160, l. 19 – R. 161, l. 4. The prosecutor admitted that if Appellant testified he could "talk about his knowledge about Jamie Galloway and the attempted murder charge and all that kind of stuff." R. 160, ll. 21-23. However, he wanted to prevent defense counsel from "being able to ask every other person about it because, one thing, it doesn't matter," and the prosecutor did not believe it was "appropriate." R. 160, l. 23 – R. 161, l. 1. According to the state, Galloway's prior

attempts to shoot and kill two people were not relevant unless Appellant testified that he knew about it. R. 161, l. 10. Defense counsel argued the evidence was relevant because it went to whether Appellant's belief was reasonable. R. 161, ll. 22-24. Galloway's prior charges made Appellant's belief that Galloway was violent reasonable. R. 161, l. 25 – R. 162, l. 1.

Defense counsel proffered the testimony of Katie Leavitt on this point. Leavitt told the jurors that Galloway was one of her good friends. R. 175, ll. 1-2. During the proffer, Leavitt explained she was aware that Galloway was out on bond for two counts of attempted murder. R. 184, ll. 22-24. The state argued Leavitt's testimony was not admissible under Rule 405, SCRE. R. 185, ll. 8-20. To this point, the state argued the attempted murder charges arose out of an incident that occurred four months prior to Galloway's death. R. 185, l. 21 – R. 186, l. 1. Further, the state argued the evidence was inadmissible from Leavitt because she was not aware of the facts giving rise to the charges. R. 186, ll. 1-4. The state pointed out that "none of those witnesses" were present at the trial. R. 186, ll. 4-5; R. 186, l. 23 – R. 187, l. 8. In the state's view, the specific conduct giving rise to the attempted murder charges was not admissible "with any witness who didn't see it." R. 188, ll. 24-25.

According to the state, the fact that Galloway tried to kill two people four months prior was not relevant to his state of mind on the night of his death. R. 186, ll. 6-9. According to the state, "the way it could possibly be admissible" would be if Appellant testified. R. 186, ll. 10-11.

Defense counsel countered that Galloway's attempt to murder two people happened recently; it was not "years earlier." R. 186, ll. 16-17. He explained that "four months earlier he had two counts of attempted murder charges," which was "known in the community." R. 186, ll. 18-20. The community's knowledge of the charges meant Appellant was aware of them too. R. 186, ll. 21-22. Counsel argued Leavitt's knowledge of the charges went to both reputation and specific instances of conduct as contemplated under the rule. R. 188, ll. 5-6.

The judge surmised that Leavitt's knowledge of Galloway having two indictments for attempted murder was not "in and of itself" "a specific instance of conduct." R. 187, ll. 16-20. Rather, it was "an accusation of conduct," according to Judge Griffith. R. 187, ll. 16-20. The judge would not permit counsel to ask Leavitt if she were aware of Galloway's charges for attempted murder in the presence of the jury. R. 189, ll. 3-9.

Later, defense counsel proffered testimony of Kaysha Fontenot regarding Galloway's prior attempt to murder two people. Fontenot was present when Galloway was charged. R. 209, ll. 12-14. She was in the parking lot of the East Room where the shootings occurred. R. 209, ll. 15-17. She was aware that Galloway was armed with a gun and that he shot the gun. R. 209, ll. 18-21; R. 212, ll. 22-23. However, she did not see the altercation and claimed she only heard the gunshot. R. 211, ll. 23-25; R. 212, ll. 18-19. Further, she was aware Galloway was charged with two counts of attempted murder as a result of his conduct at the East Room. R. 210, ll. 15-25.

The state argued to exclude Fontenot's testimony because she was not "an eyewitness to the event." R. 213, ll. 3-4; R. 216, l. 7; R. 216, ll. 21-23. Thus, she could not "speak to the specific incident." R. 213, ll. 4-5. According to the state, "Galloway's story [was] that he was defending himself and he got jumped and attacked." R. 213, ll. 17-20; R. 216, l. 23 – R. 217, l. 1. "The fact that he [got] arrested later [was] not relevant to a specific incidence of conduct." R. 213, ll. 20-21. Defense counsel argued that Fontenot testified that Galloway had a gun and he shot someone with the gun. Thus, he had satisfied the requirements of the rule. R. 213, ll. 5-15. As counsel indicated, Fontenot was a witness because she was there, and she heard it. R. 217, ll. 4-5. Just as counsel argued before, Fontenot's testimony was critical to establish an element of Appellant's defense – that his belief of imminent danger was reasonable because Galloway was a violent man. R. 217, ll. 6-14.

