

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Greenwood County
Honorable Edward W. Miller, Circuit Court Judge

THE STATE,

Petitioner,

vs.

ONTAVIOUS DERENTA PLUMER,

Respondent.

APPENDIX (Volume II of II)

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of General Sessions
Edward W. Miller, Circuit Court Judge

Appellate Case No. 2017-000481

The State,..... Respondent,

v.

ONTAVIOUS DERENTA PLUMER

..... Appellant.

FINAL BRIEF OF APPELLANT

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QUESTION'S PRESENTED

Question 1

Did the trial judge err as a matter of law by denying Ontavious Plumer's request for a jury instruction on self-defense when the jurors acquitted Mr. Plumer of armed robbery and direct and circumstantial evidence established the elements of self-defense?

Question 2

Did the trial judge err as a matter of law by denying Ontavious Plumer's motion to relieve his trial counsel from representation and allowing Mr. Plumer to represent himself?

Question 3

Did the trial judge err as a matter of law when by not qualifying Dr. Robert Bennett as expert in gunshot residue when the record establishes the witness has the necessary education, training and experience, and the exclusion of this expert testimony denied Ontavious Plumer his constitutional right to present a complete defense?

Question 4

Did the trial judge err as a matter of law by sentencing Ontavious Plumer to five years imprisonment when S.C. Code Ann. § 16-23-490(A) expressly prohibits imposing an additional sentence with the court imposed a life sentence without the possibility of parole?

STATEMENT OF THE CASE

For an incident occurring on October 11, 2015, the State charged the appellant, Ontavious Plumer, with armed robbery, attempted murder, and possession of a firearm during the commission of a violent crime. The Greenwood County Grand Jury returned “true bill” indictments for these charges on July 8, 2016. R. 438-42.

On or about December 21, 2016, the State served its notice of intent to seek life imprisonment without the possibility of parole pursuant to S.C. Code Ann. § 17-25-45. R. 444.

From February 6 – 8, 2017, the State tried Mr. Plumer before the Honorable Edward Miller and a jury. Elizabeth White and Josh Thomas represented the State. William Yarborough represented Mr. Plumer. The jurors convicted Mr. Plumer of attempted murder and possession of a weapon during the commission of a violent crime. The jurors acquitted Mr. Plumer of armed robbery. Judge Miller sentenced Mr. Plumer to life imprisonment without the possibility of parole for attempted murder and five years for possession of a weapon during the commission of a violent crime. The sentences are concurrent. R. 446-47.

This appeal follows.

STATEMENT OF FACTS

Christopher “Jock” Maggiacomo arranged a drug deal between Oshamar Wells and Jamel Brownlee. On October 11, 2015, Mr. Wells met Mr. Brownlee and Ontavious Plumer at the Mr. Chip convenience store on South Main Street in Greenwood, South Carolina. Mr. Brownlee and Mr. Plumer followed Mr. Wells to Kema Moore’s house on the west side of Greenwood. Ms. Moore is Mr. Wells’ cousin. When they arrived at Ms. Moore’s house, the three men sat at the kitchen table. In a cabinet next to the table, only an arm’s reach away, Mr. Wells had a handgun he planned to use during the drug deal. The three men “smoked a couple of [marijuana] blunts,” as Mr. Wells was letting his buyers try the product. Mr. Wells testified the two men expected him to sell them a pound of marijuana for \$3,600.00. R. 13-34, 71-72.

After smoking the blunts, Mr. Wells claims, “instead of pulling out the money,” Mr. Plumer pulled out a gun. Mr. Wells “instantly” grabbed a 40-caliber handgun from the kitchen cabinet.¹ According to Mr. Wells, “everything happened so fast” it was a “blur.” Mr. Wells testified, “I think I was actually getting hit when I reached to grab the gun out of the cabinet.” Mr. Wells fell to the floor. Mr. Plumer “was returning fire” and “stepping back out of the door.”² Mr. Wells fired his gun five or six times. R. 20-31, 44-46; State’s Exhibits 1, 2.

¹ This gun belongs to Mr. Wells’ mother, Wenona Wells. On direct examination, Mr. Wells claimed he saw his mother place the gun in the kitchen cabinet earlier in the day. On cross-examination, Mr. Wells acknowledged he planned for the gun to be in the kitchen cabinet in case he needed it during the drug deal. Mr. Wells is not allowed to possess a gun because of his criminal record. R. 21-22, 50, 68, 76-79, 81-83.

² Mr. Plumer went the Greenville Memorial Hospital in Greenville, South Carolina for treatment of his gunshot wounds. Deputy Andrew Reese of the Greenville

Mr. Wells called an ambulance, his aunt, and his mother, Wenona Wells. Ms. Wells arrived before the ambulance and law enforcement. One of Ms. Wells' grandchildren found the handgun Mr. Wells used to shoot Mr. Plumer. Ms. Wells put that handgun in her purse. She later put it in the trunk of her car, where it remained until her son asked her to deliver it to Investigator Wesley McClinton a couple of days later. R. 74-87, 233-34, State's Exhibit 10.

Officer Kerry Cooper of the Greenwood Police Department was the first law enforcement officer to arrive. He tried to get a description of possible suspects from Mr. Wells to provide to other patrol officers in the area. Mr. Wells said he was robbed by "two black males and that one was wearing a white tee shirt," but he did not provide any other specifics. Mr. Wells denied having a firearm, and he did not tell Officer Cooper about the drug deal. EMS arrived and transported Mr. Wells to the hospital. Officer Cooper secured the scene to be processed for evidence. R. 87-93, 100-04.

At the hospital, Mr. Wells told Greenwood Police Department Officer Patrick Durkin that two black males entered the residence, "told him to give it up," and began shooting. Mr. Wells continued to conceal his culpability in the confrontation. Officer Durkin photographed Mr. Wells' injuries and collected gunshot residue samples. R. 228-45.

Dr. Ricky Ladd, an emergency room physician at Self Regional Hospital, treated Mr. Wells' gunshot wounds. Mr. Wells had three entrance wounds and three exit wounds. Mr. Wells had two fractures in his hip and leg. A bullet transacted the femur neck. The second fracture below that area could have been caused by a bullet or by a fall.

County Sheriff's Office interviewed Mr. Plumer, who said he had been shot at a location in Greenville County. R. 107-11.

Dr. Ladd explained the bullet traveling through the femoral neck, which is a weight bearing bone, would have caused Mr. Wells to fall down immediately. R. 282-97.

Investigators located a black Mercedes Benz at Mr. Moore's residence. According to Department of Motor Vehicle records, the license tag for the black Mercedes Benz is registered to Walter Plumer of Starr, South Carolina, which is in Anderson County. Investigators Wesley McClinton and Mike Dixon spoke to Walter Plumer at this home, and he provided a written statement. Walter Plumer is Ontavious Plumer's grandfather. Walter Plumer initially denied knowing who was driving his Mercedes Benz and reported it stolen. He later acknowledged allowing his grandson, Ontavious Plumer, drive his Mercedes Benz on October 11, 2015. Mr. Plumer acknowledged being at Ms. Moore's residence and being shot. R. 128-30, 174-77, 181-83, 194-95.

Investigators Wesley McClinton and William Kay interviewed Mr. Wells at Self Regional Hospital in Greenwood. By his own admission, Mr. Wells did not tell the investigators the truth because he was afraid of getting into trouble. Mr. Wells initially told law enforcement "he was sitting at the kitchen table and two random guys came in the front door and tried to rob him, and that they ended up shooting him when he didn't have anything." Mr. Wells told law enforcement about the drug deal only after law enforcement confronted him about finding the Mercedes Benz driven by Mr. Plumer. Investigator McClinton testified about Mr. Wells' second statement:

The story was a drug deal was set up. He had met the two individuals at Mr. Chip. They followed him to the house on [redacted]. They were sitting at the table smoking marijuana and talking about the marijuana. [Mr. Wells] produced the marijuana and looked to who he said was Mr. Plumer to get the money and instead of pulling out the money Mr. Plumer pulled out a handgun and began firing at him.

R. 130-32.³ Investigator Kay, however, recalled Mr. Wells admitting he reached for his gun before Mr. Plumer started shooting. Investigator Kay testified Mr. Wells said “he was meeting two guys to sell them a quantity of marijuana and that they ended up trying to rob him, and during the robbery he reached for a gun to defend himself and they began shooting and he returned fire.”⁴ Mr. Wells ultimately identified Mr. Plumer in a six-person photograph lineup. R. 26-29, 59-60, 115-19, 132-33; State’s Exhibit 8.

