STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Allendale County
The Honorable Brooks P. Goldsmith, Circuit Court Judge

Appellate Case No. 2019-001217

THE STATE,

Respondent,

vs.

TRAIVON DAYSHAD YOUNG,

Appellant.

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

1. Did the trial judge abuse his discretion by refusing to admit evidence that the decedent was a registered sex offender since such evidence constituted a "pertinent trait of character of the victim of the crime offered by the accused" and, therefore, admissible pursuant to Rule 404(a)(2), SCRE, where the decedent's character for violence and aggressiveness was relevant to Appellant's defense of self-defense and highly probative as to his state of mind during the shooting and whether his fear of imminent death or serious bodily injury was reasonable?

2. Did the trial judge err by refusing to tailor the self-defense instruction to adequately reflect the facts and theories presented by Appellant, specifically that the "defendant is not required to wait until his adversary is on equal terms before he acts" when the charge was supported by the evidence and was crucial to the jury's understanding of the law on self-defense?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

I. Did the trial judge abuse his discretion by excluding propensity evidence of the victim's status as a sex offender, where the underlying conviction that resulted in this status was irrelevant to Appellant's claim of self-defense, since it was incident-specific and it was not so closely connected at point of time or occasion with the murder as to reasonably indicate the victim's state of mind of at the time of the homicide, or to produce in Appellant a reasonable apprehension of great bodily harm. Also, its probative value was substantially outweighed by its prejudicial effect under Rule 403, SCRE.

II. Did the trial judge err in failing to instruct jurors that the "Defendant is not required to wait until his adversary is on equal terms or fires in order to act," because when the jury charge actually given is read as a whole, it adequately covered the applicable law of self-defense, including the substance of the requested instruction.

STATEMENT OF THE CASE

Respondent accepts Appellant Traivon Dayshad Young (Appellant)'s Statement of the Case for purposes of this appeal.

STATEMENT OF FACTS

Viewed in the light most favorable to the State, the direct and circumstantial evidence presented at trial showed that Appellant Young murdered his friend, Nigel Walker (the victim), on April 17, 2017, at a mutual friend's Fairfax, South Carolina residence. This shooting ended what had been a peaceful and enjoyable cookout.

In April 2017, Sophia Hall lived with Thomas "Boo Boo" Frederick in Fairfax. Ms. Hall testified that there was "a get together" at her residence on April 17th. She did not know how many people were present because she was inside most of the evening. However, both the victim and Appellant were present. She had known both men for twenty-one years and described the victim as "a friend of mine and a close person to all [of] the family." Ms. Hall was unaware of any trouble between Appellant and the victim.[1] ***R. 59-63; 68-69.***

Ms. Hall was cooking in the kitchen, along with her friend Janae Smalls, and Ms. Smalls' daughter, when they heard a gunshot outside. Ms. Hall's two daughters and Mr. Frederick were in the adjoining living room and also heard the gunshot. Ms. Hall immediately ran out of her side door, which was already open, and saw the victim on the ground. The victim said, "Oh, this boy shot me in my leg." ***R. 63-65; 67; 79-82; 84.***

She asked Appellant why he was shooting the victim. Instead of answering her question, he smirked at her. Then, he turned and shot the victim "two more times," as the victim lay

[1] Specifically, she testified that "it was the word around that ... Pookie and Nigel ... were close, but they did not click like that." ***R. 70.***

defenseless on the ground "hollering." Mr. Frederick immediately ushered Ms. Hall back inside the house for her safety, and either he or Ms. Smalls called 911. Appellant left immediately after the shooting. ***R. 64-68; 73; 76; 82-84; 90***. Ms. Hall gave a statement about the shooting to police and identified Appellant, a/k/a Pookie,[2] from a photographic lineup (State's Exhibit 16) as the shooter. ***R. 74-76; 79***.

Ms. Hall also provided express evidence of Appellant's malice. Appellant had a history of coming over to Ms. Hall's house when Mr. Frederick was not there. These visits were unannounced and uninvited, and they made her uncomfortable. He made one such visit earlier on the 17th. While there, he said, "I'm going to kill somebody today. I don't know who it is." She was somewhat concerned about his remarks but not overly so because "it's Pookie." ***R. 70-72***.

Thomas Frederick testified that he held "a little social cookout" at his residence on Monday evening, April 17, 2017. His closest friends, Nigel Walker and Appellant, were both present. ***R. 91-93***. At some point, Mr. Frederick left the house and went uptown. He testified that:

> [W]hen I came back home that evening, I went to the house. Everybody was sitting outside, you know, guys sitting outside. And I was sitting down, I went inside the house and then I heard a gunshot, and that is when I ran to the door. There was Sophia, my girlfriend. She was hollering and ... screaming that someone got shot. And she was talking about Nigel.

R. 93.

Looking outside, Mr. Frederick saw the victim standing by his truck, holding his chest and "screaming that he was hit." Concerned for Ms. Hall's safety, he told her to get back in the house. Then, Mr. Frederick saw Appellant "walked out of there and shot [the victim] in his leg." Mr. Frederick testified that he saw Appellant, his close friend, shoot the victim, his other close friend,

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[2] She knows Appellant as Pookie, although his nickname is actually Pokey. R. ***61-62; 33***.

a total of four times. Appellant did not say anything while shooting, and calmly and slowly drove away once he finished shooting. ***R. 93-94; 97-99***. *See also* ***R. 103-05***.

Mr. Frederick was confused because his friends had been at the cookout "off and on" throughout the day and had not argued. Nor was Mr. Frederick aware of any bad blood between his friends, even though he saw both men daily and they had both lived at the residence at some point. He testified that he still did not know why Appellant shot the victim. Finally, Mr. Frederick had known the victim for a decade and had never known him to carry a gun. ***R. 93; 99-100; 105***.

