STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenwood County
Honorable Edward W. Miller, Circuit Court Judge
Appellate Case No. 2017-000481

THE STATE,

Respondent,

vs.

ONTAVIOUS DERENTA PLUMER,

Appellant.

RETURN TO APPELLANT'S PETITION FOR REHEARING

On March 3, 2021, this Court issued a published decision affirming Appellant Ontavious Derenta Plumer's convictions for attempted murder and possession of a weapon during the commission of a violent crime. State v. Plumer, Op. No. 5806 (S.C. Ct. App. filed Mar. 3, 2021). In affirming those convictions, this Court correctly rejected the majority of Plumer's appellate allegations of error. Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, both the State and Plumer petitioned this Court for rehearing, and this Court—along with asking Plumer to file a return to the State's petition—asked the State to file a return to Plumer's petition. For the following reasons, Plumer's petition should be denied.

Turning to the first question raised in his petition, Plumer contends this Court committed three distinct "errors of law" by concluding the request for a self-defense jury instruction was properly rejected by the trial judge. Specifically, Plumer maintains this Court: (1) "shifted the burden" of proving self-defense to him by quoting a portion of our Supreme Court's decision in

State v. Slater, 373 S.C. 66, 644 S.E.2d 50 (2007), that recited the required elements of self-defense; (2) imposed a requirement upon him to testify or call witnesses on his behalf in order to be entitled to a self-defense instruction; and (3) overlooked the specific facts he identified in support of his claim of being entitled a self-defense instruction.

Initially, since the elements of self-defense are critically important to any analysis of a self-defense issue, it is wholly unclear how this Court could have shifted the burden of proof to Plumer merely by identifying and acknowledging those elements. Indeed, Plumer himself identified the same elements of self-defense in his own brief, and the appellate decision he relied upon when doing so expressly characterized them as "elements." See State v. Wiggins, 330 S.C. 538, 545, 500 S.E.2d 489, 493 (1998) (stating "self-defense is comprised of four *elements*" (emphasis added)). Beyond that, this Court—in resolving Plumer's appeal—recognized a jury instruction on self-defense must be given "*[i]f* there is any evidence in the record from which it could reasonably be inferred that the defendant acted in self-defense[.]" (emphasis added and citation and internal quotations omitted). Once again, Plumer acknowledged the existence of that same principle in his appellate brief as part of his own argument on the issue. See State v. Day, 341 S.C. 410, 416-417, 535 S.E.2d 431, 434 (2000) (" 'If there is any evidence in the record from which it could reasonably be inferred that the defendant acted in self-defense, the defendant is entitled to instructions on the defense, and the trial judge's refusal to do so is reversible error.' " (quoting State v. Muller, 282 S.C. 10, 316 S.E.2d 409 (1984))). Under such circumstances, it is clear this Court understood and applied the correct non-burden-shifting analysis for evaluating whether a self-defense instruction should have been presented, and any suggestion to the contrary is lacking in merit. See Rule 220(b)(2), SCACR ("The Court of Appeals need not address a point which is manifestly without merit.").

Similarly, this Court in no way "impos[ed] a requirement" on Plumer to testify or affirmatively call witnesses in order to be entitled to a self-defense instruction simply by noting in in its opinion Plumer did not testify. Instead, this Court simply identified a fact that was: (1) indisputably true; and (2) relevant to the matter of whether any evidence existed from which the jury could have inferred Plumer acted in self-defense. See State v. Williams, 427 S.C. 246, 249, 830 S.E.2d 904, 906 (2019) (instructing South Carolina law on self-defense "places the burden on the defendant to produce some evidence to support the existence of each element"); see also State v. Soukup, 656 N.W.2d 424, 432 (Minn. Ct. App. 2003) ("[Soukup] did not testify, nor did he present other witnesses on his behalf. Though a defendant may still raise self-defense without testifying, the lack of testimony makes it difficult for a defendant to meet the burden of production necessary to go forward with a claim of self-defense." (citations omitted)); cf. State v. Breeze, 379 S.C. 538, 545, 665 S.E.2d 247, 251 (Ct. App. 2008) ("Conversely, Breeze did not contradict [the officer]'s testimony with respect to the issue of whether the statement was voluntary. . . . Faced with [the officer]'s undisputed testimony the trial court concluded the State had showed that Breeze voluntarily made the statement. Based on [the officer]'s testimony, we cannot conclude the trial court's ruling is unsupported by any evidence."). After that, this Court properly conducted the applicable analysis for determining whether a self-defense jury instruction was warranted and correctly found the trial judge did not err by refusing to instruct the jury on self-defense *because there was no evidence in the record* from which the jury could have inferred Plumer was acting in self-defense. See Williams, 427 S.C. at 249, 830 S.E.2d at 905-906 ("If there is no evidence to support the existence of any one element, the trial court must not charge self-defense to the jury."). Thus, this Court faithfully adhered to South Carolina law in addressing the self-defense issue on appeal and did *not* impose any improper

requirements or burdens upon Plumer when doing so.