Investigator Mike Dixon of the Greenwood Police Department obtained a search warrant to process Kema Moore’s house. R. 178-80. Kenya Griffin, who is the crime scene and evidence technician for the Greenwood Police Department, processed Ms. Moore’s house for evidence. After photographing the residence, Officer Griffin collected numerous shell casings and projectiles. Officer Griffin also obtained a DNA sample from Mr. Plumer. Additionally, Officer Kerry collected a projectile from a residence across the street and provided it to Officer Griffin. Investigator McClinton collected a blood sample from the sidewalk in front of the residence and provided it to Sargent Griffin. Sargent Griffin transferred all of this evidence to the South Carolina Law Enforcement Division (“SLED”). R. 164-65, 200-215.

Tracey Thrower, a firearms examiner at SLED, determined at least two firearms were involved in the confrontation. Ten cartridge cases and two projectiles were fired by the handgun used by Mr. Wells. Agent Thrower determined that two projectiles were not

³ At some point, Mr. Wells told law enforcement that both Mr. Plumer and Mr. Brownlee “produced handguns and commenced shooting him striking him numerous times.” R. 136.

⁴ Mr. Plumer wanted to play Mr. Wells’ recorded statements for the jurors, but the trial judge sustained the solicitor’s objection. R. 154-56.

fired by Mr. Wells gun, but the examination could not determine whether these two projectiles were fired by the same gun. Agent Thrower determined six cartridge casings were fired by a gun other than the one fired by Mr. Wells. These six cartridge casings were fired by the same gun. Agent Thrower's examined an additional projectile but the result was inconclusive whether it was fired by Mr. Wells gun or another gun. R. 252-69.

Jennifer Clayton, a DNA analyst at SLED, determined the blood collected by Investigator McClinton from the sidewalk in front of Ms. Moore's residence matched the know DNA standard from Mr. Plumer. R. 269-75.

Megan Fletcher, a forensic scientist with SLED with training and experience analyzing gunshot residue, testified the Solicitor's Office requested SLED *not* conduct an analysis of the gunshot residue kit collected from Mr. Wells. She also testified that SLED never received the gunshot residue kit collected from Mr. Plumer. R. 236-52. The trial court judge sustained the State's objection to Dr. Robert Bennett testifying as an independent gunshot residue analyst. R. 356-66.

STANDARD OF REVIEW

“In criminal cases, this court reviews errors of law only and is bound by the trial court's factual findings unless they are clearly erroneous.” *State v. McBride*, 416 S.C. 379, 385, 786 S.E.2d 435, 438 (Ct. App. 2016). “Thus, on review, the court is limited to determining whether the trial court abused its discretion.” *Id.* “An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law.” *Id.*

ARGUMENTS

Question 1

Did the trial judge err as a matter of law by denying Ontavious Plumer's request for a jury instruction on self-defense when the jurors acquitted Mr. Plumer of armed robbery and direct and circumstantial evidence established the elements of self-defense?

Mr. Plumer requested the trial judge instruct the jurors about the law of self-defense, but the trial judge declined. R. 371-73. "The law to be charged to the jury is determined by the evidence presented at trial. . . . , [and] a trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence." *State v. Hill*, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). *And see State v. Blurton*, 352 S.C. 203, 207, 573 S.E.2d 802, 804 (2002) ("The evidence presented at trial determines the charged jury instruction. The purpose of a jury instruction is to enlighten the jury and to aid it in arriving at a correct verdict." (internal citations and quotations omitted)). "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." *State v. Day*, 341 S.C. 410, 416-17, 535 S.E.2d 431, 434 (2000) (quoting *State v. Muller*, 282 S.C. 10, 316 S.E.2d 409 (1984)). "[W]hen a defendant claims self-defense, the State is required to disprove the elements of self-defense beyond a reasonable doubt. *State v. Dickey*, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011) (citing *State v. Wiggins*, 330 S.C. 538, 544-45, 500 S.E.2d 489, 492-93 (1998)). A person is justified in using deadly force in self-defense when:

- (1) The defendant was without fault in bringing on the difficulty; (2) The defendant . . . actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in

such imminent danger; (3) If the defense is based upon the defendant's actual belief of imminent danger, a reasonable 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; and (4) The defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

State v. Wiggins, 330 S.C. 538, 545, 500 S.E.2d 489, 493 (1998) (citing *State v. Davis*, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984)).

Seven facts establish that a self-defense instruction was required in this case. First, Mr. Wells admitted he was prepared to use his handgun during the drug transaction. Second, Mr. Wells placed himself in a location where he could stand up and his gun would be within an arm's reach. Third, Investigator Kay recalls Mr. Wells saying he reached for his gun before any shots were fired by Mr. Plumer. Fourth, according to Dr. Ladd, Mr. Wells would have fallen down when a bullet broke his femoral neck, meaning Mr. Wells had stood up and retrieved his handgun prior to that shot that broke that bone was fired. Fifth, Mr. Wells and his mother conspired to hide the gun and cover up his culpability in this incident, which is circumstantial evidence of a consciousness of guilt. *See, e.g., State v. Pace*, 337 S.C. 407, 415, 523 S.E.2d 466, 470 (Ct. App. 1999) ("As a general rule, any act or conduct on the part of the accused is admissible as some evidence of consciousness of guilt."). Sixth, Mr. Wells testimony provides evidence Mr. Plumer retreated from the confrontation. Seventh, the jurors acquitted Mr. Plumer of armed robbery, thereby removing the prosecution's motive for Mr. Plumer to commit attempted murder, including the inference of malice arising from shooting someone during the commission of another crime. *See, e.g., Gore v. Leeke*, 261 S.C. 308,

315, 199 S.E.2d 755, 757 (1973) (“The law itself implies the malice from proof of the felony.”).

Based the facts presented in this case, reasonable jurors could infer that Mr. Wells was the first person to introduce a firearm into the encounter, meaning Mr. Wells—not Mr. Plumer—was responsible for bringing on the difficulty. Once Mr. Wells introduced his handgun into the encounter, Mr. Plumer and Mr. Brownlee actually were in imminent danger of sustaining serious bodily harm or death. A reasonable person would have entertained such a belief. Under the circumstances, Mr. Plumer and Mr. Brownlee were justified in returning fire. Finally, it is not disputed that Mr. Plumer and Mr. Brownlee retreated from the incident location.

The trial judge seemingly believed Mr. Plumer was guilty of attempted murder and armed robbery and involved himself in plea negotiations.⁵ When Mr. Plumer wanted to continue his trial, the trial judge scolded Mr. Plumer, “Sometimes pride can be a real dangerous asset to have.” R. 319. From the record it is not clear whether the trial judge wanted Mr. Plumer to plead guilty because of the trial judge’s personal beliefs about Mr.

⁵ Our Supreme Court has adopted the American Bar Association’s Criminal Justice Standard 13-3.3, Guilty Pleas, Responsibility of the Trial Judge. *Harden v. State*, 276 S.C. 249, 250, 277 S.E.2d 692 (1981); *Medlin v. State*, 276 S.C. 540, 280 S.E.2d 648 (1981). Under this rule, the trial judge may participate in plea negotiations, but “the judge should never through word or demeanor, either directly or indirectly, communicate to the defendant or defense counsel that a plea agreement should be accepted or that a guilty plea should be entered.” *Medlin*, 276 S.C. at 542, 280 S.E.2d at 649. “The Standard is designed to prevent both the fact and the appearance of the trial judge’s becoming an advocate against the desires of the defendant or the State of a particular resolution.” *Harden*, 276 S.C. at 257, 277 S.E.2d at 695. “Due to the force and majesty of the judiciary, a trial court’s participation in the plea negotiation may skew the defendant’s decision-making and render the plea involuntary because a defendant may disregard proper considerations and waive rights based solely on the trial court’s stated inclination as to sentence.” *McDaniel v. State*, 271 Ga. 552, 553, 522 S.E.2d 648, 650 (1999).