Janae Smalls testified that she was at the April 17, 2017 cookout. She had known the victim for roughly eight years and they were good friends. She and the victim bought some food to cook and went to the cookout after the victim did some work for his grandmother. ***R. 106-08***. Appellant or "Pokey," whom Ms. Smalls had known for six months, was present at the party and everyone seemed to be having a good time. Also, Ms. Smalls was unaware of any trouble between Appellant and the victim. ***R. 108-10***.

While Ms. Smalls and her then-boyfriend were in the back bedroom, she heard gunshots and Ms. Hall screaming. So, Ms. Smalls ran to the side door. When she looked out, she saw Appellant standing over the victim and shooting him at least twice. Appellant did not say anything. However, "he looked at us standing in the doorway and smiled and went back to shooting [the victim]." ***R. 111-13; 117***.

Ms. Smalls was frightened because her five year old was in the house; but after shooting the victim, Appellant calmly walked to his truck, got in it, and slowly drove away from the residence. ***R. 114-16***. She later gave a statement to police and she identified Appellant from a photographic lineup (State's Ex. 17) as the shooter. Finally, she testified that Appellant had been

at her apartment complex before the shooting and said that he was "out looking for blood." ***R. 121-24.***

Lt. Jamie Singleton, of the Fairfax Police Department testified that he received a dispatch that a man had been shot at the address of Mr. Frederick's residence at 9:37 pm. on April 17, 2017. Lt. Singleton arrived seven minutes later and saw the victim laying on the ground. Although the victim was still alive, he was covered in blood and the ground was very bloody. Also, six or seven people were standing around him. Lt. Singleton immediately called EMS to notify them that it was safe for them to come and render assistance. They arrived shortly thereafter. ***R. 20-22; 24; 36.***

Lt. Singleton asked the other people present what had happened, but "[t]hey refused to talk, [and] they started walking off." He was unable to keep these people at the scene and while he recognized some of their faces, he did not know their names. Still, he spoke to both Ms. Hall and Mr. Frederick and they told him what had occurred. He then secured the scene, called for backup, and called for SLED. ***R. 22-24.***

When then-Lt. Tyrone Loadholt arrived, the two men marked the seven or eight shell casings and two projectiles (see State's Exs. 12-13) that they found at the scene. ***R. 24-26; 28-29; 31-34.*** *See also* State's Exs. 1-5. Lt. Singleton knows Appellant, or Pokey. When Lt. Singleton first left the scene and went to Appellant's residence, Appellant was not there. So, he told Appellant's parents that Appellant was a "person of suspicion in a shooting." Appellant's father left to try and find him and Lt. Singleton returned to the crime scene. ***R. 33-35.***

Jody Kearse testified that she was a paramedic in April of 2017. The victim was in such bad shape when she responded to the crime scene that he was quickly loaded into an ambulance and Ms. Kearse immediately began treatment. The ambulance headed to the airport, so that a helicopter could air lift him to the trauma center in Augusta, Georgia. He went into cardiac arrest

along the way and, even though he was revived, Ms. Kearse did not expect a good outcome for him when she turned him over to the helicopter personnel. ***R. 46-51.***

Maj. Tyrone Loadholt, of the Fairfax Police Department, testified that he was a lieutenant on April 17, 2017. After briefly going to the crime scene that night, he returned to his office, where he spoke to Ms. Hall and got summaries of others who had witnessed the shooting. Appellant's parents brought him to the police station and Maj. Loadholt explained to the three of them what was happening. Maj. Loadholt advised Appellant of his *Miranda* rights[3] and secured a written waiver of his rights (State's Ex. 18) before interviewing him. Appellant then give two videotaped statements. In his first statement (State's Ex. 15), he admitted knowing the victim, but he denied having problems with the victim and repeatedly denied shooting the victim. Rather, he claimed that he left before the shooting occurred. He also denied ever owning a gun Maj. Loadholt ended this interview when Appellant invoked his right to counsel less than nine minutes after the interview began. ***R. 125-36; 147-49.***

Thereafter, Special Agent Mary Kathryn McCallister administered a gunshot reside (GSR) kit to Appellant pursuant to a search warrant. She also seized his cell phone and obtained a buccal swab pursuant to the warrant. ***R. 137; 162-69.*** Once that was completed, Maj. Loadholt gave Appellant the opportunity to speak with his father. Appellant and his father then had an extended private conversation in Maj. Loadholt's office. ***R. 149-52.***

Following this conversation, the Youngs came out of the office and indicated that Appellant wished to speak with the officers. Appellant confirmed this and acknowledged it in his subsequent statement, State's Ex. 14.[4] In this statement, Appellant asserted that the victim had

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[3] See *Miranda v. Arizona*, 384 U.S. 436 (1966).

[4] His father left the room before the statement began. ***R. 149.***

placed a voodoo curse on him three or four days before the shooting.[5] The victim was going to use Appellant to make the victim's mother better. Appellant said that the victim was using this "evil talk" or "evil jumbo" on the 17th and this was why he shot the victim (to protect himself). Yet, he did not claim that the victim had a gun. Asked how he felt (at the time of his statement), he said, "Paranoid." He also lied about where he had hidden his weapon and claimed that he put it in the sewer drain on 14th Street. ***R. 137-38; 152; 172; 196;*** State's Ex. 14.

Special Agent McCallister searched that location but did not find any weapon. When confronted about the weapon not being in the sewer, Appellant admitted that he had lied and that his weapon was actually in his bedroom. Appellant's mother consented to the search of the home and Appellant consented to a search of his bedroom. Appellant thereafter accompanied Special Agent McCallister and Maj. Loadholt to his parents' home and pointed to where he had hidden his 9 mm weapon (State's Ex. 19). Maj. Loadholt seized Appellant's weapon, which was covered by sweatpants, as well a clip (State's Ex. 20) and a live round (State's Ex. 21) that were found with it. ***R. 139-42; 153; 172-77.***

Dr. Janice Ross is the forensic pathologist who performed an autopsy on the victim. She testified that the victim was "shot at least six times." The first bullet[6] "went into the right upper arm, and then went out of the arm and back into the chest." This bullet "went through the lower lobe of the right lung [and] then went behind the spinal cord." It was located "just to the left of the spinal cord in the back, but it did not injure the spinal cord. Dr. Ross recovered bullet fragments

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[5] According to Appellant, he began getting angry for no reason after the curse began and that this ager kept building. His family suggested he had actually been cursed.