Judge Griffith ruled that Fontenot did not have "firsthand knowledge" "of his acts of violence" based upon her being "nearby when the conduct took place." R. 217, ll. 16-19. Therefore, the judge refused to allow Appellant to present the testimony of Fontenot to the jury. R. 217, ll. 18-19. However, he seemed to indicate that he would permit counsel to call witnesses who had firsthand knowledge of Galloway's acts of violence. R. 217, l. 19.

Prior to Appellant's case-in-chief, the solicitor noted that three people on Appellant's witness list were "people who [were] witnesses of the incident that occurred at the East Room approximately four months before that went into the attempted murder charges that Mr. Galloway was currently out on bond on." R. 517, ll. 15-20. Believing defense counsel planned "to go into the facts of those cases with those witnesses," the state argued the law did not allow such. R. 517, ll. 20-25.

Defense counsel reminded the judge that he had proffered witnesses to testify as to what happened at the East Room on January 9, 2014, and Galloway's criminal charges stemming therefrom. R. 518, ll. 7-16; R. 522, ll. 6-7. He agreed with the state that he had a witness to the actual incident prepared to testify. In fact, the witness was shot by Galloway. R. 518, ll. 7-8; R. 518, ll. 24-25. He argued the evidence was admissible pursuant to Rule 405, SCRE. R. 518, ll. 13-16. Defense counsel noted that previously the solicitor objected to evidence of Galloway's prior charges of attempted murder because the proposed witnesses did not actually see the event. R. 521, ll. 1-4. Galloway was charged with shooting someone several months before his death "and everybody knew about it." R. 521, ll. 1-14.

The solicitor argued that Appellant informed the police that he was aware that Galloway was out on bond for attempted murder, and this information was before the jury because the state had introduced Appellant's statements to police in its case-in-chief. R. 519, ll. 14-15; State's Exhibit #43; State's Exhibit #44. According to the solicitor, there was "no evidence that [Appellant] knows about

anything specific." R. 519, ll. 16-17. Thus, in the solicitor's mind, "go[ing] into the facts of what happened somewhere else," was not admissible. R. 519, ll. 23-25. The solicitor argued Appellant "had to have knowledge of the specific facts before you can go in and they had to be relevant." R. 519, l. 25 – R. 520, l. 2; R. 520, ll. 10-11 ("He has to have the knowledge of the specifics and he doesn't or it has to be related."). The state promised that there were "other witnesses who are gonna come up and say it didn't happen the way that this happened, the way that he's gonna claim that it happened." R. 520, ll. 19-21. In fact, the state had a witness under subpoena who would say "Galloway was being beaten and while in the process of being beaten he pulled a gun and shot defending himself." R. 521, ll. 17-23.

Judge Griffith indicated he had no desire to "try two cases to just to get one done." R. 521, ll. 24-25. However, he agreed to hear from the defense's witness, Orville Edwards, in camera. R. 522, ll. 13-15. In January 2014, Edwards was a bartender at The East Room. R. 523, ll. 13-17. "[A] young lady" entered the bar "crying, saying her boyfriend was beating her up out in the parking lot." R. 524, ll. 1-3. Edwards and two others went outside and told Galloway that he could either leave or the police would be called. R. 524, ll. 3-5; R. 525, ll. 8-11. Galloway left, but he returned. R. 524, ll. 7-11; R. 525, ll. 14-17. Edwards and the two others went back outside when they learned that Galloway had returned. R. 524, ll. 17-19; R. 525, ll. 23-25. As Edwards was approaching Galloway to tell him to leave yet again, someone yelled "he's got a gun." R. 524, ll. 17-20. Upon hearing that Galloway was armed, Edwards grabbed Galloway and tried to wrestle him to the ground to get the gun. R. 524, ll. 22-24; R. 526, ll. 15-20. During this melee, Galloway shot Edwards in the leg. R. 524, l. 24. Galloway then stood up and shot Edwards' friend, Jake, in the chest "and popped off a few more rounds into the crowd as he backed up to his car and got in and sped away." R. 524, ll. 24 – R. 525, l. 2.

After the judge heard Edwards' proffered testimony, he determined the evidence would "confuse the jury." R. 530, ll. 16-17. Acknowledging there was testimony that Galloway was charged with two counts of attempted murder, that "he had a propensity to not be one to fight with," and "there was an incident in front of the car at the mother-in-law's house on Mother's Day before this incident," the judge explained he did not "want to get into more specific facts of that conduct because of [his] concern of confusing the jury over the factual issue because this [was] getting into trying a second case and Mr. Berry's case is Mr. Berry's case." R. 530, l. 20 – R 531, l. 5. Additionally, the judge surmised that the East Room incident that occurred four to five months prior to the deceased's death was "too far removed to be allowed." R. 531, ll. 8-12; R. 531, ll. 19-22.