Likewise, this Court did *not* overlook the specific facts Plumer identified in support of his claim related to the trial judge's failure to instruct the jury on self-defense. To the contrary, this Court both thoroughly analyzed each of the facts identified by Plumer and explained why they did not support an inference Plumer was acting in self-defense at the time of the shooting, and its analysis of those facts was entirely correct. See State v. Williams, 427 S.C. at 249, 830 S.E.2d at 905-906 (2019) ("If there is no evidence to support the existence of any one element, the trial court must not charge self-defense to the jury."); Slater, 373 S.C. at 69, 644 S.E.2d at 52 ("A self-defense charge is not required unless it is supported by the evidence."). Therefore, rehearing could not be—and is not—warranted on the basis this Court overlooked facts that it clearly did not actually overlook.

Turning to the second question raised in his petition, Plumer appears to contend this Court somehow erred by failing to conclude the trial judge violated his right to self-representation. In support of that apparent contention, Plumer acknowledges this Court found he never clearly asserted that particular right during the trial. Following that, Plumer simply repeats a portion of the argument section of his appellate brief without ever specifically: (1) disputing the accuracy of this Court's finding concerning his failure to invoke his right to self-representation; (2) identifying anything to establish he actually desired to represent himself at any point during trial; (3) explaining how his right to self-representation could have been violated without it being asserted; or (4) citing to any authority from South Carolina or anywhere else that would support a conclusion a trial judge must discuss the dangers and disadvantages of self-representation with a criminal defendant who makes a mid-trial request for defense counsel to be relieved and replaced with new counsel.

Because Plumer has not actually contested in his petition for rehearing the accuracy of this Court's finding he did clearly invoke his right to self-representation during trial, that dispositive finding—which was indisputably correct—has now become the law of the case regardless of whether it was right or wrong. See State v. Black, 400 S.C. 10, 28, 732 S.E.2d 880, 890 (2012) (instructing an unappealed ruling—regardless of whether it is right or wrong—becomes the law of the case); State v. Mazique, 419 S.C. 282, 295, 797 S.E.2d 730, 737 (Ct. App. 2016) (explaining "the request to proceed pro se must be clearly asserted by the defendant" in order to be valid). However, even assuming the law-of-the-case doctrine was somehow not applicable, Plumer's mid-trial request to relieve his defense counsel was simply not a valid or timely assertion of his right to self-representation, and, therefore, this Court's determination Plumer's right to self-representation was not violated was entirely correct on the merits. See City of Columbia v. Assa'ad-Faltas, 420 S.C. 28, 45, 800 S.E.2d 782, 791 (2017) (instructing the assertion of the right to self-representation must be clear and unequivocal in order to be effective); State v. Winkler, 388 S.C. 574, 587, 698 S.E.2d 596, 603 (2010) (recognizing the assertion of the right to self-representation must be timely made *prior to trial* in order for the procedure articulated in Faretta v. California, 422 U.S. 806 (1975), to be mandated).

Lastly, turning to the third and final question raised in his petition, Plumer contends this Court "overlooked ruling on [his] motion for a remand" when it rejected his appellate challenge to the trial judge's decision not to qualify Dr. Robert Bennett, an intended witness for the defense, as an expert in gunshot residue. As support for that contention, Plumer merely points to a portion of his appellate brief in which he argued either: (1) he should be granted a new trial; or (2) his case should be remanded "for a hearing to determine whether Dr. Bennett's testimony [wa]s admissible under the third prong of Watson."

Importantly though, Plumer appears to himself overlook the likely reason this Court did not explicitly address his remand request in its decision. Specifically, during oral argument before this Court, Plumer's appellate counsel asserted the "best thing" he could probably hope for concerning the issue with Dr. Bennett's testimony was for a remand to be granted. (State v. Plumer Oral Argument Recording, 33:40 to 33:46). In response to that assertion, this Court quickly pointed out a remand would "reward someone for not proffering something" while noting defense counsel did, in fact, have an opportunity to proffer Dr. Bennett's testimony during trial. (State v. Plumer Oral Argument Recording, 33:47 to 33:54). At that point, Plumer's appellate counsel responded: "I would rather just leave that issue for post-conviction." (State v. Plumer Oral Argument Recording, 33:54 to 33:58). Based on that response, the request for a remand was abandoned during oral argument, and, as a result, there was no longer a need for this Court to address that particular matter on appeal. Cf. State v. Oglesby, 384 S.C. 289, 294, 681 S.E.2d 620, 623 (Ct. App. 2009) ("Two other issues were raised by Oglesby in his brief but were abandoned at oral arguments; thus, we do not address them.").