[6] Dr. Ross explained that although the wounds were numbered, it was not possible to determine the order in which they were inflicted. ***R. 255.***

from his right arm and the rest of this bullet from his back. This was a fatal wound because it caused the victim to "bleed out" into his chest cavity and he drowned in his own blood. ***R. 253-57.***

Dr. Ross testified that she did not find any evidence of soot or stippling. This meant the gun was at least several feet away from the victim when it was fired. So, she labeled the wound as "distant." ***R. 266, 268.***

The second bullet entered the left side of the victim's abdomen. It passed "from front to back and towards the right" before exiting on the right side of the victim's back. The third bullet went through the victim's left forearm, while the fourth bullet went into his left thigh and fractured his femur. Dr. Ross recovered some bullet fragments from this wound. The fifth and sixth bullets went through the victim's right calf. ***R. 255; 257.***

SLED Agent James Green is a forensic firearms examiner and was qualified as an expert in firearms identification. Agent Green testified that he examined Appellant's 9 mm; the clip associated with it (State's Ex. 20); the cartridge cases found at the scene; the magazine found at the scene (Defense Ex. 1); and fired bullets and fired bullet fragments. He opined that each of the five cartridge cases submitted (State's Ex. 33) were fired by State's Ex. 19, as were the fired bullet fragment (State's Ex. 12) and the fired jacket fragment (State's Ex. 12) recovered from the scene. The items recovered at autopsy were consistent with having been fired by State's Ex. 19, but his testing was inconclusive. ***R. 232-43; 245-46.***

SLED Agent Stephanie Tanley performed DNA testing on several items of evidence in the case. She testified that a touch DNA profile developed from swabs of the trigger on Appellant's 9 mm pistol (State's Ex. 19) was a mixture to two individuals. Appellant and another individual could have contributed to this mixture or it could have been DNA from two unidentified people. She opined that it was "approximately 9.17 trillion times more likely that [it was] Traivon Young

and an unidentified individual" who contributed to this mixture. Also, the victim was excluded as a contributor to the mixture. ***R. 209-19.***

She further opined that swabs of the pistol grip from Appellant's pistol was a mixture of two individuals and that it was "approximately 58 trillion times more likely" that Appellant and an unidentified individual contributed to the DNA profile that was developed, as opposed to two unknown individuals. Again, the victim was excluded as a contributor. Agent Tanley developed a DNA profile from swabs of a pistol magazine found at the scene. She opined that it was "approximately 540 billion times more likely" that the profile developed was a mixture of the victim and two unknown individuals, as opposed to three unknown people. She was able to exclude Appellant as a contributor to this mixture. ***R. 221-23; 225; 228.***

Finally, she was able to develop a DNA profile on the smooth edge of one of the bullets removed at autopsy. She explained that this DNA came from one individual and she opined that it was "approximately 820 sextillion times more likely that Nigel Walker contributed the DNA profile than if an unidentified unrelated individual contributed that profile." ***R. 223.***

Officers seized Appellant's shoes, white T-shirt, pants (State's Ex. 22), and jacket (State's Ex. 23) that he had worn on the night of the shooting after he was taken to the Allendale County Jail. ***R. 143-46; 176.*** SLED Agent Tyler Sturkie tested the GSR lifts taken from Appellant and concluded that the lifts taken from Appellant's hands were positive for the presence of GSR. Likewise, there was GSR on the white T-shirt and the jeans that Appellant had worn on the night of the shooting. This meant that he either fired a weapon, touched an object with GSR on it, or "was in the vicinity when that firearm was discharged." Studies have concluded that GSR can only travel five to eight feet. ***R. 198-201; 204-07.***

STANDARD OF REVIEW

"In criminal cases, an appellate court sits to review only errors of law, and it is bound by the trial court's factual findings unless they are clearly erroneous." *State v. Brown*, 401 S.C. 82, 87, 736 S.E.2d 263, 265 (2012); *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). When reviewing an evidentiary ruling, the appellate court gives great deference to the trial judge because the reception or exclusion of evidence is a matter left largely to the sound discretion of a trial judge. *State v. Groome*, 274 S.C. 189, 190-191, 262 S.E.2d 31, 32 (1980); *see also State v. Torres*, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010). "It is well settled that the scope of cross-examination is within the trial judge's discretion, and [an appellate court] will not interfere absent a showing of prejudice by the complaining party." *State v. Sherard*, 303 S.C. 172, 174, 399 S.E.2d 595, 596 (1991). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). "The burden is upon the appellant to satisfy [the appellate] court that there has been prejudicial error." *State v. Smith*, 230 S.C. 164, 168, 94 S.E.2d 886, 887 (1956). Finally, an appellate court will not reverse the trial [court's] decision regarding a jury charge absent an abuse of discretion." *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010).

ARGUMENTS

I. The trial judge did not abuse his discretion by excluding propensity evidence of the victim's status as a sex offender, where the underlying conviction that resulted in this status was irrelevant to Appellant's claim of self-defense, since it was incident specific and it was not so closely connected at point of time or occasion with the murder as to reasonably indicate the victim's state of mind of at the time of the homicide, or to produce in Appellant a reasonable apprehension of great bodily harm. Also, its probative value was substantially outweighed by its prejudicial effect under Rule 403, SCRE.

Notwithstanding Appellant's contrary argument, Respondent submits that the trial judge did not abuse his discretion by propensity evidence of the victim's status as a sex offender where

the underlying conviction that resulted in this status was irrelevant to Appellant's claim of self-defense, since it was incident specific and it was not so closely connected at point of time or occasion with the murder as to reasonably indicate the victim's state of mind of at the time of the homicide, or to produce in Appellant a reasonable apprehension of great bodily harm. Also, the probative value of the proffered evidence was substantially outweighed by its prejudicial effect under Rule 403, SCRE.

