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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County
Honorable Brooks P. Goldsmith, Circuit Court Judge
Appellate Case No. 2019-001919

The State,

Respondent,

vs.

John Ira Duncan, III,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. The trial court properly admitted State's Exhibit 37, a video containing interviews with a witness, as extrinsic evidence of prior inconsistent statements because the witness was sufficiently advised of the substance of the statements, the time and place they were made, and the person to whom they were made prior to their introduction.

- II. The trial court properly allowed the use of a copy of Exhibit 37 which contained a subtitle transcript as demonstrative evidence. The copy with the transcript was not submitted to the jury, there has been no objection to the quality or content of the transcript, and the judge made it clear to the jury that they were to believe their own hearing and not the words on the screen.

- III. While the instruction on implied from the use of a deadly weapon may have been incorrectly given based on the mitigating claim of self-defense, the issue is not properly preserved for review on appeal and is harmless beyond a reasonable doubt.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

On Sunday, July 19, 2015, Alex Contello was vacationing in Hilton Head with his family down from Syracuse, New York. He was walking near his hotel and the beach when he heard a bang. (T.168; 170; R.224; 226). He turned and saw a young man lying on the ground and heard someone say something like “That’s what you’re going to get.” (T.171-172; R.227-228). He could not identify the shooter, but did see someone run away from the scene in a black windbreaker. (T.172; R.228). He immediately started recording the scene with his phone. (State’s Exhibit 30).

Trey Daniel, a paramedic, arrived on scene to individuals performing CPR on a young man lying on the ground. He noted the man was not breathing and had no pulse. Further, he indicated there appeared to be an entry wound directly below his right eye. (T.195-196; R.251-252). Dr. Presnell, a forensic pathologist, identified the victim as Dominique Williams (Dominique). (T.200; R.256). He indicated Dominique suffered a gunshot wound that entered near the right eye, “goes into the skull, through the bottom of the brain, through part of the brainstem, and to the back of the brain and exists the back of the skull on the right and then stops in the scalp.” (T.202; R.258). Death “would have been within seconds.” (T.204; R.260).

Sergeant Robert DiCarlo with the Beaufort County Sheriff’s Office arrived on the scene. He attempted to speak to two individuals on scene, Jestin Morrow and Devon Williams. Morrow was too inconsolable to speak. Williams indicated: “they fought yesterday. John Duncan shot him.” (T.232; R.288). Further, cameras around the area record movement and one of the cameras recorded the shooting. (State’s Exhibit 32).

The incidents leading up to the shooting began a couple days earlier. Dominique and Trey Days contacted Jestin Morrow about going with them to Appellant’s house to get some weed. Morrow agreed to go because Appellant had his BB gun. (T.266-267; R.322-323). When they

arrived, Appellant gave Morrow his gun back. Appellant then passed Dominique some marijuana. Instead of paying for the marijuana, Dominique drove off. (T.269-270; 537; R.325-326; 593). Appellant chased the vehicle, but was unable to catch it. Later, Appellant sent a text for Morrow to tell Dominique “I got a bullet waiting for him.” (T.272; R.328).

The following day, Dominique and Appellant fought over near Dontarious Seay’s residence. Morrow and Williams were also there. (T.273; 324; 344-345; 541; R.329; 380; 400-401; 597). Morrow recorded the fight. After the fight, Williams made Dominique and Appellant shake hands in hopes that the fight had ended everything between Appellant and Dominique. (T.277; 324; R.333; 380). Appellant, however, stated: “If I don’t get my stuff back, he’s dead regardless.” (T.278; R.334). According to Dajon Robinson, Appellant’s statement was “If I don’t get my weed back by 7 o’clock, I’m going to get the strap.” He indicated “strap” meant a gun. (T.346; R.402).

On Sunday July 19, 2015, Appellant called Cedric Knighton looking for Dominique. Knighton did not know where he was, so Appellant told Knighton if he saw Dominique to “tell him I got that thing for him.” (T.392; R.448). Appellant also called Jeffrey Wilson looking for Dominique. Appellant indicated he “had a .40 for him” a reference to a handgun. (T.399; R.455).