Discussion

"The Sixth Amendment rights to notice, confrontation, and compulsory process guarantee that a criminal charge may be answered through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence." State v. Gillian, 360 S.C. 433, 449–450, 602 S.E.2d 62, 71 (Ct.App.2004); accord State v. Mizzell, 349 S.C. 326, 330, 563 S.E.2d 315, 317 (2002); State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994); State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 402 (1986). The Due Process Clause of the Fourteenth Amendment ensures these rights are extended to criminal defendants in state courts. See U.S. Const. amend. XIV; Pointer v. Texas, 380 U.S. 400, 403–404 (1965) (holding the Sixth Amendment applicable to the states through the Fourteenth Amendment); Mizzell, 349 S.C. at 330, 563 S.E.2d at 317 ("The Sixth Amendment is applicable to the states through the Fourteenth Amendment."). "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." Chambers v. Mississippi, 410 U.S. 284, 294 (1973).

Generally, evidence of a person's character or a trait of character is not admissible to prove action in conformity therewith on a particular occasion. Rule 404(a), SCRE. However, the rule provides for several exceptions. One of those exceptions permits "[e]vidence of a pertinent trait of character of the victim offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor." Rule 404(a)(2), SCRE. This has long been the rule in South Carolina – even prior to the adoption of the Rules of Evidence. See State v. Boyd, 126 S.C. 300, 119 S.E. 839 (1923) (explaining a defendant has the right to attack the reputation of the prosecuting witness for violence); see also, State v. Thrailkill, 71 S.C. 136, 50 S.E. 551, 553 (1905) (explaining general reputation evidence of the deceased for turbulence is admissible). Whenever "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." Rule 405(a), SCRE. "In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct." Rule 405(b), SCRE.

> In 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 in 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, 419-420, 535 S.E.2d 431, 436 (2000); see also State v. Hill, 129 S.C. 166, 123 S.E. 817 (1924); State v. Amburgey, 206 S.C. 426, 429, 34 S.E.2d 779, 780 (1945).

The South Carolina Supreme Court reversed a murder conviction where a judge refused to permit evidence of specific instances of violence by the deceased. Day, 341 S.C. at 421, 535 S.E.2d at 437. The Court explained that Day wanted to present testimony of a witness "concerning

a past act of violence" by the deceased. Id. at 420, 535 S.E.2d at 436. During a proffer, the witness testified the deceased held a shotgun to her head for eighteen hours while he drove around Aiken County, accusing her of being involved in a drug trafficking scheme from which he was not benefitting. Id. This prior act of violence "occurred only four months" prior to the deceased's death and "was admissible to prove Day had a reasonable apprehension of violence from [the deceased], an essential element of his self-defense claim." Id. at 421, 535 S.E.2d at 437; cf. State v. Brown, 321 S.C. 184, 187, 467 S.E.2d 922, 924 (1996) (affirming the exclusion of the deceased's prior manslaughter conviction because it occurred twenty-three years before his death). The Court explained "[t]his evidence [was] relevant to Day's theory of self-defense because he claimed he thought [the deceased] may pull a gun on him if thought Day had deceived him." Day, 341 S.C. at 421, 535 S.E.2d at 437. Additionally, "[the deceased's] conduct in holding a gun to [the witness]'s head because he was suspicious of her [was] also further evidence of the continuous and consistent pattern of [the deceased]'s drug-induced, violent paranoia, which the defense attempted to establish during trial." Id.

This Court examined a similar issue in State v. Mekler, 368 S.C. 1, 626 S.E.2d 890 (2005). Mekler was tried for shooting Bubba, who was the husband of her friend, Robette. The trial judge refused to permit testimony from Mekler regarding Bubba's prior conviction for criminal domestic violence. Mekler, 368 S.C. at 13, 626 S.E.2d at 896. Specifically, Mekler heard Bubba beating in Robette's door. Id. She later learned Bubba had been drinking when the incident occurred. Id. He also threated Robette and beat on her door until he broke through it with his fists. Id. This Court held "the prior act of violence by Bubba against Robette occurred less than three months prior to Bubba's death and was so closely connected at point of time to indicate Bubba's state of mind at the time of the shooting." Id. at 14, 626 S.E.2d at 897. "The prior incident of criminal

domestic violence was also admissible to prove Mekler had a reasonable apprehension of great bodily harm from Bubba, an essential element of Mekler's claim of self-defense as well as her claim of defense of others." Id.