A. How issue arose at trial.

The trial judge heard arguments on the State's motion *in limine* to bar Appellant from eliciting evidence that the victim was on the sex offender registry, as the result of a 2001 conviction for lewd act on a minor. The State noted that lewd act on a minor was not a violent crime when the victim committed the offense, but today the same crime would be criminal sexual conduct with a minor in the third degree under S.C. Code Ann. § 16-3-655 (Supp. 2020), which is a violent crime. See S.C. Code Ann. § 16-1-60 (Supp. 2020). The State pointed out that at Appellant's first trial, which resulted in a mistrial, Appellant's counsel had asked several witnesses if they were aware that the victim was a sex offender. Some witnesses were aware of this and others were not. ***R. 3.***

It was the State's understanding that trial counsel intended to elicit this evidence in the current trial to show the victim had a violent character, even though the nature of the offense the victim committed was not "violent either in the statutory sense or in the [colloquial] sense." While Rule 404(a)(2), SCRE, permits a defendant to present "[e]vidence of a pertinent trait of character" of the victim, the State argued that the victim's status of a sex offender did not qualify under this rule. Also, it was inadmissible under Rule 404(b), SCRE. Rather, evidence of his sex offender

status was "just designed to inflame the jury against [the victim]." Yet, the State conceded that Appellant could properly question witnesses about the victim's reputation for violence. ***R. 3-5.***

Appellant's trial counsel argued that the proposed line of inquiry was proper under Rule 404(a), SCRE. He observed that the victim was originally charged with "criminal sexual conduct with a minor under 11 years old," which was "a violent charge." Counsel contended that there was "nothing more aggressive" that this charge. Counsel also noted that he had asked witnesses in the first trial, "[D]id you know that he was a sex offender[?] Did you know that he was a sex offender who had been in prison[?]" Counsel stated no witness denied it. ***R. 5.***

Counsel observed that he could alternatively ask whether a witness was aware of the original charged offense. Counsel argued that the case was about "whether or not [Appellant's] fear was reasonable and whether it was actual," and he suggested that it was scarier to be threatened by a sex offender than someone who is not a sex offender. He contended this was why eliciting the evidence was important: "it is a pertinent trait of aggressiveness, because he is a sex offender, everyone knows it, and when they threaten you it's [scarier]. That is why it's relevant." He further asserted that it is explicitly allowed [Rule 404(a)(2)]." ***R. 5-7.***[7]

In response to the trial judge's inquiry as to how this evidence would arise in the trial, counsel again asserted that the people who knew the victim could testify to it. ***R. 7-8.*** Counsel also said the inquiry was not being made to show the victim acted in conformity with the fact he was a sex offender, as proscribed by Rule 404(b), SCRE and counsel stated,

> I'm not saying that [the victim] was aggressive towards [Appellant] because he is a sex offender, I'm saying that [Appellant] is more scared of his [behavior] because he is a sex offender. So, it has nothing to do with Nigel's [behavior], it has to do with the state of mind, the motive, the required intent element that both self-

[7] Counsel also hypothesized, without citing any supporting authority, that the evidence could be admissible to show "absence of mistake or accident by [Appellant]." The State responded that the proposed inquiry was simply designed to elicit the victim's conviction. ***R. 7.***

> defense as well as the crime of murder require, as well as, you know, if there's manslaughter on the table. That ... [s]ex offenders put more fear in people than non sex offenders. And that is why it's important.

R. 8.

When asked by the trial judge whether he was saying that sex offenders were more dangerous than other people, counsel stated that they are "scarier" and "more dangerous" than persons who are not sex offenders. ***R. 8.*** He further asserted that this was why they have to wear a "tracking device" and why "[t]hey have to check in every six months." ***R. 8-9.*** Although sex offenders are only prohibited from living near children, counsel asserted that sex offenders "are not just scary against kids, sex offenders can offend against anybody, and they are aggressive." ***R. 9.***

In response to the trial judge's query about whether statistics showed that sex offenders had "some connection with their victims," counsel argued that the Solicitor's Office had a unit that specifically prosecuted sex offenders and that sex offenders commit offenses against all categories of people. ***R. 9-10.*** Although the trial judge stated that he was not sure he agreed with counsel's position, he ascertained from the State when it would present its eyewitnesses, and he took the matter under advisement. ***R. 10.***

The trial judge subsequently revisited the issue during a break in testimony and indicated that he was inclined to grant the State's motion to dismiss based on this Court's opinion in *State v. McCray*, 413 S.C. 76, 773 S.E.2d 914 (Ct. App. 2015). The trial judge quoted the following relevant language from that decision:

> The rule has long been established in this State that 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....

Id. at 94, 773 S.E.2d at 923 (quoting *State v. Amburgey,* 206 S.C. 426, 429, 34 S.E.2d 779, 780 (1945)). *See also McCray*, 413 S.C. at 94-95, 773 S.E.2d at 924. Despite his preliminary ruling, he allowed trial counsel to research the issue over a lunch break and further argue the matter. See ***R. 52-53.***

After the break, counsel argued that he was seeking to elicit the victim's character trait as a sex offender under Rule 404(a)(2), SCRE. Counsel contended that "the case law and the rules distinguish between evidence by reputation and evidence of specific instances of conduct." ***R 54-55.*** He also argued that the State had wrongly asserted that saying that a person is a sex offender "is tantamount to evidence of a specific instance of conduct," and he analogized calling a person a sex offender to calling someone an alcoholic. He explained that he was "distinguishing between reputation [as a] sex offender and it being a specific incident of conduct." ***R. 54.***

Counsel then sought to distinguish *McCray*, asserting that McCray had attempted to admit evidence of the victim's specific criminal convictions and disciplinary records from the South Carolina Department of Corrections. However, Appellant only sought to admit the decedent's status as a sex offender, which is a pertinent character trait. He conceded that if it was a specific instance of conduct, it was inadmissible. ***R. 55.*** Counsel again asserted that he proposed asking witnesses, "[A]re you aware that [the victim] is a sex offender, and the answer is either yes or no." ***R. 54-56.***