Seay and Appellant were walking to the beach around 8:00 pm and cut through the Frosty Frog. (T.365-366; 548; R.421-422; 604). Appellant was wearing a black jacket. While at the beach, Appellant and Seay met up with Dominique, Williams, and Morrow. (T.534; R.590). At this point the stories diverge.

According to Appellant and only Appellant, he walked up to the trio and asked Morrow “how he was supposed to be my homeboy but he was hanging with somebody that just robbed me.” Dominique responded: “what that supposed to mean?” Appellant claimed he looked up and

saw Dominique coming towards him and “reaching for something.” (T.554; R.610). As a result, Appellant pulled his gun and shot once in that direction, then ran away. He explained he did not aim and shoot to hurt Dominique. Instead he just “shot in his direction.” (T.554-555; R.610-611). He admitted he did not know whether any of them had a gun. (T.555-556; R.611-612).

The other witnesses told a different story. Morrow and Williams both indicated they were headed to the beach with Dominique. (T.254; 309; R.310; 365). As they were walking, they noticed Appellant yelling while he is walking with Seay. (T.255-256; 310; R.311-312). According to Morrow, Appellant walked up and said to Dominique: “you thought it was a game, you thought it was a game?” He then asked Morrow: “Are you still with him, Jestin?” (T.258-259; R.314-315). Williams explained Appellant walked up and asked Dominique if he thought he was playing. (T.310-311; R.366-367). Appellant then asked Morrow if he was still with Dominique. (T.312; R.368). According to Morrow, at that point, Appellant pulled a Crown Royal bag out of the middle of his pants and shot Dominique with a gun inside the bag. (T.259-260; R.315-316). Williams explained that Appellant: “chuckled and shot him.” (T. 312; R.368). After shooting Dominique, Appellant said “that’s what you get because I’m not playing.” Appellant then turned and left. (T.260; 313; R.316; 369).

Seay indicated he met up with Appellant and they decided to go to the beach. (T.365; R.421). They heard a noise and Appellant headed in the direction of the noise. (T.367; R.423). He indicated he was walking behind Appellant. Appellant then confronted Morrow, Williams, and Dominique. (T.368; R.424). Seay indicated Dominique did not have to walk across the grass to get to Appellant, Appellant walked up to them. (T.369; R.425). He said that the next thing that happened was a gunshot went off, and Appellant shot Dominique. (T.369; R.425).

Dominique Williams was shot by with a .40 caliber bullet, which could have been fired by either a .40 caliber or a 10 millimeter handgun. (T.422-423; R.478-479). After the shooting, Appellant called Wilson again and simply told him: "He's dead." (T.402; R.458).

ARGUMENT

- I. **The trial court properly admitted State's Exhibit 37, a video containing interviews with a witness, as extrinsic evidence of prior inconsistent statements because the witness was sufficiently advised of the substance of the statements, the time and place they were made, and the person to whom they were made prior to their introduction.**

Appellant contends the trial court erred in admitting two of the three statements contained on State's Exhibit 37, interviews conducted of Dontarious Seay, because the State failed to comply with Rule 613(b), SCRE, prior to their introduction. Initially, the issue is not properly preserved. Appellant concedes at least one statement was properly admitted by the Court. He never sought to separate the statements and instead argued solely that none of them should be admitted. Further, he never maintained the third statement was admitted by the witness, which is the basis for exclusion on appeal. Finally, any possible error is entirely harmless in light of the fact the Seay was already impeached by properly admitted inconsistent statements or because he already admitted the third statement so there was no prejudice from its admission.

Pursuant to the Rule:

Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible. However, if a witness admits making the prior statement, extrinsic evidence that the prior statement was made is inadmissible.

Rule 613(b), SCRE.

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001); State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). “The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion.” 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.

“A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice.” State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995). “Prejudice occurs when there is reasonable probability the wrongly admitted evidence influenced the jury’s verdict.” State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011).

Preservation

Initially, the issue raised regarding the third statement is not preserved for review on appeal. Appellant never asserted Seay admitted the statement; instead, his sole argument at trial was that the witness was not adequately provided notice of the contents of the statement, when it was made, and to whom it was made. (T.493; 495; R.549; 551). See State v. Stone, 376 S.C. 32, 36, 655 S.E.2d 487, 488-489 (2007) (“Because Appellant did not argue these grounds in support of his objection at trial, Appellant’s argument is not preserved for review. . . . If a pitch was never thrown at trial, we cannot review whether the trial court made the proper call.”)