The trial judge erred in refusing to permit Appellant to present evidence of the facts giving rise to the deceased's two counts of attempted murder. Pursuant to Rule 404(a)(2), the evidence was admissible because it was a pertinent trait of character of the victim offered by an accused. Further, pursuant to Rule 405(b), SCRE, Appellant was permitted to offer "specific instances" of the deceased's conduct because it was an essential element of his defense. Finally, the evidence proffered by Appellant was admissible pursuant to the principles expressed in Day, supra. The deceased's act of shooting two people and firing indiscriminately into a crowd was "evidence of other specific instances of violence on the part of the deceased … [that were] directed against others [and] were so closely connected in 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." See Day, 341 S.C. at 419-420, 535 S.E.2d at 436. The evidence was admissible to prove Appellant had a reasonable apprehension of violence from the deceased, which was an essential element of his defense. See id. at 421, 535 S.E.2d at 437The time frame for the deceased's shooting two people at the East Room was four months prior to his death, which was the same time period of the conduct ruled admissible in Day, supra. Thus, contrary to the judge's ruling, the time frame was not too remote.

Turning next to the judge's ruling that the evidence would be confusing to the jury, an examination of applicable rules is necessary.

Generally, all relevant evidence is admissible. Rule 402, SCRE. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the

determination of the action more probable or less probable than it would be without the evidence. Rule 401, SCRE. However, even relevant evidence must "be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE.

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "Under Rule 401, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy." State v. Preslar, 364 S.C. 466, 476, 613 S.E.2d 381, 386 (Ct. App. 2005). "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears, and it is not required that the inference sought should necessarily follow from the fact proved." State v. Sweat, 362 S.C. 117, 126-127, 606 S.E.2d 508, 513 (Ct. App. 2004).

When looking at Rule 403, SCRE, the starting point for analyzing evidence under Rule 403 is determining the probative value of the evidence offered. "'Probative' means '[t]ending to prove or disprove.'" State v. Gray, 408 S.C. 601, 609, 759 S.E.2d 160, 165 (Ct. App. 2014). "'Probative value' is the measure of the importance of that tendency to the outcome of a case." Id. at 610, 759 S.E.2d at 165. While relevant evidence and probative evidence are not synonymous, the two share many similarities as demonstrated through their definitions. The probative value of evidence is directly related to the how important that evidence is in assisting the jury in rendering a verdict. Id. Thus, when analyzing the probative value of evidence, the court must consider the importance of the evidence as it relates to the issues presented in the case. State v. Lee, 399 S.C. 521, 528, 732 S.E.2d 225, 228 (Ct. App. 2012).

After determining the probative value of the evidence, the court must next evaluate the danger of confusion to the jury presented by the evidence. Very little case law exists in South Carolina regarding this aspect of Rule 403, SCRE. In Wilson v. Rivers, 357 S.C. 447, 453-454, 593 S.E.2d 603, 606 (2004), the Supreme Court held it was error to exclude the testimony of a biomechanics expert based on a contention that the testimony would be confusing. The case involved an automobile accident and the question before the jury was whether the plaintiff's back problems were caused by the accident. Id. at 449, 593 S.E.2d at 603-604. The defendant sought to introduce the testimony of an expert in the field of biomechanics to refute the plaintiff's claims. Id. at 450, 593 S.E.2d at 604. The Court held the testimony would not have been confusing to the jury because the expert considered the "damage to the car," "depositions, medical records, photographs, impact tests, and the accident report in reaching his conclusion." Id. at 453, 593 S.E.2d at 606. The expert discussed "fully explained the method he used to reach his conclusion and did not contradict himself." Id. at 453-454, 593 S.E.2d at 606.

In State v. Lyles, 379 S.C. 328, 340, 665 S.E.2d 201, 207 (Ct. App. 2008), this Court explained that evidence "potentially insinuating a key witness for the state is a drug dealer and drugs were present next to the victim" could "cloud the issues." The proffered testimony "would have established drugs were offered for sale outside of the apartment several months before the shooting by an individual known only as C.C." Id. This Court held "evidence of the mere presence of marijuana, without further indication of impairment, could mislead the jury" in a case asking the jury to decide whether the plaintiff, who was involved in an automobile accident and had marijuana in his system, was entitled to recover damages from the other driver. Kennedy v. Griffin, 358 S.C. 122, 128-129, 595 S.E.2d 248, 251 (Ct. App. 2004). The blood test performed that detected the marijuana in his system "did not measure the quantity of marijuana" or "how recently [he] had been exposed to

marijuana." Id. at 128, 595 S.E.2d at 251. Additionally, there was no marijuana found in or near the plaintiff's truck and there was no testimony that he smelled of marijuana. Id.