Plumer's guilt or out of a "paternalistic" desire to protect Mr. Plumer from the mandatory life without parole sentence.⁶ R. 312. Regardless of his intentions, the trial judge never considered the possibility that Mr. Wells was responsible for the difficulty, and Mr. Plumer was innocent of armed robbery. *See, e.g. State v. Niles*, 400 S.C. 527, 532, 735 S.E.2d 240, 243 (Ct. App. 2012) ("The circuit court charged the jury on self-defense. . . . reasoning that 'either the victim started shooting and Mr. Niles was acting in self-defense or Mr. Niles started shooting ... [and] killed the victim during the commission of an armed robbery.'") *reversed on other grounds by State v. Niles*, 412 S.C. 515, 772 S.E.2d 877 (2015). This Court, accordingly, should order a new trial.

⁶ *See, e.g., State v. Rivera*, 402 S.C. 225, 243, 741 S.E.2d 694, 703 (2013) ("It is apparent the trial court, like defense counsel, was operating under the paternalistic belief that it wanted to protect Appellant from potentially undermining his own defense.").

Question 2

Did the trial judge err as a matter of law by denying Ontavious Plumer's motion to relieve his trial counsel from representation and allowing Mr. Plumer to represent himself?

At the close of the second day of trial, the trial judge informed Mr. Plumer, "[T]he consequences of life without parole are just hard to enumerate." At the beginning of the third day of trial, Mr. Plumer moved the trial judge to relieve his trial counsel. Mr. Plumer explained the last offer from the state was for a term of imprisonment of seven years. Trial counsel had informed Mr. Plumer he "shouldn't worry about the life sentence because if I get found guilty of attempted murder that they was going to give me a lot of time anyway." Mr. Plumer further explained he did not understand that the life sentence was mandatory until the trial judge informed him the prior day. The colloquy between the trial judge, prosecutor, and trial counsel, revealed trial counsel's failure to communicate clearly with Mr. Plumer. The following exchange took place between Mr. Plumer and the trial judge:

THE COURT: "Do you want to go forward with this trial?"

THE DEFENDANT: I want to get me another lawyer.

THE COURT: No, that ain't happening. The jury is sworn. We are in the middle of your case. I'm not relieving him and we're not stopping this case so you can get a new lawyer. You want to go forward with this trial?

THE DEFENDANT: Yes, sir. I don't have no choice.

THE COURT: You do have a choice and you know what it is.

THE DEFENDANT: *I have a constitutional right to relieve my lawyer when I want to relieve him*, but I guess that don't – that ain't work like that down here.

THE COURT: So you want to go foreward with this? You know what your options are.

THE DEFENDANT: I don't have a choice.

THE COURT: You know what the options are that were discussed yesterday in the bench conference. The State would be willing to lift the life without parole notice in return for a guilty plea, so – and you – but you want to go forward to the jury; is that right?

THE DEFENDANT: I don't have a choice.

THE COURT: You do have a choice, and it's your choice and yours alone. You said you wanted to talk to your family.

THE DEFENDANT: I talked to more than my family though.

THE COURT: Okay. So you want to go forward; is that right?

THE DEFENDANT: Yes, sir. I ain't got no choice. I can't –

THE COURT: Stand up when you talk to me.

THE DEFENDANT: Obviously the Court don't believe nothing I'm saying anyway about me being able to get – my disability. They ain't believing nothing about that. You're going to believe what my lawyer said about it. But it's my life on the line and I know what was told to me= and I know how I took it and I understood. So, I mean, I don't have no choice but to go forward with it. And my constitutional rights being violated the whole time I've been down here. So let's go on with the trial.

R. 311-18 (emphasis added).

“A South Carolina criminal defendant has the constitutional right to represent himself under both the federal and state constitutions.” *State v. Barnes*, 407 S.C. 27, 35, 753 S.E.2d 545, 550 (2014) (citing *State v. Starnes*, 388 S.C. 590, 698 S.E.2d 604 (2010)). The trial judge should have treated Mr. Plumer's insistence to relieve his trial counsel as a motion to represent himself. Mr. Plumer, in fact, correctly stated he has the constitutional right to relieve his trial counsel at any time. *Faretta v. California*, 422 U.S. 806 (1975).

Here, the attorney-client relationship had deteriorated because of the lack of communication. The trial judge incorrectly told Mr. Plumer his only options were to plead guilty or continue the trial. Mr. Plumer correctly informed the trial judge his only choice as to continue trial. Had Mr. Plumer allowed the trial judge to persuade him to plead guilty, then the jurors would not have acquitted Mr. Plumer of armed robbery, and this issue—and the other issues raised in the brief—would not have been preserved for appeal. Continuing the trial presented the trial judge two options. First, trial counsel would continue representing Mr. Plumer through the conclusion of the trial. Second, after giving Mr. Plumer his *Faretta* warnings, the trial could have continued with Mr. Plumer representing himself. The trial judge chose the former option, which denied Mr. Plumer his Sixth Amendment right to represent himself.

This Court, accordingly, should order a new trial.

Question 3

Did the trial judge err as a matter of law when by not qualifying Dr. Robert Bennett as expert in gunshot residue when the record establishes the witness has the necessary education, training and experience, and the exclusion of this expert testimony denied Ontavious Plumer his constitutional right to present a complete defense?

Greenville County Sheriff Deputy Spurgeon collected gunshot residue evidence from Mr. Plumer. R. 113-15. Wes Smith, legal coordinator for the Greenville County Sheriff's Office, testified this evidence remained secure in the evidence locker at the Greenville County Sheriff's Office until released to Detective McClinton. R. 319-28; Defendant's Exhibits 3, 4, 5. Detective McClinton transferred Mr. Plumer's gunshot residue kit to Joseph Best, who is a private investigator retained by Mr. Plumer's trial counsel. Mr. Best transferred this evidence to Dr. Robert Bennett. R. 348-55.

Dr. Robert Bennett is a forensic scientist. He has a pharmacy degree and Ph.D in drug sciences and toxicology from the Medical University of South Carolina. He has additional training certifications from the United States Department of Justice involving ballistics, including gunshot residue analysis. "For the past 20 years [gunshot residue analysis] has been a core study" for Dr. Bennett. He works with JR Regrove, which is "an accredited facility" that provides gunshot residue analysis to over 400 laboratories in the United States and Europe. Trial courts have qualified Dr. Bennett in "[m]any different areas of forensic scien[ce]." The Solicitor objected to Dr. Bennett's qualification as an expert because he was not the technician that actually conducted the test. The trial judge sustained the objection." R. 356-65.

In *Watson v. Ford Motor Co.*, our Supreme Court adopted a three-part test for determining the admissibility of expert testimony. "First, the trial court must find that the

subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury. 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010) (citing *State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606 (2009)). Second, “while the expert need not be a specialist in the particular branch of the field, the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter.” *Id.* (citing *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 487 S.E.2d 596 (1997)). Third, “the trial court must evaluate the substance of the testimony and determine whether it is reliable.” *Id.* (citing *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999)). *See also* Rule 702, SCRE.

Here, gunshot residue analysis is a subject matter where expert testimony assists jurors. *See Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007) (granting post-conviction relief because trial counsel did not retain independent expert in gunshot residue analysis). Dr. Bennett has a Justice Department certification in gunshot residue analysis and gunshot residue analysis has been a “core study” of his for 20 years. The first two prongs of *Watson*, therefore, are satisfied. The trial judge denied Mr. Plumer’s request for Dr. Bennett to proffer “the results of the test,” which goes to the subject matter of the testimony under the third prong of *Watson*. R. 364. The exclusion of this evidence prejudiced Mr. Plumer by denying his constitutional right right to present a complete defense. *Holmes v. South Carolina*, 547 U.S. 319, 319, 126 S. Ct. 1727, 1728, 164 L. Ed. 2d 503 (2006) (“Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’”).

The State might argue—as it did at trial—that Dr. Bennett not being the technician that ran the machinery is significant. Expert witnesses, however, are allowed to testify based on “facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing” when those facts and data are “of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.” Rule 703, SCRE. *And see Hundley ex rel. Hundley v. Rite Aid of S.C., Inc.*, 339 S.C. 285, 295, 529 S.E.2d 45, 50 (Ct. App. 2000) (“An expert witness may state an opinion based on facts not within his firsthand knowledge.”).