Further, Appellant asserted at trial that the entire video should be excluded. However, he now concedes part of the video was properly admitted. The trial court was not confronted with a request to redact any portions of the recording or to only allow the jury to see the second statement

which Appellant has agreed was properly admitted. As a result, the trial court did not err in denying the request to exclude the entirety of Exhibit 37.

“For an issue to be properly preserved it has to be raised to and ruled on by the trial court.” State v. Stahlnecker, 386 S.C. 609, 617, 690 S.E.2d 565, 570 (2010). Additionally, a party may not raise one ground at trial and an alternative ground on appeal. State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989); State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (holding an issue not preserved when one ground is raised to the trial court and another ground is raised on appeal).

Finally, after raising his objection, the State indicated that according to their notes the proper questions required by Rule 613, SCRE, were asked of Seay when he was testifying. (T.495-496; R.551-552). In response, Appellant’s counsel did not continue to contest whether the proper questions were posed to the witness. Instead, he stated: “I have to take him at his word just because I don’t remember it. I trust that that’s, in fact, the questions he asked.” (T.497; R.553). At that point, Appellant’s counsel removed any determination from the judge’s hands and acquiesced that Rule 613 had been met. See State v. Bryant, 372 S.C. 305, 315–16, 642 S.E.2d 582, 588 (2007) (explaining an issue conceded at trial cannot be argued on appeal); State v. Mitchell, 330 S.C. 189, 195, 498 S.E.2d 642, 645 (1998) (holding appellant waived an issue for appellate review because he acquiesced to the trial court’s ruling); State v. Rios, 388 S.C. 335, 342, 696 S.E.2d 608, 612 (Ct. App. 2010) (“[A] party cannot acquiesce to an issue at trial and then complain on appeal.”).

Harmless Error

Even if the first and third statements were improperly admitted, any error was entirely harmless.¹ First, the third statement was admitted so the admission of the statement, while error,

¹ On the merits, the first statement was properly admitted as a prior inconsistent statement under Rule 613, SCRE. The witness, Seay, was sufficiently provided notice of the contents of the statement, when the statement was given,

was at best cumulative and could not have been prejudicial. See Anderson v. Elliott, 228 S.C. 371, 376, 90 S.E.2d 367, 369 (1955) (“A careful examination of the testimony of the witnesses given at the prior trial with that in the present case reveals no material variance in their testimony, and, under such circumstances, the ruling of the trial judge resulted in no prejudice to the appellant.”). Additionally, in order for an error to warrant reversal, the error must result in prejudice to the appellant. See State v. McLeod, 362 S.C. 73, 79–80, 606 S.E.2d 215, 219 (Ct. App. 2004); see also State v. Wyatt, 317 S.C. 370, 453 S.E.2d 890 (1995) (error without prejudice does not warrant reversal).

As to the first statement, Seay was impeached by the properly admitted prior inconsistent statement. As a result, the purpose behind its admission under Rule 613 was already accomplished and so any prejudice from its admission was miniscule. Further, the extent of the statement was that after Appellant shot Dominique “he said something else to them, he said something else to somebody over there.” While impeaching because it contradicts Seay’s claim that he didn’t hear Appellant say anything after the shooting, it does not even indicate what was said or provide anything exculpatory in the statement. As a result, it could not conceivably have affected the outcome of the trial. See State v. Byers, 392 S.C. 438, 448, 710 S.E.2d 55, 60 (2011) (“Error is harmless when it could not reasonably have affected the result of the trial.”); State v. Pagan, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006) (“Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result.”).

and to whom the statement was given. He was asked: “Do you recall telling officers that you heard [Appellant] say something [after the shooting]?” (T.370; R.426). Shortly thereafter, Seay was specifically asked about the second statement which he made to officers during interviews that took place. He was given specific dates, times, and locations. It is clear that Seay would have understood the questions about both the first and second statement related to the interviews with officers after the shooting. There is no other logical time which could have been referenced. As a result, he was provided sufficient notice as required under Rule 613.