Once a court has determined the probative value and the danger of confusion to the jury posed by the evidence, the court must balance the two. State v. Dial, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013). When juxtaposing the confusing effect against the probative value, the determination must be based on the entire record and will turn on the facts of each case. State v. Collins, 409 S.C. 524, 534, 763 S.E.2d 22, 27-28 (2014) (citing State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008)). Only after balancing the probative value and the danger of confusion may the court determine if the danger of unfair prejudice outweighs the probative value of the proffered evidence as required by Rule 403, SCRE.

The evidence of the deceased's conduct – shooting two people in the parking lot of the East Room during an altercation – was probative of the deceased's violent nature. The probative value of the evidence was extremely high because it went directly to an element of Appellant's defense, which required a showing that he (and Adam) was in reasonable apprehension of fear of imminent death or great bodily injury from the deceased. While the judge opined the information would confuse the jury, the information was very straightforward. The state conceded the jury was aware the deceased faced two counts of attempted murder because the state presented Appellant's statements to law enforcement during its case-in-chief, which contained information about the charges. Permitting the jurors to hear from the witnesses – specifically, Edwards – was unlikely to cause confusion among the jurors regarding the issues in the case. Edwards would have provided context to the jurors on the facts supporting the criminal charges lodged against the deceased, which the jurors easily would have understood. Edwards' testimony was short, straightforward, and unequivocal. Thus, the danger of confusing the jurors was very low. Balancing the high probative value of the evidence against the

low danger of confusion required admission of the testimony regarding the deceased's specific instances of conduct giving rise to his two charges of attempted murder. The trial judge erred in finding otherwise.

III. The trial judge erred 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.

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.

Relevant facts

During his closing argument, the prosecutor argued that even if Appellant believed his brother was in danger of losing his life or serious bodily injury, he was still guilty of murder because the deceased was stabbed twenty-five times. R. 640, ll. 7-12. According to the solicitor, it may have been defense of others if Appellant had stabbed the deceased only once, but that "malice kick[ed] in" when the stab wounds numbered twenty-five. R. 640, ll. 7-12; see also R. 653, ll. 12-13. Using photographs of Adam, the prosecutor asked if he looked like "a man who was beat to death" or someone who had "serious bodily injury." R. 647, ll. 8-11. According to the solicitor, Adam "got hit in the face" and he "lost a tooth." R. 646, ll. 14-15. That was the extent of his injuries in the solicitor's view. R. 646, l. 15. These injuries were "[n]othing serious" because he had "[n]o broken bones." R. 646, l. 17.

Additionally, the solicitor asked the jurors to look at photographs of Adam. R. 647, ll. 8-11. He asked the jurors if he looked like he was beat to death, and then reminded them that he was not dead and had been released from the hospital. R. 647, ll. 8-11. He also asked the jurors if Adam had serious bodily injury based upon the photos. R. 647, ll. 8-11. The solicitor argued Adam and the deceased engaged in a fistfight and "[n]obody [was] close to death." R. 651, ll. 9-10. He characterized the brutal attack the deceased delivered to Adam as "wrestling." R. 651, ll. 11-24. He claimed Adam "was choosing to fight" and was "not running away in fear for his life." R. 651, ll. 11-24. Continuing along these lines, the solicitor told the jurors that "Adam never cried for help" and his injuries showed he was not in imminent danger. R. 653, ll. 2-20.

After the presentation of evidence by both sides, the judge entertained a charge conference. Defense counsel had provided written requests to charge. R. 620, l. 25 – R. 621, l. 1. While reviewing the submissions, the judge indicated he was "gonna consider Number 4." R. 624, l. 17. Specifically, 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 erm is used in defining the crime of Voluntary Manslaughter.

R. 755.

However, the judge did not give the instruction. Therefore, defense counsel renewed his request. R. 685, ll. 5-8. He explained that the judge did not cover the concept of mistaken belief in the need for deadly force. R. 685, ll. 5-8. The judge indicated that he "thought [he] did." R. 685, ll. 9-10. He went on to explain that he "hid it" "in the second element." R. 685, ll. 12-14. He instructed the jurors regarding the reasonable belief of the person who defended another. R. 685, ll. 14-22. Defense counsel 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, l. 23 – R. 686, l. 3. The judge refused to provide this instruction to the jury. R. 686, ll. 4-6.

During the motion for new trial, defense counsel re-iterated his request for an instruction regarding how to analyze "a failed self-defense claim." R 703, ll. 3-9; see also R. 725. Defense counsel explained that 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, l. 20 – R. 704, l. 1. He elaborated: "And we specifically requested the charge just in case the jury did not believe that self-defense charge was perfected." R. 704, ll. 2-4.