This Court, accordingly, should order a new trial. In the alternative, this Court should remand this case for a hearing to determine whether Dr. Bennett’s testimony is admissible under the third prong of *Watson*. *See, e.g., State v. Hughes*, 346 S.C. 339, 343, 552 S.E.2d 35, 37 (Ct. App. 2001) (“remand[ed] for an evidentiary hearing to determine whether Hughes was entitled to access to the notes as outlined in Rule 612,” SCRE.). If the trial court find Dr. Bennett’s testimony admissible and its exclusion impaired Mr. Plumer’s defense, then the trial court should be allowed to grant a new trial. *Hughes*, 346 S.C. at 343-44, 552 S.E.2d at 37.

Question 4

Did the trial judge err as a matter of law by sentencing Ontavious Plumer to five years imprisonment when S.C. Code Ann. § 16-23-490(A) expressly prohibits imposing an additional sentence with the court imposed a life sentence without the possibility of parole?

S.C. Code Ann. § 16-23-490(A) provides:

If a person is in possession of a firearm or visibly displays what appears to be a firearm or visibly displays a knife during the commission of a violent crime and is convicted of committing or attempting to commit a violent crime as defined in Section 16-1-60, he must be imprisoned five years, in addition to the punishment provided for the principal crime. *This five-year sentence does not apply in cases where the death penalty or a life sentence without parole is imposed for the violent crime.*

(emphasis added).

S.C. Code Ann. § 16-1-60, of course, classifies attempted murder as a violent crime. The trial judge sentenced Mr. Plumer to life imprisonment without the possibility of parole for attempted murder. The additional five-year sentence for violating § 16-23-490 is prohibited by the express terms of the statute. This Court, accordingly, should vacate that sentence. *See, e.g., State v. Palmer*, 415 S.C. 502, 783 S.E.2d 823 (Ct. App. 2016) (sentence for possession of a weapon during the commission of a violent crime was inapplicable, in light of life imprisonment without parole sentence for murder charge).

CONCLUSION

For the forgoing reasons, this Court should reverse Ontavious Plumer's convictions and sentences and remand this case for a new trial.

In the alternative, this Court should remand this case for an evidentiary hearing to determine whether Dr. Bennett's expert testimony was admissible pursuant to the third prong of *Watson*. If the trial court on remand determines Dr. Bennett's testimony stratifies the third prong of *Watson*, then the trial court should order a new trial. See *Hughes, supra*.

In any event, this Court should vacate the sentence for a violation of section 16-23-490.

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November 13, 2018
Greenwood, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of General Sessions
Edward W. Miller, Circuit Court Judge

Appellate Case No. 2017-000481

The State,..... Respondent,

v.

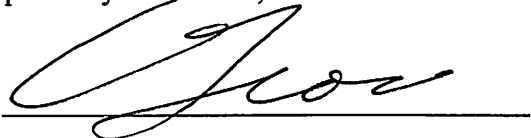
Ontavious Plumer, ... Appellant.

Rule 211, SCACR Certification

This Final Brief of Appellant complies with Rule 211(b), SCACR.

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November 13, 2018
Greenwood, South Carolina

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.

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STATEMENT OF ISSUES ON APPEAL

I.

The trial judge properly declined to instruct the jury on self-defense because the evidence and testimony presented during trial did not establish any of the required elements of self-defense and, instead, established Appellant unlawfully shot his victim after pulling out a gun and attempting to rob him during the course of a drug transaction.

II.

The trial judge neither erred in any manner nor violated Appellant's constitutional right to self-representation by denying Appellant's mid-trial request to relieve defense counsel in order to obtain "another lawyer" because that request was untimely and did not constitute a clear and unequivocal assertion of his right to self-representation since it was a request to replace defense counsel with a different attorney as opposed to a request for Appellant to be permitted to represent himself.

III.

Any issue with the trial judge's exclusion of the testimony of a purported expert witness on gunshot residue was not properly preserved for appellate review because defense counsel never proffered or attempted to proffer the substance of the witness's intended testimony. However, notwithstanding any issue preservation concerns, the trial judge did not abuse his broad discretion by refusing to qualify the witness as an expert so the witness could testify about the results of a gunshot residue analysis he did not personally perform because that testimony would have simply constituted improper and inadmissible hearsay disguised as an expert opinion.

IV.

Any issue with Appellant's five-year sentence for possession of a firearm during the commission of a violent crime was not properly preserved for appellate review because defense counsel did not raise any objections to Appellant's sentence during trial.

STATEMENT OF THE CASE

In December of 2015, Appellant Ontavious Derenta Plumer was arrested following an investigation into a shooting that occurred a few months earlier in Greenwood, South Carolina. In July of 2016, the Greenwood County Grand Jury indicted Appellant for attempted murder, armed robbery, and possession of a firearm during the commission of a violent crime. Prior to trial, the solicitor served timely notice on Appellant indicating the State would seek a sentence of life without parole upon conviction based on Appellant's prior conviction for a "most serious" offense. On February 6, 2017, a jury trial was commenced in the Greenwood County Court of General Sessions with the Honorable Edward W. Miller, circuit court judge, presiding. At the conclusion of the three-day trial, the jury convicted Appellant of attempted murder and possession of a firearm during the commission of a violent crime and acquitted him of armed robbery. Following the verdict, the trial judge sentenced Appellant to terms of imprisonment of life without parole for attempted murder and five years for possession of a weapon during the commission of a violent crime. Appellant then timely filed a notice of appeal.

STATEMENT OF FACTS

On the evening of October 11, 2015, Oshamar Wells (“Victim”), who was making money at that time by selling marijuana, met up with Appellant and another man identified as “Mel” at a pre-arranged location so he could sell them one pound of marijuana, which was worth roughly \$3,600.¹ (R. pp. 13-14; p. 18; p. 20; pp. 31-32; pp. 40-41; pp. 72-73). After meeting up with the men, Victim led them to his cousin’s residence, which was located on Spring Woods Trail in Greenwood, South Carolina, in order to complete the transaction. (R. pp. 15-16). Once there, they parked their vehicles outside, entered the residence, sat down at the kitchen table, and proceeded to smoke “a couple of blunts” to test the “product.” (R. pp. 17-20). After doing so, Victim placed a bag containing the agreed-upon pound of marijuana onto the table and waited for the men to produce his payment for it. (R. pp. 18-20; p. 132). However, instead of presenting the money, Appellant suddenly pulled out a gun and began firing it at Victim while “Mel” grabbed the bag of marijuana and fled from the home. (R. pp. 20-21; p. 43; pp. 66-67). In response, Victim quickly turned to retrieve his mother’s holstered gun from a nearby cabinet, and, as he was doing so, he was hit by bullets in his back, buttocks, and legs. (R. pp. 20-24; p. 29; p. 44; p. 50; pp. 66-67; p. 70; p. 72; pp. 81-82). Victim then collapsed to the floor, but he was able to fire several shots in Appellant’s direction, which caused Appellant to flee from the home so rapidly he left his vehicle’s keys behind. (R. pp. 23-24; p. 41; p. 43; pp. 173-174).

Once Appellant was gone, Victim, who was gravely injured, placed a number of phone calls seeking help, including one to his mother. (R. p. 25; p. 74; p. 284). In response, Victim’s mother, Wenona Wells (“Mother”), quickly responded to the scene along with several young

¹ According to Victim, the drug deal was arranged by Christopher Maggiacomo, who also was known as “Jock.” (R. p. 33; pp. 71-72). In the past, “Jock” had served as a middleman for Victim, but “Jock” was out of town at the time of the incident. (R. pp. 33-34).

children in her care. (R. pp. 74-75). Upon arriving, Mother found Victim on the floor in the kitchen, and her grandson found her gun on the floor nearby. (R. pp. 75-76). After her grandson picked up the gun, Mother took it from him, secured it in her purse to keep it away from the children present, and later transferred it to the trunk of her vehicle. (R. pp. 75-76; p. 78; p. 84). Shortly thereafter, Officer Kerry Cooper of the Greenwood Police Department arrived at the residence and was directed inside to Victim's location. (R. pp. 88-90). At that point, Victim reported to the officer he had been shot by two unknown men who tried to rob him. (R. pp. 91-93; pp. 103-104). Victim was then rapidly transported to the hospital by emergency medical personnel who responded to the scene. (R. p. 93).

At the hospital, Dr. Ricky Ladd, a board-certified emergency room physician, provided treatment to Victim, who reported he had been shot during a home invasion. (R. p. 284). During that treatment, Dr. Ladd discovered Victim's femur was broken and Victim had sustained potentially life-threatening gunshot injuries to his buttocks, lower back, thighs, and lower leg. (R. pp. 284-285; pp. 288-289).