II. The trial court properly allowed the use of a copy of Exhibit 37 which contained a subtitle transcript as demonstrative evidence. The copy with the transcript was not submitted to the jury, there has been no objection to the quality or content of the transcript, and the judge made it clear to the jury that they were to believe their own hearing and not the words on the screen.

Appellant maintains the trial court erred in allowing the jury to view a copy of State's Exhibit 37 which contained a transcript in the subtitles of the video. The transcript was properly allowed to assist the jury. The trial court properly gave a limiting instruction that the transcript was not evidence and the jury was only to consider what they heard. Finally, Appellant cannot demonstrate how he was prejudiced because he has not even argued that any discrepancies exist between the transcript and what Seay actually said on the video.

Standard of Review

As discussed in the previous issue, the admission of evidence is within the discretion of the trial judge and his rulings will not be disturbed absent a showing of probable prejudice. See Pagan, 369 S.C. at 208, 631 S.E.2d at 265; Kelley, 319 S.C. at 176, 460 S.E.2d at 370.

Merits

On the merits, the trial court properly allowed the jury to utilize the provided transcript to assist them with the Exhibit. In State v. Winkler, 388 S.C. 574, 585, 698 S.E.2d 596, 602 (2010), the Supreme Court found the trial court did not abuse its discretion by allowing the jury to review a 911 call transcript while the 911 tape was replayed in the courtroom during deliberations, which mirrored the way the evidence was presented at trial. Additionally, its admission is similar to other demonstrative evidence used to assist the jury in its understanding of the evidence being admitted. See, e.g., Clark v. Cantrell, 339 S.C. 369, 383, 529 S.E.2d 528, 535 (2000) (“Demonstrative evidence often is admitted only for use in the courtroom to explain and illustrate a witness’s testimony.”). As the Fourth Circuit has explained: “The use of typed transcripts as aids to the jury

in listening to the tapes is a matter within the sound discretion of the trial judge.” United States v. Long, 651 F.2d 239, 243 (4th Cir. 1981); see also, United States v. McMillan, 508 F.2d 101, 105 (8th Cir. 1974) (finding a transcript of a recording can be used to assist the jury as it listens to the tape, especially when there is no contest to the accuracy of the transcript and even when the transcript is created and provided by one party). In the instant case the trial court did not abuse its discretion in allowing the jury to utilize the transcript to assist them as they listened to the interview recordings.

Most significantly, the trial court explained the purpose for the transcript and limited the jury’s use of the transcript. He specifically charged the jury:

I do tell you that you are not to consider this transcript that accompanies the Exhibit Number 37 for any purpose other than to assist you in understanding the words spoken in this Exhibit Number 37. This transcript is not in evidence. And if any juror believes the words spoken in this State’s Exhibit Number 37 are not the same as the words in the transcript, then you are to trust your own hearing even if it’s different than these words.

(T.517-518; R.573-574). If there was any confusion regarding how the jury was to use the transcript and whether they needed to pay attention to the video, the trial court correctly limited the use and reliance on the transcript. See State v. Young, 420 S.C. 608, 624, 803 S.E.2d 888, 896 (Ct. App. 2017) (“Limiting instructions are deemed to cure error unless ‘it is probable that, notwithstanding the instruction, the accused was prejudiced.’ ” (quoting State v. Smith, 290 S.C. 393, 395, 350 S.E.2d 923, 924 (1986))); id. at 623, 803 S.E.2d at 896 (“We start by presuming the cure worked, for we also presume juries follow their instructions.”).

Finally, Appellant has not demonstrated how he was prejudiced by the inclusion of the transcript when the recording was played. He speculates about the jury and whether they will pay proper attention or only read the words on the screen, but he does not indicate how this is

prejudicial. Importantly, Appellant has never identified at trial or on appeal any significant distinctions between what is heard on the recording being said by Seay and what is in the transcript provided while it was being watched at trial. The trial court also minimized any harm by sending back and admitting State's Exhibit 37 without any copy of the transcript provided so the only evidence actually admitted to be considered by the jury, consistent with the judge's limiting instruction, was the actual recording. As a result, there was no abuse of discretion by the judge in allowing the use of the transcript during the playing of State's Exhibit 37.

III. While the instruction on implied from the use of a deadly weapon may have been incorrectly given based on the mitigating claim of self-defense, the issue is not properly preserved for review on appeal and is harmless beyond a reasonable doubt.