When the trial judge stated that he believed counsel was attempting to ask about a specific incident, counsel again stated that the South Carolina Rules of evidence and the case law permitted him to introduce evidence of a sex offender's "propensity." He contended that "it is a reputation and something that you have a propensity for." ***R. 56-57.*** However, the trial judge disagreed with

counsel because he did not believe anyone could "draw a character [inference] from one event." Therefore, he did not change his ruling. ***R. 57-58.***

Later in the trial, counsel supplemented his argument by relying on S.C. Code Ann. § 23-3-400 (Supp. 2020), which sets forth the purpose of the sex offender registry. He noted that § 23-3-400 states that "statistics show that sex offenders often pose a higher risk of reoffending." Based on the statistics showing recidivist behavior, he contended that it was a character trait and not a specific instance of conduct. ***R. 156-57.***

The State argued that rather than being a character trait, "sex offender ... is a legal status imposed by a court following a conviction for a sexual crime. Accordingly, it was evidence of a prior bad act. ***R. 157.*** Again, the trial judge declined to change his ruling. ***R. 157.*** After the trial judge had denied Appellant's motion for a directed verdict, counsel renewed his objection to the trial judge's ruling that he could not elicit testimony the victim was a sex offender. He contended that it was relevant to explaining Appellant's "subjective and objective fear." ***R. 271-72.*** Counsel also renewed his objection following Appellant's conviction, as part of his motion for new trial. ***R. 424-26.***

B. Discussion.

The trial judge did not abuse his discretion by excluding the proposed line of cross-examination. *See Sherard*, 303 S.C. at 174, 399 S.E.2d at 596. Generally, all relevant evidence is admissible. Rule 402, SCRE. Yet, evidence is only relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy. Rule 401, SCRE. Appellant contends that evidence a witness was aware the victim was a sex offender was admissible under Rule 404(a)(2), SCRE. Respondent disagrees.

Rule 404(a)(2), states that:

> 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 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.

The comments to Rule 404(a)(2) state that "Rule 404(a)(2) identical to the federal rule and is consistent with the law in South Carolina." In other words, Rule 404(a)(2) is consistent with cases such as *McCray*, 413 S.C. at 94, 773 S.E.2d at 923, and *State v. Day*, 341 S.C. 410, 419-20, 535 S.E.2d 431, 436 (2000), where the Supreme Court likewise stated that:

> 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 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. Brown,* 321 S.C. 184, 467 S.E.2d 922 (1996); *State v. Amburgey,* 206 S.C. 426, 34 S.E.2d 779 (1945). 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. *Id.* (citing *State v. Peak,* 134 S.C. 329, 133 S.E. 31 (1926)).

See also McCray, 413 S.C. at 94-95, 773 S.E.2d at 924 (quoting *Day*); *State v. Franklin*, 267 S.C. 240, 226 S.E.2d 896 (1976); *State v. Jones*, 182 S.C. 1, 188 S.E. 178 (1936); *State v. Hill*, 129 S.C. 166, 123 S.E. 817 (1924). Evidence that the victim was a "sex offender" and on the sex offender registry does not meet this standard.

As the State correctly argued at trial ***(R. 157)***, the term "sex offender" is a status given following a conviction for a wide variety of different offenses. See S.C. Code Ann. § 23-3-430 (C)(1)-(23) (Supp. 2020). Standing alone, evidence that someone is on the sex offender registry is nothing more than inadmissible propensity evidence. *Cf. State v. Nelson*, 331 S.C. 1, 7, 501 S.E.2d 716, 719 (1998) ("Generally speaking, character refers to an aspect of an individual's personality which is usually described in evidentiary law as a 'propensity' ") (citation omitted). Also and as

the trial judge correctly observed, the offense giving rise to this status was "situation-specific-*i.e.*, it was a specific criminal act against a minor female – and it was unrelated to Appellant's state of mind at the time of the offense. *See McCray*, 413 S.C. at 94, 773 S.E.2d at 923-24.

Nor did Appellant's proffer indicate that he was aware of the victim's status as a sex offender at the time of the homicide. His proffer only indicated that several prosecution witnesses knew the victim's status. So, the proffered evidence could not "produce reasonable apprehension of great bodily harm" under *Day*, 341 S.C. at 420, 535 S.E.2d at 436. Further, that he was unaware of the victim's sex offender status is important on the question of who was the initial aggressor "because the mere fact of a sex-offender registration is of little, if any, probative value in determining who was the initial aggressor." *State v. Avery*, 275 S.W.3d 231, 235 (Mo. 2009).[8]

Further, Appellant tried to present evidence the victim was a sex offender because he obviously understood there was no close temporal connection between the victim's 2001 conviction and the 2017 homicide and, thus, proof of the underlying act was inadmissible. *See McCray*, 413 S.C. at 95, 773 S.E.2d at 924. *See also Brown*, 321 S.C. at 187, 467 S.E.2d at 924 (trial judge did not abuse discretion by excluding prior violent act the victim in support of a self-defense charge where the specific act of violence occurred twenty-three years prior to the homicide); *State v. Evans,* 112 S.C. 43, 99 S.E. 751 (1919) (trial judge in a manslaughter trial did not abuse discretion in excluding record of deceased's indictment for burglary where burglary charge was not sufficiently connected in time and circumstances to be submitted as evidence affecting self-defense); *Accord Day*, 341 S.C. at 419-20, 535 S.E.2d at 436 (trial judge abused his

[8] Again, Appellant conceded that he was not saying that the victim was aggressive towards Appellant because he was a sex offender. ***R. 8.***

discretion by excluding evidence victim committed violent act against witness four months before homicide).

Moreover, even relevant evidence "may 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, [or] waste of time ...." Rule 403, SCRE. To the extent that the victim's status as a sex offender had any probative value, that probative value was *de minimis*. *See Avery*, 275 S.W.3d at 235. On the other hand, its prejudicial effect was substantial.