Once Dr. Ladd and the other medical personnel were able to stabilize Victim's condition, Officer Patrick Durkin of the Greenwood Police Department briefly spoke with Victim at the hospital, and, during that discussion, Victim reported two unknown men entered the residence and told him to "give it up" before shooting at him. (R. pp. 228-229; p. 231; p. 234). Officer Durkin then collected evidence for gunshot residue testing from Victim's hands, which had been bagged upon his arrival at the hospital.² (R. p. 232).

² Ultimately, no gunshot residue testing was conducted in regard to the evidence collected from Victim's hands due to the fact Victim eventually admitted to firing a weapon and had unquestionably been shot during the incident. (R. pp. 241-247; p. 251).

At the same time Victim was being treated at the hospital, officers and other law enforcement personnel began conducting an investigation into the shooting at the Spring Woods Trail residence. (R. pp. 94-95; pp. 124-125; pp. 178-180; p. 200). As part of that investigation, the officers checked the information connected to the vehicles present at the scene and discovered one of the vehicles was registered to an individual named Walter Plumer, who was Appellant's grandfather. (R. p. 94; p. 119; pp. 125-126; p. 128; p. 175). Additionally, the officers processed the crime scene, which was in disarray, and discovered blood spots, a number of fired and unfired bullets, multiple shell casings, numerous bullet holes, some unpackaged marijuana, a holster, and several sets of keys, including the keys to Appellant's vehicle. (R. p. 95; p. 98; pp. 101-102; p. 136; pp. 173-174; pp. 202-203; pp. 205-208; p. 210; pp. 216-217; p. 220). Upon making those discoveries, the officers collected and secured the evidence, and a number of those items were subsequently submitted for analysis, including a swab collected from blood located on the ground outside of the residence.³ (R. pp. 165-166; pp. 211-213).

Meanwhile, in the immediate aftermath of the shooting, Appellant, who had been shot in the leg during the incident, ran from the scene and was able to solicit a ride from Sameka Hawes, who was driving through the area in her car. (R. pp. 109-110; pp. 301-303; p. 306). Upon doing so, Appellant initially requested Hawes drive him to the hospital, but he quickly changed his mind and directed her to transport him to "his baby mom's house." (R. p. 303; p. 346). Hawes then drove Appellant to an apartment complex as directed. (R. p. 304). Thereafter, while at the apartment complex, Appellant sought assistance from several of his family members, and his

³ Upon analysis, Lieutenant Tracey Thrower, a firearm and toolmark examiner at SLED, determined two of the recovered bullets were fired from the gun used by Victim, two other recovered bullets were fired by a different gun, ten of the recovered shell casings were fired by the gun used by Victim, and six other shell casings were fired by a different gun. (R. p. 252; pp. 254-255; pp. 259-260; pp. 263-265). Based on those determinations, Lieutenant Thrower concluded between two and four guns were involved in the shooting. (R. p. 267).

cousin, VanJarvis Martin, ultimately picked him up and drove him to a hospital in Greenville, South Carolina, at his request. (R. p. 335; pp. 366-367). Subsequently, at the hospital, Deputy Andrew Reese of the Greenville County Sheriff's Office made contact with Appellant based on the fact Appellant had sustained a gunshot injury. (R. pp. 107-108; p. 112). During their conversation, Appellant claimed he was shot in the leg by a stranger as he was walking along a roadway in Greenville and was transported to the hospital by a random bystander after the shooting. (R. pp. 109-110). Another officer then took possession of Appellant's clothing from hospital staff and, at approximately 11:15 p.m., collected evidence from Appellant's hands for potential gunshot residue testing. (R. p. 112; p. 323; pp. 332-333).

On the following morning, Detective Wesley McClinton and Detective William Kay of the Greenwood Police Department went to speak with Victim at the hospital in Greenwood.⁴ (R. p. 26; p. 47; pp. 115-116; p. 124; p. 130; p. 166). During the conversation, Victim, who was afraid he would get in trouble if he revealed the truth about being shot during a drug transaction, falsely claimed two random men came to the residence, tried to rob him, and shot him when did not have anything for them to steal.⁵ (R. p. 27; p. 48; pp. 58-59; p. 117; p. 130).

After speaking with Victim, Detective McClinton went to speak with Appellant's grandfather at his home in Starr, South Carolina, along with Lieutenant Mike Dixon, who was

⁴ Due to the severity of his injuries, Victim was at the hospital for approximately one week following the shooting. (R. p. 26).

⁵ In addition to being involved in a drug transaction, Victim also had prior convictions for possession of marijuana and possession of marijuana with intent to distribute, so he could not lawfully possess a firearm. (R. p. 31; p. 68). Notably, prior to the shooting, Appellant had previously been convicted of attempted armed robbery. (R. p. 429; p. 444). Therefore, Appellant *also* could not lawfully possess a firearm at the time of the incident. See S.C. Code Ann. § 16-23-500(A) ("It is unlawful for a person who has been convicted of a violent crime, as defined by Section 16-1-60, that is classified as a felony offense, to possess a firearm or ammunition within this State."); see also S.C. Code Ann. § 16-1-60 (identifying attempted armed robbery as a violent crime).

the supervisor of the investigations unit at the Greenwood Police Department. (R. p. 174; p. 176; p. 178). During that conversation, Appellant's grandfather initially claimed his car had been stolen. (R. p. 177; p. 182). However, he eventually acknowledged his car was not actually stolen and, instead, was loaned to Appellant, whom he called "Too-Too." (R. p. 175; p. 177; p. 182). Appellant's grandfather further admitted he was initially untruthful because his vehicle had been "involved in something." (R. p. 183).

On the following day, Detective McClinton and Detective Kay returned to the hospital to speak with Victim again, and Victim again claimed to have been shot during an attempted robbery. (R. p. 48; pp. 60-61; p. 131; p. 167). However, after being confronted about the implausibility of his account and speaking with a family member, Victim eventually told the truth and revealed he was shot during the course of a drug transaction. (R. p. 27; p. 49; pp. 116-117; pp. 131-132; p. 157). Additionally, Victim revealed he shot at Appellant during the incident, but he consistently indicated he only fired his weapon after Appellant first began shooting. (R. pp. 116-117; p. 133; pp. 148-149; pp. 164-165). Victim also revealed his mother was currently in possession of the gun he used to defend himself, which enabled Detective McClinton to retrieve the gun from Mother a short time later. (R. pp. 78-79; p. 84; pp. 133-134). Furthermore, Detective McClinton showed a photographic lineup containing Appellant's picture to Victim, and Victim immediately identified Appellant as the person who shot him.⁶ (R. pp. 27-28; pp. 118-119; pp. 121-122; pp. 132-133).

Thereafter, the investigating officers obtained an arrest warrant for Appellant in connection to the shooting, but they were initially unable to locate him despite searching "quite a few places." (R. p. 183; pp. 345-346). However, a few months after the shooting, Appellant was

⁶ Later on during trial, Victim identified Appellant in the courtroom as the person who shot him. (R. p. 21).

finally apprehended and arrested. (R. p. 184). Following his arrest, Appellant was brought before a judge for a bond hearing, and, during the hearing, Appellant acknowledged he was present at the scene of the shooting while asserting he had also been shot. (R. pp. 184-185; p. 195). Furthermore, a sample of Appellant's DNA was collected for comparative purposes, and, upon analysis, Appellant's DNA profile was conclusively matched to the DNA profile developed from the blood recovered on the ground outside of the Spring Woods Trail residence shortly after the shooting. (R. pp. 213-214; pp. 271-276).

Subsequently, Appellant was indicted for attempted murder, armed robbery, and possession of a firearm during the commission of a violent crime, and he chose to proceed forward to trial. (R. pp. 3-4; pp. 438-443). At the conclusion of trial, the jury convicted Appellant solely of attempted murder and possession of a firearm during the commission of a violent crime. (R. p. 426). The trial judge then sentenced Appellant to an aggregate sentence of life without parole based on his prior "most serious" conviction for attempted armed robbery. (R. pp. 429-430).

ARGUMENT

I.

The trial judge properly declined to instruct the jury on self-defense because the evidence and testimony presented during trial did not establish any of the required elements of self-defense and, instead, established Appellant unlawfully shot his victim after pulling out a gun and attempting to rob him during the course of a drug transaction.