The prosecutor thought the judge "made the right ruling at the time," but he admitted he did not "know that the charge [was] appropriate under the law and the facts of the case." R. 704, ll. 13-16. However, the solicitor had told the jurors that "[s]eeing his brother get in a fight, that's probably sufficient legal provocation," but he argued there was no heat of passion. R. 654, ll. 9-11.

The judge acknowledged that controlling case law required him to tailor the charge to the facts presented. R. 704, ll. 17-20. He also acknowledged that he could be wrong, but he stood by his decision not to provide the requested instruction. R. 704, l. 17 – R. 705, l. 3.

Discussion

"In some jurisdictions there is recognition of an imperfect right of self-defense which will not excuse one from criminal liability, but which will mitigate a homicide from murder to manslaughter." William S. McAnnich, et al., The Criminal Law of South Carolina 635-636 (6th ed. 2013). One of

the ways in which this issue may develop is when "the defendant may have had an honest but unreasonable belief in the necessity to use deadly force." Id. at 636. Additionally, imperfect self-defense may exist where a defendant "may have used excessive force." Id.

> The basic rationale of such cases proceeds as follows: a person who acts under an honest but unreasonable belief in the necessity to use deadly force to defend himself, or who uses excessive force has not acted with malice aforethought, the predicate of any murder conviction; however, he has committed an unlawful and intentional killing, so he is guilty of manslaughter.

Id.

Imperfect self-defense "operates to negate malice, an element the state must prove to establish murder." State v. Faulkner, 483 A.2d 759, 761 (Md. Ct. App. 1984). "As a result, the successful invocation of this doctrine does not completely exonerate the defendant, but mitigates murder to voluntary manslaughter." Id. Maryland also recognizes imperfect defense of others. Bowman v. State, 650 A.2d 954, 955 (Md. Ct. App. 1994). Maryland's pattern jury instructions provide that "if the defendant actually believed that the person defended was in immediate and imminent danger of death or serious bodily harm, even though a reasonable person would not have so believed, the defendant's actual, though unreasonable, belief is a partial defense of others and results in a verdict of voluntary manslaughter rather than murder." Id. at 955 n.1.

Pursuant to imperfect self-defense doctrine, the crime is reduced from murder to manslaughter (1) where the defendant had a genuine, but unreasonable fear of imminent danger, (2) where the defendant acted in self-defense, but was the aggressor, or (3) where the defendant acted in self-defense, but used excessive force. State v. Sams, 410 S.C. 303, 315, 764 S.E.2d 511, 517 (2014). "South Carolina has not expressly adopted the doctrine of imperfect self-defense." Id.

However, the South Carolina Supreme Court appeared to reject imperfect self-defense for the first scenario. State v. Finley, 277 S.C. 548, 551, 290 S.E.2d 808, 809 (1982). Finley argued for the

jury to be instructed that if the jury believed Finley had an actual, although unreasonable, belief that he was in imminent danger of bodily harm, then the crime would be reduced from murder to voluntary manslaughter. Id. The Court declared, "This is not the law in South Carolina." Id. Rather, South Carolina law requires the defendant's actual belief in imminent danger to be a reasonable belief. Id.

Nevertheless, South Carolina has adopted the doctrine of imperfect self-defense in at least two circumstances. In the first scenario, the Supreme Court held a trial judge erred in failing to instruct the jury on voluntary manslaughter based upon evidence showing the deceased, who was a police officer, used excessive force in effectuating an arrest. State v. Linder, 276 S.C. 304, 308, 278 S.E.2d 335, 337 (1981). The state alleged Linder shot the officer while the officer was in the process of making a valid arrest. Id. at 307, 278 S.E.2d at 337. Linder testified that the officer bumped his motorcycle with his patrol car causing Linder to fall to the ground. Id. The officer then began to fire on him. Id. Linder returned fire ultimately killing the officer. Id.

In reviewing whether Linder was entitled to a voluntary manslaughter instruction, the Court explained that "[u]nder either version of the facts the jury could find that Linder had failed to establish each element of the self-defense." Id. However, the Court concluded that "under Linder's version of the facts the jury could find sufficient provocation for a heat of passion by concluding that the officer used unnecessary force under the circumstances." Id. at 307-308, 278 S.E.2d at 337. "While a lawful arrest in a lawful manner will not constitute sufficient legal provocation to incite heat of passion, a killing may be only manslaughter where a legal arrest is attempted in an unlawful manner because the passion may be aroused by the use of unnecessary violence." Id. at 308, 278 S.E.2d at 337.