This line of inquiry would have circumvented the common law rule for the admissibility of evidence of specific acts of violence by victim in homicide cases where self-defense is raised. Clearly, the 2001 conviction for lewd act on a minor was not "directed against the defendant." Nor was that offense "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." *See McCray*, 413 S.C. at 95, 773 S.E.2d at 924. *See also Brown*, 321 S.C. at 187, 467 S.E.2d at 924. Appellant did not assert that the status played any role in his claim of self-defense and, indeed, his proffer did not indicate that he even knew of it at the time he allegedly acted in self-defense. See *Avery*, 275 S.W.3d at 235.

Although this evidence would have done nothing to aid Appellant's claim of self-defense and could not have served any other legitimate purpose, it would have needlessly besmirched the victim's character. This would have prejudicially inflamed the passions and prejudices of the jury against the victim, based on an irrelevant conviction entered sixteen years before the homicide. Also, even if the trial judge had denied the State's motion *in limine*, the testimony was nevertheless inadmissible. In the offer of proof, Appellant contended the witnesses "were aware" the victim was a registered sex offender *E.g.*, ***R. 5, 7.*** Importantly, he failed to show that any witness had

personal knowledge of the status, as required by Rule 602, SCRE ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter"). *See also State v. Brockmeyer*, 406 S.C. 324, 339 n. 11, 751 S.E.2d 645, 653 n. 11 (2013) ("Assuming the anonymous commenter was present and actually witnessed the shooting, he or she would not have been able to testify that the killing 'was an accident.' Any testimony would have been limited to what the witness observed, with the ultimate decision of murder or accidental killing to be decided by the jury") (citing Rule 602, SCRE); *State v. Tennant*, 394 S.C. 5, 12, 714 S.E.2d 297, 300 (2011).

Rather, it appears each witness' knowledge of his status was based on inadmissible hearsay. 801(c), SCRE (defining hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted"); Rule 802, SCRE (providing hearsay is generally not admissible). *See also State v. Adams*, 430 S.C. 420, 427, 845 S.E.2d 217, 220 (Ct. App. 2020) ("Our rules of evidence deem hearsay inadmissible, subject to exceptions") (citing Rule 802, SCRE); *State v. LaCoste*, 347 S.C. 153, 160, 553 S.E.2d 464, 468 (Ct. App. 2001) ("Hearsay is inadmissible except as provided by statute, the South Carolina Rules of Evidence, or other court rules") (citing Rule 802, SCRE). Accordingly, if these witnesses had been asked whether they were aware the victim was on the sex offender registry, the State still could have successfully objected on these grounds.

Finally, for many of these same reasons, any error in excluding the proffered line of cross-examination was non-prejudicial and harmless beyond any reasonable doubt. *See State v. Black*, 400 S.C. 10, 27, 732 S.E.2d 880, 890 (2012) ("An appellate court generally will decline to set aside a conviction due to insubstantial errors not affecting the result"); *State v. Collins*, 409 S.C. 524, 537, 763 S.E.2d 22, 29 (2014) ("The harmless error rule generally provides that an error is

harmless beyond a reasonable doubt if it did not contribute to the verdict obtained"). The conviction giving rise to the victim's status as a sex offender was remote and while the victim's status as a sex offender may have had probative value if the defendant was a minor female, it had little, if any, probative value in determining who was the initial aggressor in this case because Appellant is an adult male. Again, his proffer did not indicate that he was aware the victim was a sex offender.

Also, because Appellant claimed that he acted in self-defense, identity was not an issue. As a result, the jury was only required to determine whether (1) the shooting was malicious, (2) whether the victim had sufficiently provoked Appellant, such that he was only guilty of voluntary manslaughter,[9] or (3) whether Appellant shot the victim in self-defense.[10] The State's evidence tended to show that the victim did nothing to provoke the shooting and that Appellant had indicated to at least two witnesses that he had express malice. *See* ***R. 71*** (Sophia Hall testified on day of

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[9] *See State v. Oates*, 421 S.C. 1, 23, 803 S.E.2d 911, 923–24 (Ct. App. 2017) (defining voluntary manslaughter as "the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation" (quoting *State v. Starnes*, 388 S.C. 590, 596, 698 S.E.2d 604, 608 (2010))).

[10] There are four elements necessary to a claim of self-defense:

> First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984).

shooting he said, "I'm going to kill somebody today. I don't know who it is"); ***R. 121*** (Janae Smalls testified he said before shooing that he "out looking for blood").

On the other hand, Appellant testified that the victim returned to the cookout while Appellant was using the Wi-Fi at Mr. Frederick's residence. No one else was outside at the time. The victim began talking about "black magic," as he had for several days. He told Appellant that he was going to make "a sacrifice" for him. Appellant became very nervous when the victim pulled out a gun. Appellant claimed that he had known the victim to become violent and to carry a gun. So, Appellant first backed up. He soon began shooting as he ran towards his truck and did not look back. ***R. 296-305***.

Therefore, neither the victim's status as a sex offender nor the 2001 lewd act conviction played any role in his decision to act in self-defense. According, the exclusion of this line of cross-examination was harmless beyond a reasonable doubt. *See Black*, 400 S.C. at 27, 732 S.E.2d at 890; *Collins*, 409 S.C. at 537, 763 S.E.2d at 29.

II. The trial judge did not err in failing to instruct jurors that the "Defendant is not required to wait until his adversary is on equal terms or fires in order to act," because when the jury charge actually given is read as a whole, it adequately covered the applicable law of self-defense, including the substance of the requested instruction.

There is also no merit to Appellant's claim that the trial judge erred by failing to instruct jurors that the "Defendant is not required to wait until his adversary is on equal terms or fires in order to act." Notwithstanding Appellant's complaint, when the jury charge actually given is read as a whole, it adequately covered the applicable law of self-defense, including the substance of the requested instruction.