Appellant contends the trial judge committed reversible error by refusing to instruct the jury on self-defense. In support of that contention, Appellant maintains the evidence and testimony presented during trial warranted such a charge, and he points to a variety of things he alleges support an inference Victim first produced a gun during the incident.⁷ To the contrary, the testimony and evidence presented during trial established Appellant attempted to rob Victim at gunpoint and unlawfully shot him when Victim turned to retrieve his own gun to protect himself, and Appellant neither testified in his own defense nor offered anything else to refute that version of events. Therefore, because no testimony or evidence was presented to establish the required elements of self-defense, the trial judge properly declined to instruct the jury on self-defense. Appellant's convictions should be affirmed.

RELEVANT FACTS

During the course of trial, the officers and other witnesses who responded after the shooting testified about the events that followed it and the ensuing investigation that culminated

⁷ Through his appellate challenge to the trial judge's jury instructions, Appellant has raised entirely new arguments in support of a self-defense charge. See *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) (instructing a party cannot properly argue one ground in support of an issue during trial and then argue an alternative ground on appeal). However, because those arguments were not properly presented to the trial judge during trial, they cannot appropriately be raised or considered for the first time on appeal. Cf. *State v. Benton*, 338 S.C. 151, 156-157, 526 S.E.2d 228, 231 (2000) (finding Benton's appellate challenge to the trial judge's refusal to give a requested charge was not preserved for appellate review where Benton "argued one ground in support of a circumstantial evidence charge at trial (State only presented circumstantial evidence of intent) and argues another ground in support of the charge on appeal (palm print is circumstantial evidence).").

in Appellant's arrest. (R. pp. 74-75; pp. 87-88; pp. 115-116; pp. 124-125; pp. 178-179; p. 184; p. 200; pp. 228-229; pp. 252-254; pp. 270-271). Likewise, Dr. Ladd testified about Victim's injuries after the shooting, and, during his testimony, he indicated Victim "more than likely" fell when he was shot and would not have been able to bear weight on his leg after his femur was broken. (R. p. 289; p. 291; p. 297). However, he specifically noted he had no idea which of Victim's injuries was caused first or last. (R. p. 297).

Furthermore, regarding the shooting itself, Victim consistently and unwaveringly testified Appellant produced a gun during the course of the drug transaction and shot him when he reached for his own gun, which was stored nearby for defensive purposes, solely to defend himself from Appellant's actions. (R. pp. 20-21; p. 25; pp. 43-44; p. 50; pp. 66-67; pp. 70-71). Similarly, the officers who spoke with Victim after the shooting testified about his various out-of-court accounts of the incident, and, in those accounts, Victim never indicated he reached for his own weapon at any point before Appellant and his confederate either attempted to rob him or pulled out a gun. (R. p. 103; pp. 116-117; p. 130; p. 132; pp. 148-149; pp. 164-165; p. 232).

Beyond that testimony and evidence, Appellant elected *not* to testify during trial and, thus, did not personally offer an alternative version of events that could have supported a conclusion he acted in self-defense during the incident. (R. p. 365). However, testimony was presented establishing Appellant made claims at different times after the shooting he either was shot by a stranger while walking along a roadway in an entirely different city or was present at the time of the incident and was *also* shot during it. (R. pp. 108-110; p. 195). Notably, in neither of those accounts did Appellant assert he acted in self-defense at any point in time. (R. pp. 108-110; p. 195).

At the conclusion of the evidentiary phase of trial, the trial judge asked the parties if they had any requests for jury instructions, and defense counsel responded by requesting a charge on self-defense based on the fact Appellant “may have been shot at [the] incident location.” (R. p. 369; pp. 371-372). However, the solicitor noted nothing had been presented during trial to establish Appellant acted in self-defense, and the trial judge indicated he agreed. (R. p. 372). In response, defense counsel alleged “a good bit of evidence” had been presented establishing Appellant was not the individual who fired the first shots, and the trial judge asked defense counsel to identify the specific evidence supporting that particular contention while noting the only evidence of how the shooting occurred had come from Victim. (R. p. 372). At that point, defense counsel incorrectly claimed Dr. Ladd testified Victim would not have been able to shoot when his femur was broken, and both the trial judge and the solicitor immediately responded Dr. Ladd had not, in fact, testified in that fashion. (R. p. 372). The trial judge then denied defense counsel’s request for a self-defense instruction after having been presented with nothing to justify such a charge. (R. p. 373).

Subsequently, the trial judge instructed the jury on the applicable law. (R. pp. 410-420). In doing so, the trial judge—consistent with his earlier ruling—did not present a jury instruction on self-defense.⁸ (R. pp. 410-420).

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). On appeal, an appellate court reviewing a trial judge’s jury charge must view the charge as a whole and in light of the evidence and issues from trial. State v. Simmons, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009); see Todd v. State, 355

⁸ At the conclusion of the trial judge’s jury instructions, defense counsel renewed all his prior motions and objections while raising no new arguments. (R. p. 420).

S.C. 396, 402, 585 S.E.2d 305, 308 (2003) (“[J]ury charges should be examined in their entirety and not in isolation[.]”). Significantly, the appellate court will only reverse a trial judge’s decision regarding jury instructions when that decision constituted a prejudicial abuse of discretion. See Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000) (“An appellate court will not reverse the trial court’s decision regarding jury instructions unless the trial court abused its discretion.”); Rauch v. Zayas, 284 S.C. 594, 597, 327 S.E.2d 377, 378 (Ct. App. 1985) (“[A]n alleged error in a portion of the charge must be prejudicial to the appellant to warrant a new trial.”). Meanwhile, if the jury instructions presented were substantially correct and covered the applicable law, the trial judge’s decision will not be reversed on appeal. See State v. Ezell, 321 S.C. 421, 425, 468 S.E.2d 679, 681 (Ct. App. 1996) (“A jury charge which is substantially correct and covers the law does not require reversal.”); see also State v. Rye, 375 S.C. 119, 123, 651 S.E.2d 321, 323 (2007) (“A trial court’s decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied.”).

ANALYSIS

In South Carolina, four elements must be present in order for the defense of self-defense to be established. State v. Bryant, 336 S.C. 340, 344, 520 S.E.2d 319, 321 (1999). Specifically, the required elements of self-defense are: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must either have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury or have actually been in imminent danger; (3) if the defense is based on the belief of imminent danger, the belief must have been the same as one that would have been entertained by a reasonably prudent person of ordinary firmness and courage in the same situation; if the defendant was in actual imminent danger, the circumstances must have been such that would warrant a person of ordinary prudence, firmness, and courage to

strike the fatal blow in order to prevent serious bodily injury or loss of life; and (4) there was no other probable manner of avoiding the danger than to act as the defendant did in the situation. State v. Goodson, 312 S.C. 278, 280, 440 S.E.2d 370, 372 (1994). Critically, it is axiomatic all four elements of self-defense must be established in order for that defense to apply. State v. Bixby, 388 S.C. 528, 554, 698 S.E.2d 572, 586 (2010).

When determining whether the issue of self-defense should be submitted to the jury, the trial judge must look to the evidence actually introduced during trial because “[t]he law to be charged to the jury is determined by the evidence presented at trial.” Goodson, 312 S.C. at 280, 440 S.E.2d at 372. If any evidence of self-defense is presented, the trial judge should instruct the jury on self-defense in the event such an instruction is requested. State v. Hill, 315 S.C. 260, 261, 433 S.E.2d 848, 849 (1993); see State v. State, 294 S.C. 286, 287, 363 S.E.2d 903, 904 (1988) (“Upon request, a defendant is entitled to a jury instruction on self-defense *if he has produced evidence tending to show the four elements of that defense.*” (emphasis added)). Conversely, if no evidence is presented to support the issue of self-defense, the trial judge should *not* present a self-defense instruction to the jury. State v. Slater, 373 S.C. 66, 69, 644 S.E.2d 50, 52 (2007); see State v. Wigington, 375 S.C. 25, 31, 649 S.E.2d 185, 188 (Ct. App. 2007) (“A jury charge on self-defense is not required unless it is supported by the evidence.”); see also State v. Blurton, 352 S.C. 203, 208, 573 S.E.2d 802, 804 (2002) (“If a jury instruction is provided to the jury that does not fit the facts of the case, it may confuse the jury. Only law applicable to the case should be charged to the jury. Instructions that do not fit the facts of the case may serve only to confuse the jury.” (citations omitted)).