Second, the Court held a defendant was entitled to a jury instruction on voluntary manslaughter based upon a failure to satisfy each element of self-defense. After re-iterating that voluntary manslaughter and self-defense are not mutually exclusive, the South Carolina Supreme

Court explained that a voluntary manslaughter instruction must be given where "the jury may fail to find all the elements of self-defense but could find sufficient legal provocation and heat of passion." State v. Gilliam, 296 S.C. 395, 397, 373 S.E.2d 596, 597 (1988). Gilliam claimed he and the deceased were arguing when the deceased made threatening statements. Id. at 396, 373 S.E.2d at 597. The deceased then shot at Gilliam. Id. Gilliam pulled his own gun and shot the deceased. Id. The Court explained Gilliam's testimony that the deceased threatened him and then fired at him would support a finding of sufficient legal provocation and heat of passion. Id. at 397, 373 S.E.2d at 597.

The South Carolina Supreme Court has not addressed "imperfect defense of others." While the Court appears to have rejected imperfect self-defense where the actual belief in danger was not reasonable, see Finley, supra, the Court agreed that a jury instruction on self-defense was proper where the facts alleged to support a claim of self-defense provided evidence of heat of passion based upon sufficient legal provocation, see Gilliam, supra. Thus, where the evidence supported an actual belief in danger to another, but the belief was unreasonable, an instruction on imperfect defense of others was required. The instruction was necessary in this case to combat the solicitor's closing argument in which he informed the jurors that Adam was not in imminent danger of death or serious bodily injury based upon the injuries he actually sustained and his failure to call out for help. Had the jury agreed with the solicitor that Adam was not in actual danger of losing his life or sustaining serious bodily injury, but also believed that Appellant entertained the belief, then the instruction on how to view such evidence – as reducing murder to voluntary manslaughter – was required. Appellant respectfully requests this Court adopt the doctrine of imperfect self-defense as an extension of the Supreme Court's opinion in Gilliam, supra, and hold the trial judge erred failing to instruct the jury as requested.

IV. The trial judge erred 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.

Standard of review

A trial judge's decision denying a mistrial will be reversed on appeal if the denial amounts to an abuse of discretion. State v. Rowlands, 343 S.C. 454, 458, 539 S.E.2d 717, 719 (Ct. App. 2000). "Whether a mistrial is manifestly necessary is a fact specific inquiry. It is not a mechanically applied standard, but rather is a determination that must be made in the context of the specific difficulty facing the trial judge." Id. at 457–58, 539 S.E.2d at 719 (internal quotations and citations omitted). Although the decision to grant or deny a mistrial is within the sound discretion of the trial court, the appellate court must reverse the ruling if the decision was an abuse of discretion amounting to an error of law. State v. Dial, 405 S.C. 247, 257, 746 S.E.2d 495, 500 (Ct. App. 2013) (citing State v. Wiley, 387 S.C. 490, 495, 692 S.E.2d 560, 563 (Ct. App. 2010)).

Relevant facts

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 discus 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.

In his motion for new trial, Appellant argued his rights to "a fair trial and due process of law were violated when the jury discussed his case before all evidence and arguments were in." R. 725. He reminded the court that the "fact that the jury was discussing the case during the trial was brought to the attention of the court by the bailiff who heard jurors discussing the case." R. 725. During the hearing on the motion for new trial, Appellant argued the judge erred in not granting his motion for a mistrial based upon the jurors engaging in premature deliberations. R. 700, l. 24 – R. 701, l. 14.

Appellant also noted that jury deliberated for less than thirty minutes despite the trial lasting three days, encompassing fifty exhibits and thirty witnesses. R. 725; R. 701, ll. 9-14. Specifically, the jury began deliberating at 3:50 p.m. R. 687, ll. 5-8. The court returned to the record at 4 p.m. R. 687, l. 9. Although two questions from the jury were marked as court's exhibits, there was no indication in the transcript that the jurors received responses to their inquiries. R. 687, ll. 10-11; R. 754; R. 754. The questions included a request for the jury instructions in written form and a laptop in order to listen to recordings. R. 754; R. 754. The jury then returned to the courtroom at 4:14 p.m., twenty-four minutes after it began deliberating. R. 687, ll. 16-17. The jury found Appellant guilty of murder and possession of a weapon during the commission of a violent crime. R. 688, ll. 2-8. Appellant argued the jurors "were prejudiced by discussing the case during the State's case, and therefore, [Appellant's] rights to a fair trial were violated and the motion for mistrial should have been granted at that time." R. 701, ll. 15-20.