A. How issue arose at trial.

As discussed in Argument I, Appellant claimed that he acted in self-defense, after he victim, who was talking about "black magic" and making a "sacrifice," brandished a gun. ***R. 296-***

305. The trial judge stated during the charge conference that he was going to instruct jurors on both the law of self-defense and voluntary manslaughter. The parties discussed the self-defense charge at length but Appellant's trial counsel did not ask the trial judge to include this specific language in connection with the charge on self-defense, even though he had a written copy of the trial judge's proposed instructions. ***R. 337-44; 345-63***.

The trial judge gave the following instructions on Appellant's right to act in self-defense:

> Now, the Defendant has raised the defense of self-defense. I tell you that self-defense is a complete defense. If it is established, you must find the Defendant not guilty.
>
> The State has the burden of disproving self-defense by proof beyond a reasonable doubt. If you have a reasonable doubt of the Defendant's guilt, after considering all the evidence, including the evidence of self-defense, then you must find the Defendant not guilty.
>
> On the other hand, if you have no reasonable doubt of the Defendant's guilt, after considering all of the evidence, including the evidence of self-defense, you must find the Defendant guilty.
>
> To establish self-defense, the following elements are required. First, the Defendant must be without fault in bringing on the difficulty. If the Defendant's conduct was the type that could be reasonably calculated to and did provoke, then the assault of the Defendant would be at fault in bringing on the difficulty, and would not be entitled to an acquittal based on self-defense.
>
> The second element of self-defense is that Defendant was actually in imminent danger of death or serious bodily injury, or the Defendant actually believed he was in imminent danger of death or serious bodily injury.
>
> If the Defendant was actually in imminent danger, it must be shown that the circumstances would have warranted a person with ordinary firmness and courage to strike the fatal blow to prevent death or serious bodily injury.
>
> If the Defendant believed that he was in imminent danger of death or serious bodily injury, it must be shown that a reasonably prudent person of ordinary firmness and courage would have had the same belief.
>
> In deciding whether the Defendant actually was or believed he was in imminent danger of death or serious bodily injury, you should consider all of the

facts and circumstances surrounding the incident including physical abuse, psychological condition, and characteristics of the Defendant and the deceased.

The Defendant does not have to show that he was in actual danger. It's enough that the Defendant believed he was in imminent danger, and a reasonably prudent person of ordinary firmness and courage would have had the same belief.

The Defendant has a right to act on appearances even though the Defendant's belief may have been mistaken. It is for you to decide whether the Defendant's fear of imminent danger or death or serious bodily injury was reasonable, and would have been felt by an ordinary person in the same situation, or is accompanied by hostile acts made, depending on the circumstances, to establish self-defense.

If there was some prior difficulties between the Defendant and the deceased may be considered in deciding whether the threat existed, whether the Defendant had a reason to believe that a threat existed, and how serious that threat was.

The relative sizes, ages, and weights of the Defendant and the victim may also be considered in deciding whether the [apparent] or actual need for force in self-defense and the amount of force needed.

Threats made by the deceased may be considered in determining whether the Defendant actually was, or believed he was, in imminent danger.

And the final element is that the Defendant had no other probable way to avoid the danger of serious bodily other than to act as the Defendant did in this particular case.

A person cannot be required to make an exact calculation as to the degree or amount of force which may be needed to avoid death or serious bodily harm, therefore in self-defense the Defendant has a right to use the force needed to avoid death or serious bodily harm.

Force used in self-defense does not have to be limited to the degree of the amount of force used by the deceased. *The Defendant has the right to use so much force as appears to be necessary for complete [self-protection], and of which a person of ordinary reason and firmness would have believed to be needed to prevent death or serious bodily harm.*

If the Defendant is justified in defending himself or others in firing the first shot, the Defendant is also justified in continually shooting until it is apparent that the danger of death or serious bodily injury has completely ended.

R. 409, line 16-412, line 15 (emphasis added).

B. Discussion.

There was no error. The applicable law regarding jury instructions is set forth in *State v. Marin*, 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016):

> " 'The law to be charged must be determined from the evidence presented at trial.' " [*State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011)] (quoting *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001)). "An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) (citing *State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 166 (2007)). " 'In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial.' " *Brandt*, 393 S.C. at 549, 713 S.E.2d at 603 (quoting *State v. Adkins*, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct.App.2013)). "The substance of the law is what must be instructed to the jury, not any particular verbiage." *State v. Smith*, 315 S.C. 547, 554, 446 S.E.2d 411, 415 (1994) (citing *State v. Rabon*, 275 S.C. 459, 462, 272 S.E.2d 634, 636 (1980)). Moreover, " '[t]o warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant.' " *Brandt*, 393 S.C. at 550, 713 S.E.2d at 603 (quoting *Mattison*, 388 S.C. at 479, 697 S.E.2d at 583).

In *Davis*, the South Carolina Supreme Court "suggest[ed] to the trial bench" that the four-pronged common law instruction on self-defense discussed in footnote 8, *supra*, "be used in those cases where the facts indicate that a self-defense charge is appropriate." *Davis*, 282 S.C. at 46, 317 S.E.2d at 453. Five years later, however, the Court jettisoned *Davis* as the only proper charge on self-defense and reverted to its former precedent in *State v. Fuller*, 297 S.C. 440, 443, 377 S.E.2d 328, 330 (1989). The Court in *Fuller* held that "it was error for the trial judge to charge *Davis* as an exclusive self-defense charge when Fuller's counsel repeatedly requested additional charges." *Id.* The Court explained that while it had "intended that the *Davis* charge cure the difficulties the trial bench encountered in charging the burden of proving self-defense," it had not "intend[ed] for the trial courts to eradicate the body of common law self-defense by accepting *Davis* as an exclusive charge. *Id.* The Court then gave the following directive to the trial bench: "In

charging self-defense, we instruct the trial court to consider the facts and circumstances of the case at bar in order to fashion an appropriate charge." *Id.*[11]

Thus, "the jury instruction in *Davis* is not an exclusive charge, [and] additional elements may be included with a self-defense charge if the facts and circumstances of the case support their addition." *McCray*, 413 S.C. at 89, 773 S.E.2d at 921. *See also Fuller*, 297 S.C. at 443, 377 S.E.2d at 330. Still, the failure to give Appellant's requested instruction was not prejudicial and did not render the charge improper because when the trial judge's jury charge is read as a whole, it was clear that Appellant did not have to wait until the victim actually attacked him to use force to defend himself.