However, even ignoring Plumer's abandonment of the matter during oral argument, a remand was—and is—unwarranted in Plumer's case because defense counsel had a clear opportunity to proffer Dr. Bennett's testimony if he wished to do so during trial, and he failed to avail himself of that opportunity. See United States v. Simons, 206 F.3d 392, 399, n. 11 (4th Cir. 2000) (explaining a remand "for further factual development" would *not* be appropriate when an issue was clearly raised in the original proceeding and there was already an opportunity to introduce evidence on the matter). As a result, this Court correctly resolved Plumer's case by applying our state's well-established issue preservation law and declining to unjustly reward him with a remand purely so he could have yet another opportunity to do something he already had a

full and fair opportunity to do during trial.[1] See State v. Cabbagestalk, 281 S.C. 35, 36, 314 S.E.2d 10, 11 (1984) (explaining "[f]ailure to make an offer of proof *precludes the appellant from raising the issue on appeal*" (emphasis added)); see also State v. Ballew, 83 S.C. 82, 87, 63 S.E. 688, 690 (1909) ("The general principle that a party can not take his chances of a successful issue, reserving vices in the trial, of which he has notice, for use in case of disappointment, is universally recognized and obviously just."); cf. Lewis v. Lewis, 392 S.C. 381, 393, n. 11, 709 S.E.2d 650, 656, n. 11 (2011) ("The court of appeals' remand instructions invited the family court to 'accept additional evidence . . . or order supplemental information on its own motion.' Given Respondent's incomplete presentation at trial, it would be fundamentally unfair to Petitioner to give Respondent a second bite at the apple.").

Accordingly, for all those reasons coupled with the arguments raised in the Final Brief of Respondent and during oral argument before this Court, this Court should deny Plumer's petition for rehearing and uphold its decision correctly affirming Plumer's convictions. However, for the reasons urged in the State's petition for rehearing, the State respectfully submits this Court should reconsider the matter pursuant to Rule 221(a) of the South Carolina Appellate Court

[1] Notably, in his appellate brief, Plumer relied upon this Court's decision in State v. Hughes, 346 S.C. 339, 552 S.E.2d 35 (Ct. App. 2001), as support for his remand request. (App. Br. p. 18). In that case, Hughes's defense counsel did everything possible during trial to obtain evidence that was being sought pursuant to Rule 612 of the South Carolina Rules of Evidence, and a remand was only ordered on appeal after those efforts were thwarted by an error of law committed by the trial judge. Id. at 343, 552 S.E.2d at 37. Contrastingly, in the case at bar, Plumer's defense counsel did *not* take the steps necessary to preserve the issue related to Dr. Bennett's testimony by failing to proffer it despite having an unmistakable opportunity to do so during trial. See State v. Roper, 274 S.C. 14, 20, 260 S.E.2d 705, 708 (1979) (holding an issue related to the exclusion of testimony was "waived" because the testimony was not proffered and instructing "[i]t is well settled that a reviewing court may not consider error alleged in exclusion of testimony unless the record on appeal shows fairly what the rejected testimony would have been"). Therefore, since the circumstances justifying a remand in Hughes's case were absent from Plumer's, this Court's earlier decision in Hughes does not in any way support Plumer's request for a remand.

Rules, vacate its prior opinion, strike its reference to "criminal equity," and issue a new opinion correctly affirming Plumer's convictions *and* sentences, including his unobjected-to five-year sentence for possession of a weapon during the commission of a violent crime.

Respectfully submitted,

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April 19, 2021

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PROOF OF SERVICE

I, Sally Ellison, certify I have served the within Return to Appellant's Petition for Rehearing on Appellant by sending an electronic copy via email to the address listed in AIS for the following individual:

E. Charles Grose, Jr., Esq.
Grose Law Firm
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I further certify all parties required by Rule to be served have been served.
This 19th day of April, 2021.

Sally Ellison

SALLY ELLISON
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From:	Sally Ellison
To:	Charles Grose
Cc:	Mark Farthing; William Blitch; Victim Services; Sally Ellison
Subject:	Emailing: Plumer.Return to Pet for Rehearing (02544587xD2C78).PDF
Date:	Monday, April 19, 2021 4:43:04 PM
Attachments:	Plumer.Return to Pet for Rehearing (02544587xD2C78).pdf

Good Afternoon:

Attached for service upon you this date is the State's Return to Appellant's Petition for Rehearing in the above appeal. This Petition will be filed today with the Court of Appeals through AIS One Drive. Please confirm receipt of this email.

Thank you.

Sally Ellison
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