Appellant contends the trial court erred in giving a jury charge instructing that malice could be inferred from Appellant's use of a deadly weapon in violation of State v. Belcher, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009). Even though it was error to give the charge, the error is not preserved for review on appeal and is harmless beyond a reasonable doubt.

Preservation

During discussion on the charges, the trial court asked both parties: "Does *State v. Belcher* take out the inferred malice done with a deadly weapon?" The court indicated his belief that it needs to be removed. (T.601; R.657). Counsel for Appellant indicated he needed to look at the case further, but was "good with leaving it out." (T.601-602; R.657-658). The discussion then turned to application of *Gibson v. State*, and whether it allows a charge regarding the implication of malice in an intentional killing. (T.602-603; R.658-659). The discussion ended with the trial court indicating they would discuss the charge further. (T.603; R.659).

When the court returned in the morning, the discussion turned to additional charges related to the self-defense charge. After significant discussion, the trial court ruled on the additional charges related to self-defense, but there was never any more discussion of the implied malice charge. Additionally, the trial court never made a clear ruling on whether he was giving or not giving the jury instruction. After the discussion, the court asked the parties if there was a need to take up anything else before the jury came in for closing arguments and instruction. Appellant's counsel indicated: "Nothing from the defense, Your Honor." (T.641; R.697).

During the charge to the jury, the court stated: “The law says that if one intentionally kills another with a deadly weapon, the implication of malice may arise.” (T.690; R.746). The court continued:

If facts are proven beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, this inference would simply be an evidentiary fact to be taken into consideration by you, the jury. Along with the other evidence in the case, you give it the weight you determine it should receive.

(T.691; R.747).

After the jury charge, the trial court asked the parties if there were any exceptions. The State indicated none, and the court then asked: “From the defense?” (T.695; R.751). Instead of raising any objection to the jury instructions and in particular to the implied malice charge, Appellant’s counsel brought up an issue related to a juror possibly falling asleep. (T.695; R.751). At the end of the discussion regarding the juror, the judge asked if there was anything else. Again, the Appellant’s counsel only addressed something related to the jury, seeking to have the juror identified. Once that was done, he indicated “Nothing else from the defense, though, Your Honor.” (T.701; R.757). Finally, the court asked: “Are we ready for the jury to begin deliberations?” Appellant’s counsel indicated: “The defense is ready, Your Honor.” At no time after the charge, did Appellant’s counsel raise any objection to the implied malice charge given by the trial court.

To preserve an issue for appellate review, “[t]he issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity.” S.C. Dep’t of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007) (quoting Jean Hofer Toal et al., Appellate Practice in South Carolina 57 (2d ed. 2002)). Rule 20(b) of the Rules of Criminal Procedure states:

Notwithstanding any request for legal instructions, the parties shall be given the opportunity to object to the giving or failure to give an

instruction before the jury retires, but out of the hearing of the jury. Any objection shall state distinctly the matter objected to and the grounds for objection. Failure to object in accordance with this rule shall constitute a waiver of objection.

Rule 20(b), SCRCrimP; see also, State v. Staten, 364 S.C. 7, 41, 610 S.E.2d 823, 841 (Ct. App. 2005) (holding an issue relating to a jury charge is not preserved for appellate review unless a party either requested the charge and obtained a ruling or objected on specific grounds to the charge as given), *vacated in part on other grounds by*, 374 S.C. 9, 647 S.E.2d 207 (2007); State v. Hartley, 307 S.C. 239, 241, 414 S.E.2d 182, 184 (Ct. App. 1992) (finding defendant did not object to instruction at trial so he “has therefore waived his right to complain about it on appeal.”).

Harmless Error

Even if preserved, the error in giving the charge was entirely harmless as it could not have reasonably impacted the jury’s determination finding Appellant guilty of murder. Even Appellant’s version of the events did not support a claim for self-defense. As a result, the giving of the improper charge could not have impacted the jury’s verdict. Errors, including erroneous jury instructions, are subject to harmless error analysis. State v. Belcher, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009). This Court recently articulated the proper harmless error analysis:

“When considering whether an error with respect to a jury instruction was harmless, we must ‘determine beyond a reasonable doubt that the error complained of did not contribute to the verdict.’ ” Further, to determine whether an error in giving the instruction was harmless, we must consider the jury charge as a whole. “We must review the facts the jury heard and weigh those facts against the erroneous jury charge to determine what effect, if any, it had on the verdict.” “[O]ur inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered.” “[W]hether or not the error was harmless is a fact-intensive inquiry.”