Appellant's argument relies heavily on *State v. Nichols*, 325 S.C. 111, 481 S.E.2d 118 (1997) and *Day*. His reliance is misplaced. In *Nichols*, the trial judge had only given jurors the *Davis* charge. The appellant objected to the charge and requested specific instructions on "1) the right to act on appearances; 2) relevance of prior difficulties; and 3) that a person does not have to wait before acting in self-defense." The trial judge refused to give the requested instructions. *Id.* at 117, 481 S.E.2d at 121.

On appeal, the Supreme Court found that this was reversible error. The Court first observed that it held in *Fuller* that it was error for the trial judge to only give the *Davis* charge when defense counsel requested additional instructions, and that trial courts must fashion an appropriate charge based on the facts and circumstances of the case being tried. *Id.* The Court then found, as it had in *Fuller*, that the trial judge should have instructed on the appellant's right to act on appearances because the evidence supported the requested instruction. *Id.* The Court further found that the

[11] The dissent in *Fuller* argued that this was needless because *Davis* covered the facts and circumstances at issue. *Id.* at 445, 377 S.E.2d at 331-32 (Gregory, C.J., dissenting).

evidence supported the requested instructions on "the relevance of prior difficulties," and that the appellant "did not have to wait before acting in self-defense." *Id.*

In *Day*, the trial judge initially refused to give a self-defense charge. He subsequently gave the *Davis* charge, as well as a specific charge on the right to act on appearances and the duty to retreat, when the deliberating jury requested a self-defense charge. *Day*, 341 S.C. at 417-18, 535 S.E.2d at 435. On appeal, the Supreme Court held that the trial judge committed reversible error by failing to give Day's three requested instructions because the requested instructions were supported by the evidence presented at trial. *Id.* at 418, 535 S.E.2d at 435.[12] The Court further found that "[t]he 'after-the-fact' self-defense instruction was inadequate" because Day's counsel was unable to present a complete defense during her closing. Specifically, counsel could not assert Day acted in self-defense, "even though that was Day's theory, because she knew the trial judge was not going to adequately charge the jury. Instead, she was forced to present the facts so they implied self-defense, without actually saying the word." *Id.* at 418-19, 535 S.E.2d at 435.

The present case is readily distinguishable from *Day* and *Nichols*. Rather than only giving the *Davis* charge, the trial judge here instructed jurors that Appellant "[did] not have to show that he was in actual danger. It's enough that [Appellant] believed he was in imminent danger, and a reasonably prudent person of ordinary firmness and courage would have had the same belief." ***Tr. 637.*** The trial judge then instructed jurors on Appellant's right to act on appearances, even if he was mistaken. The trial judge further instructed jurors that it was for them to decide "whether

[12] Specifically, the trial judge did not instruct jurors in accordance with "Day's Request to Charge Number One (factors that would give Day the right to judge [the victim's] conduct more harshly, including age difference, substance abuse, 'bad blood', prior threats, and reputation for violence; Number Two (prior acts of violence and prior difficulties between Day and Renew); and Number Eight (the State's burden of proof when a defendant asserts self-defense. *Id.* The Court also found that the original failure to instruct on self-defense was erroneous because there was sufficient evidence presented at trial supporting the requested instruction. *Id.* at 416, 535 S.E.2d at 434-35.

[Appellant's] fear of imminent danger or death or serious bodily injury was reasonable, and would have been felt by an ordinary person in the same situation, or is accompanied by hostile acts made, depending on the circumstances, to establish self-defense." ***R. 410-11.***

Respondent submits that these instructions made it clear that Appellant had the right to act in self-defense first and without waiting for the victim to "get the drop on him." Indeed, in *State v. Harris*, 382 S.C. 107, 674 S.E.2d 532 (Ct. App. 2009), this Court rejected an identical argument to the one now advanced by Appellant. The defendant in *Harris* requested the following instruction as part of the trial judge's self-defense charge:

> If a defendant is in imminent danger or if defendant's belief that he is in imminent danger of death or receiving bodily harm is reasonable, he need not wait until actual attack or injury or until force is used by the aggressor before exercising the right to use deadly force in self-defense. In other words, defendant need not wait until the assailant "gets the drop on him" in order to be entitled to use force in self-defense.

Id. at 114, 674 S.E.2d at 536. However, the "trial court refused to include the 'gets the drop on him' language." *Id.*

This Court observed that the "gets a drop on him language" first appeared in *State v. Rash*, 182 S.C. 42, 50, 188 S.E. 435, 438 (1936), and that this language had been "interpreted to mean a defendant does not have to wait until actually fired upon to use force to defend his life." *Harris*, 382 S.C. at 114, 674 S.E.2d at 536. The Court found that in light of the trial court's instruction that "Harris had a right to act on appearances even if those appearances may have been erroneous," the self-defense instructions "made it clear Harris did not have to wait until he was actually under attack in order to employ force to defend his life." *Id.* at 115, 674 S.E.2d at 536. Therefore, the

Court concluded, "The simple fact that the trial court refused to use the '[gets] the drop on him' language does not render the charge improper." *Id.*[13]

Accordingly, Appellant's argument must be rejected. *Id.*

CONCLUSION

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

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November 23, 2020.

[13] It is Respondent's position that the "gets a drop on him" language" found in *Rash* is synonymous with a defendant's right to act on appearances because it is simply a different way in which to convey the same legal principle.

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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Allendale County
The Honorable Brooks P. Goldsmith, Circuit Court Judge

Appellate Case No. 2019-001217

THE STATE,

Respondent,

v.

TRAIVON DAYSHAD YOUNG,

Appellant.

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 23rd day of November, 2020.

s/William Edgar Salter, III
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