Initially, the prosecutor claimed he "honestly [did not] remember the incident." R. 701, l. 25 – R. 702, l. 1. He then commented that "[i]t didn't stick out that much in [his] head." R. 702,

ll. 1-2. Nevertheless, he recalled the judge "gave an instruction to the jury." R. 702, ll. 5-6. Judge Griffith remembered "talking with the bailiffs," and his "curative instruction in admonishing them to follow [his] instructions and to not do that and wait for everything because everything that was not in evidence." R. 702, ll. 11-16. The judge thought his "curative instruction was sufficient and appropriate and was what was appropriate and required in that situation." R. 702, ll. 17-19. Thus, he denied the motion for new trial. R. 702, ll. 17-21.

Discussion

"[P]remature jury deliberations may affect 'fundamental fairness' of a trial such that the trial court may inquire into such allegations and may consider affidavits in support of such allegations." State v. Aldret, 333 S.C. 307, 312, 509 S.E.2d 811, 813 (1999). However, premature deliberations alone do not require an automatic reversal; rather, the complaining party must also show prejudice. Id. at 313-314, 509 S.E.2d 814 (citing State v. Kelly, 331 S.C. 132, 414, 502 S.E.2d 99, 104 (1998)). But see State v. Gill, 273 S.C. 190, 192, 255 S.E.2d 455, 457 (1979) (holding that a trial judge's improper instruction that amounted to an invitation to the jurors to begin their deliberations before the close of the close of the case was inherently prejudicial and required reversal).

Further, the Supreme Court established procedures for trial judges to follow upon learning of premature deliberations. Aldret, 333 S.C. at 315, 509 S.E.2d at 815. Applicable to this case, the Court explained that if a trial judge is made aware of premature deliberations, the judge should "conduct a hearing to ascertain if, in fact, such premature deliberations occurred, and if the deliberations were prejudicial." Id. If requested, "the court may voir dire the jurors, and if practicable, 'tailor a cautionary instruction to correct the ascertained damage.'" Id. However, "[i]f the trial court determines the deliberations were prejudicial, such findings should be set forth on the record, and a new trial ordered." Id.

The Supreme Court explained that "a jury should not begin discussing a case, nor deciding the issues, until all of the evidence, the argument of counsel, and the charge of the law is completed." State v. McGuire, 272 S.C. 547, 551, 253 S.E.2d 103, 105 (1979). According to the Court, "[t]he reason for the rule [was] apparent." Id. at 552, 253 S.E.2d at 105. "The human mind is constituted such that when a juror declares himself, touching any controversy, he is apt to stand by his utterances to the other jurors in defiance of evidence. A fair trial is more likely if each juror keeps his own counsel until the appropriate time for deliberation." Id. See also State v. Joyner, 289 S.C. 436, 437-438, 346 S.E.2d 711, 712 (1986) (holding a judge's instruction to not make up their minds, but allowing the jurors to talk about the case prior to completion was reversible error and that discussing the case was "tantamount to deliberations"); State v. Pierce, 289 S.C. 430, 433, 346 S.E.2d 707, 710 (1986) (same); State v. Gill, 273 S.C. 190, 192, 255 S.E.2d 455, 456-457 (1979) (same); Gallman v. State, 307 S.C. 273, 277, 414 S.E.2d 780, 782 (1992) (granting post-conviction relief where trial counsel failed to object to instructions that permitted the jurors to talk about the case prior to the completion of the trial).

Judge Griffith simply failed to follow the Court's instructions in Aldret, supra, regarding how to handle a revelation that jurors engaged in premature deliberations. Instead of inquiring of the jurors and the bailiffs, who were witnesses, about any premature deliberations, the judge provided a very casual reminder to the jurors that they were not to deliberate until the conclusion of the trial. What the judge later deemed a "curative" instruction was not within the realm of what the Supreme Court contemplated in Aldret when it directed trial courts to tailor a cautionary instruction to correct the ascertained damage. Indeed, Judge Griffith was unaware of what damage had been done because he failed to conduct the necessary inquiry. The prejudice arising from the premature deliberations was evident when the jury returned its verdicts within twenty-four minutes, which included the sending

of two notes with requests for a laptop for listening to recordings that lasted longer than twenty-four minutes and for the written instructions. As the Supreme Court warned, the jurors made up their minds when they engaged in premature deliberations and were unwilling to waver once their positions were made known to their fellow jurors despite any evidence to the contrary.

CONCLUSION

As to Issue I, Appellant respectfully requests this Court reverse the circuit court and hold Appellant immune from prosecution pursuant to the Protection of Persons and Property Act. As to Issues II, III, IV, Appellant respectfully requests this Court reverse the circuit court and grant him a new trial.

s/*Susan B. Hackett*
Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 15th day of October, 2020.

CERTIFICATE OF COUNSEL

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

October 15, 2020

s/*Susan B. Hackett*
Susan B. Hackett
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589