State v. Franks, 432 S.C. 58, 81, 849 S.E.2d 580, 592–93 (Ct. App. 2020) (internal citations omitted).

As discussed above in the facts, Appellant had a pre-existing dispute with Dominique. Appellant looked for Dominique, told multiple people he planned to kill Dominique because of the robbery of his marijuana. He specifically told Wilson that he had a .40 caliber waiting for Dominique. When he finally found him, Appellant approached Dominique, pulled a gun, and shot him in the face. Appellant's own good friend, Seay, supported this version of events. As a completely unbiased witness, who does not know anyone involved in the shooting, Alex Contello testified Appellant's response to shooting Dominique was to tell him: "That's what you're going to get." (T.171-172; R.227-228). Watching State's Exhibit 32, this was a murder. Appellant confirmed it was a murder when he called Wilson after the shooting and told him one thing: "He's dead."

Most significantly, Appellant's version of events does not support self-defense. To establish self-defense in South Carolina, 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, defendant must show that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that he was actually in imminent danger and that the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or the loss of his life; and (4) the defendant had no other probable means of avoiding the danger. State v. Bryant, 336 S.C. 340, 344-45, 520 S.E.2d 319, 321-22 (1999). Appellant failed both element two and three based on his own version of events.

On the day of the shooting he obtains the gun. (T.560-561; R.616-617). He claims the group including Dominique yelled at him and he went over. He acknowledges confronting Morrow about why he was still with Dominique after he robbed Appellant. He then indicates Dominique came at him and reached for something. He doesn't say he reached for a gun. Actually, he never saw Dominique with a gun. (T.565-566; R.621-622). He simply shot. He did not aim. He did not intend to hit Dominique. He just shot and ran away. (T.554-555; R.610-611).

After some prodding by his counsel, Appellant finally indicated he was “[a]fraid that he might try to do something to me, attack me, shoot me, whatever he was reaching for to try to harm me.” (T.559; R.615). His own statement does not indicate he had a belief of imminent danger of losing his life or sustaining serious bodily injury. Just the day before, he had engaged in a fistfight with Dominique and he walked right up to him indicating he did not fear Dominique. He admits never seeing a weapon, only that he was reaching. He never indicates he believed he was in imminent danger sufficient to warrant shooting Dominique. As such, his own statement fails to satisfy the second element of self-defense.

Even if it is sufficient to satisfy element two, it does not satisfy element three. No reasonable person would believe it necessary to shoot and kill Dominique based on his coming toward them and reaching for a completely unknown thing. This is not a case similar to State v. Fuller, 297 S.C. 440, 443, 377 S.E.2d 328, 330 (1989), or State v. Nichols, 325 S.C.111, 481 S.E.2d 118 (1997), in which the defendant was justified based on his right to act on appearances. In both cases, the defendant saw a shiny object or something they believed to be a gun and had prior difficulties which justified the belief the object was a gun. In this case, there is no prior experience by Appellant with Dominique involving a weapon. He did not see something shiny or that looked like a gun. Instead, Dominique merely “reached for something” and was shot in the

face. No reasonable prudent person of ordinary firmness and courage would have entertained the same belief in this case. There is no justification for shooting Dominique and whether or not the implied malice charge was given, no jury could reasonably have concluded the shooting was anything other than murder. As a result, the giving of the erroneous charge could not, beyond a reasonable doubt, have contributed to the verdict of the jury and was entirely harmless.

CONCLUSION

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

Respectfully submitted,

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April 8, 2021

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County
Honorable Brooks P. Goldsmith, Circuit Court Judge
Appellate Case No. 2019-001919

The State,

Respondent,

vs.

John Ira Duncan, III,

Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Final Brief of Respondent filed April 8, 2021, complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, 407 S.C. 607, 607, 757 S.E.2d 421 (2014) (requiring redaction of social security numbers, names of minor children, financial account numbers, home addresses, and date of birth).

This 8th day of April, 2021.



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