In the case sub judice, the testimony and evidence presented during trial did not establish all the required elements of self-defense. Specifically, regarding the first element, both Victim’s

trial testimony and the testimony regarding Victim's out-of-court accounts of the shooting established Appellant pulled out a firearm during the course of an attempt to rob Victim, and no testimony was presented to establish a contrary version of events in which Appellant was not the person responsible for the gunfight that ensued. Under those circumstances, the evidence and testimony presented only supported a conclusion Appellant brought about the difficulty that transpired, which meant Appellant could not validly raise a claim of self-defense. Cf. State v. Santiago, 370 S.C. 153, 160, 634 S.E.2d 23, 27 (Ct. App. 2006) (finding a self-defense jury instruction was not warranted where the evidence presented did not support a finding Santiago was without fault for bringing about the difficulty). Furthermore, due to the absence of any testimony from Appellant regarding his account of the shooting, there was no evidence or testimony presented establishing Appellant shot Victim in order to defend himself from imminent danger of losing his life or sustaining serious bodily injury. Cf. State v. Bruno, 322 S.C. 534, 536, 473 S.E.2d 450, 452 (1996) ("Bruno was not entitled to a self-defense charge, because he presented no evidence that he believed he was in imminent danger of losing his life or sustaining serious bodily injury."). Because no testimony or evidence was presented that established those required elements of self-defense, Appellant was simply not entitled to a jury instruction on that defense. See Goodson, 312 S.C. at 280, 440 S.E.2d at 372 (finding the trial judge committed no error by declining to instruct the jury on self-defense where no evidence was presented establishing several of the required elements of self-defense).

In arguing to the contrary, Appellant first contends a charge on self-defense was supported by the fact Victim had a gun nearby at the time of the drug transaction and was willing to use it. However, Victim's act of keeping a holstered gun in close proximity for defensive purposes in no way constituted evidence *Appellant* was acting in self-defense at the time he shot

Victim as individuals can unquestionably arm themselves for protection. See, e.g., State v. Burriess, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999) (recognizing “a person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting”).

Additionally, Appellant maintains a charge on self-defense was warranted because some testimony, including the testimony establishing Victim would have fallen when his femur was broken, could have supported a conclusion Victim reached for his gun before his was shot. Importantly though, the testimony presented during trial only established Victim reached for his gun *after* Appellant pulled out his own gun and tried to rob him. In light of that testimony, Victim’s act of reaching for his gun—even if it occurred before he was actually shot—could not have justified Appellant shooting Victim in self-defense since Victim was only responding to an unlawful provocation from Appellant when reached for his own weapon.⁹ See Bryant, 336 S.C. at 345, 520 S.E.2d at 322 (explaining an individual who provokes or initiates an assault cannot escape criminal liability by invoking self-defense); cf. Santiago, 370 S.C. at 160, 634 S.E.2d at 27 (“Even assuming, as Santiago testified, that [the victim] reached for the gun while in Santiago’s hands, he did so after Santiago brought about the difficulty by removing the shotgun from the trunk and aiming it at [him].”).

Next, Appellant contends a charge on self-defense was warranted because Victim allegedly conspired to hide the gun he used during the incident with Mother. However, notwithstanding the fact no testimony was actually presented to establish Victim conspired with

⁹ Had any actual testimony or evidence been presented to establish Victim first brandished a weapon during the drug transaction without any provocation, Appellant very well might have been entitled to a jury instruction on self-defense. Cf. State v. Muller, 282 S.C. 10, 10, 316 S.E.2d 409, 409 (1984) (finding the trial judge erred by refusing to charge the jury on self-defense where Muller testified during trial “he shot [the victim] after [the victim] took out a gun and began shooting at him”).

his mother for any purpose, Victim's actions after the shooting—even if they were designed to conceal or minimize his own criminal responsibility—simply did not constitute evidence of Appellant's actions during the shooting and could not have justified a charge on an otherwise unsupported theory of self-defense. See Barber v. State, 393 S.C. 232, 236, 712 S.E.2d 436, 438-439 (2011) (recognizing there must be some evidence presented on a particular issue in order to warrant a jury instruction on that issue while speculation based on the possibility “the jury may believe some of the evidence and disbelieve other evidence” is not sufficient to warrant an instruction); State v. Funchess, 267 S.C. 427, 430, 229 S.E.2d 331, 332 (1976) (explaining the presence of evidence “determines whether [an issue] should be submitted to the jury and the ‘mere contention that the jury might accept the State’s evidence in part and might reject it in part will not suffice’ ” (citation omitted)).

Furthermore, Appellant maintains self-defense should have been charged because there was evidence establishing he retreated at some point. While unquestionable the evidence established Appellant fled after the shooting, the fact Appellant fled did not establish he attempted to retreat *before* shooting Victim or otherwise acted in self-defense *before* taking flight. See, e.g., Santiago, 370 S.C. at 161, 634 S.E.2d at 27 (“If the defendant provokes or initiates the assault, he cannot invoke self-defense; however, he may restore his right to self-defense *if he withdraws from the conflict and communicates that decision to his adversary.*” (emphasis added)). Therefore, the evidence of Appellant's escape from the area after the shooting did not constitute evidence of any of the required elements of self-defense. See Bryant, 336 S.C. at 345, 520 S.E.2d at 322 (“A robber, who is met with such violent resistance by his victim that he has no opportunity to convince the victim that he has abandoned his criminal

intentions and only wants to withdraw, may not claim self defense if he injures or kills his victim.” (citations, brackets, and internal quotations omitted)).

Finally, Appellant maintains his acquittal for the armed robbery charge somehow warranted a jury instruction on self-defense. Critically though, the jury’s verdict on the armed robbery charge neither was evidence of anything for the jury to consider nor converted the actual evidence presented during trial into evidence of self-defense when it otherwise was not such evidence. See, e.g., State v. Minor, 171 S.C. 120, ___, 171 S.E. 737, 737 (1933) (“The fact that [Minor] was acquitted on [one] charge does not now make the evidence incompetent, and cannot result in a reversal of her conviction on the other charge of having in possession.”). Therefore, the jury’s verdict did not establish Appellant was entitled to a jury instruction on self-defense. See State v. Gaines, 380 S.C. 23, 31, 667 S.E.2d 728, 732 (2008) (“The law to be charged to the jury is determined by *the evidence presented at trial.*” (emphasis added)).

Accordingly, because none of the evidence and testimony presented during trial supported a conclusion Appellant was acting in self-defense at the time he shot Victim, a self-defense instruction was not warranted in Appellant’s case. See 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.”). As a result, the trial judge committed no error by declining to instruct the jury on a legal theory wholly unsupported by any of the evidence and testimony presented during trial. See Bryant, 336 S.C. at 345-346, 520 S.E.2d at 322 (“[Bryant]’s statements fail to establish the elements of self-defense entitling [Bryant] to a self-defense charge. No question of fact for the jury is created on this issue. . . . Accordingly, [Bryant] was not entitled to a self-defense charge and the trial judge correctly refused the charge.”). Appellant’s convictions should be affirmed.

II.

The trial judge neither erred in any manner nor violated Appellant’s constitutional right to self-representation by denying Appellant’s mid-trial request to relieve defense counsel in order to obtain “another lawyer” because that request was untimely and did not constitute a clear and unequivocal assertion of his right to self-representation since it was a request to replace defense counsel with a different attorney as opposed to a request for Appellant to be permitted to represent himself.

Appellant contends the trial judge erred by denying his mid-trial motion to relieve defense counsel and by not allowing him to represent himself in a pro se capacity. In support of that contention, Appellant does *not* allege he ever actually attempted to invoke his right to self-representation at any point during trial. Nonetheless, Appellant maintains the trial judge should have construed his request to relieve defense counsel in order to replace defense counsel with “another lawyer” as a motion for self-representation and somehow violated his right to represent himself by failing to do so. Importantly though, in order to effectively invoke the right to self-representation, Appellant was required to assert that right in a clear, unequivocal, and timely manner. Since Appellant did not do so at any point during his trial, he did not properly invoke his right to self-representation, and the trial judge was under no obligation to ensure Appellant was knowingly, voluntarily, and intelligently invoking a right he never actively sought to invoke. Accordingly, the trial judge committed no error through the manner in which he handled Appellant’s mid-trial request to relieve defense counsel and in no way violated Appellant’s constitutional right to represent himself. Appellant’s convictions should be affirmed.

RELEVANT FACTS

Over the course of the first two days of trial, the State fully presented its case against Appellant and rested after introducing the testimony of fifteen separate witnesses. (R. p. 2; p. 13; p. 74; p. 87; p. 107; p. 115; p. 124; p. 156; p. 174; p. 178; p. 200; p. 223; p. 228; p. 236; p. 252; p. 270; p. 283). Once the State’s case was concluded, defense counsel unsuccessfully moved for

a directed verdict and then presented the first witness for the defense. (R. pp. 298-300). At the conclusion of that witness's testimony, the trial judge released the jury for the day. (R. p. 309). Thereafter, following a brief discussion about a potential defense witness, the trial judge cautioned Appellant about the seriousness of the sentence he was facing in the event he was convicted before suspending the trial for the day.¹⁰ (R. p. 312).

On the following morning, the trial resumed, and Appellant personally presented a motion seeking to relieve counsel and to have a competency evaluation conducted that had apparently been prepared by an inmate who was incarcerated with him at the jail. (R. p. 313; pp. 435-437). In response to the motion, the trial judge noted Appellant had appeared competent throughout the proceedings, and defense counsel confirmed he did not have any concerns about Appellant's competency. (R. p. 314). Appellant then indicated he wished to relieve defense counsel because defense counsel purportedly failed to "make it so [he] could understand what was going on." (R. pp. 314-315). In support of that request, Appellant claimed he did not know he was facing a mandatory sentence of life without parole until the second day of trial, alleged he had received a plea offer of seven years at some point, and asserted defense counsel told him not to worry about the life without parole sentence because he would be facing a lengthy sentence upon conviction under any circumstances. (R. pp. 314-315). In rebuttal, the solicitor promptly denied ever extending a seven-year offer during plea negotiations, and defense counsel clarified he was the one who proposed the seven-year offer, which was rejected by the solicitor. (R. p.

¹⁰ Regarding the substance of the brief discussion, defense counsel identified the next witness who might testify for the defense, and the solicitor responded by noting that particular witness appeared to have been instructed how to testify by multiple individuals who contacted her from jail. (R. pp. 309-310). Upon hearing that information, the trial judge warned he would take any efforts to manipulate the proceedings "very seriously" and cautioned there would be "a price to pay" if falsified evidence was introduced. (R. p. 311). Defense counsel then conferred with the prospective witness and, after doing so, confirmed she did not wish to testify. (R. p. 311).

315). Appellant then claimed defense counsel had never relayed that information to him, and defense counsel refuted that contention while confirming he relayed all plea offers to Appellant and also discussed the life without parole sentence with him. (R. pp. 315-316).

At that point, the trial judge asked Appellant if he wanted to go forward with the trial, and Appellant responded he wanted “to get [himself] another lawyer.”¹¹ (R. p. 316). However, because the trial was already underway and the jury had been sworn, the trial judge indicated he was not going to relieve defense counsel and stop the trial to allow Appellant to get a new attorney. (R. p. 316). The trial judge then again asked Appellant if he wanted to go forward with the trial, and Appellant confirmed he did while stating he had “no choice.” (R. p. 316). Immediately in response, the trial judge advised Appellant he did, in fact, have a choice of which he was aware, and Appellant replied he had a constitutional right to relieve his counsel whenever he wanted to do so. (R. p. 316). The trial judge then again asked Appellant if wanted to go forward with the trial while noting Appellant was aware of his choices, and, once again, Appellant claimed he did not have a choice. (R. p. 316). Thereafter, the trial judge advised Appellant the solicitor was willing to remove the prospect of mandatory life without parole in the event he elected to plead guilty, but Appellant continued to insist he did not have a choice while affirming he wanted to go forward with the trial. (R. pp. 316-317).

As the discussion continued, Appellant complained the trial judge did not believe him about his “disability,” asserted the trial judge believed defense counsel over him, and alleged his constitutional rights had been violated repeatedly. (R. p. 317). He then instructed the trial judge to “go on” with the trial. (R. p. 317). After listening to those remarks, the trial judge informed

¹¹ Notably, Appellant’s statement indicating he wanted “another lawyer” was consistent with the relief requested in his motion, which was an order relieving defense counsel so he could “obtain further representation[.]” (R. pp. 435-437).

Appellant he was facing his “last chance” to avoid a mandatory life without parole sentence and asked him if he understood, which Appellant confirmed he did. (R. p. 318). The trial judge then provided one final warning to Appellant before giving him an opportunity to confer with defense counsel. (R. p. 319). Following a brief pause in the proceedings, defense counsel indicated Appellant wished to proceed forward with the trial. (R. p. 319). The jury then returned to the courtroom, and the trial continued on without Appellant ever making any actual request to represent himself. (R. pp. 313-319).

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Mazique, 419 S.C. 282, 288, 797 S.E.2d 730, 733 (Ct. App. 2016). When a defendant requests to proceed pro se after his trial has begun, “the grant or denial of the right to proceed pro se rests within the sound discretion of the trial judge[,]” and, therefore, such a ruling must necessarily be reviewed on appeal for an abuse of discretion. State v. Fuller, 337 S.C. 236, 241, 523 S.E.2d 168, 171 (1999); see United States v. Singleton, 107 F.3d 1091, 1099 (4th Cir. 1997) (reviewing a trial judge’s ruling on a mid-trial assertion of the right to self-representation for an abuse of discretion). “An abuse of discretion occurs when the court’s decision is unsupported by the evidence or controlled by an error of law.” Mazique, 419 S.C. at 288, 797 S.E.2d at 733.

ANALYSIS

Pursuant to both the United States Constitution and the South Carolina Constitution, a criminal defendant brought to trial in South Carolina “must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment.” Faretta v. California, 422 U.S. 806, 807 (1975); see U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”); S.C.

Const. art. I, § 14 (“Any person charged with an offense shall enjoy the right . . . to be fully heard in his defense by himself or by his counsel or by both.”). However, “[t]he right to defend is personal.” Faretta, 422 U.S. at 834. As a result, a defendant is permitted to waive his right to counsel and represent himself during a trial in a pro se capacity. State v. Thompson, 355 S.C. 255, 262, 584 S.E.2d 131, 134 (Ct. App. 2003); see State v. Barnes, 407 S.C. 27, 35, 753 S.E.2d 545, 550 (2014) (“A South Carolina criminal defendant has the constitutional right to represent himself under both federal and state constitutions.”). Thus, even though it ultimately may be detrimental for a defendant to personally conduct his own defense, that defendant’s choice to do so “must be honored out of ‘that respect for the individual which is the lifeblood of the law.’ ” Thompson, 355 S.C. at 262, 584 S.E.2d at 134 (citation omitted).

In order to invoke the right to self-representation, a defendant “must take affirmative steps” to advise the trial judge of his desire to proceed in that manner. Benitez v. United States, 521 F.3d 625, 632 (6th Cir. 2008); see United States v. Leggett, 81 F.3d 220, 224 (D.C. Cir. 1996) (“The law presumes that a defendant has not exercised his right to represent himself nor waived the right to counsel in the absence of an articulate and unmistakable demand by the defendant to proceed pro se.”). Therefore, if a defendant actually wishes to proceed pro se during trial, the defendant must *clearly and unequivocally* make an assertion of the right to self-representation *prior to trial*. Mazique, 419 S.C. at 291, 797 S.E.2d at 734; see State v. Reed, 332 S.C. 35, 41, 503 S.E.2d 747, 750 (1998) (“The right to proceed pro se must be clearly asserted by the defendant prior to trial.”). Significantly, the requirement for a clear and unequivocal assertion of the right to self-representation both “protect[s] against an inadvertent waiver of the right to counsel by a defendant’s occasional musings on the benefits of self-representation” and “prevents a defendant from taking advantage of and manipulating the mutual exclusivity of the

rights to counsel and self-representation.” United States v. Frazier-El, 204 F.3d 553, 558-559 (4th Cir. 2000) (citations and internal quotations omitted)).

If a criminal defendant in South Carolina makes a proper request to exercise his right to self-representation, the trial judge must take steps to ensure the defendant is knowingly, voluntarily, and intelligently waiving his right to counsel, including by advising the defendant of his right to counsel and adequately warning him of the dangers and disadvantages of self-representation. See Barnes, 407 S.C. at 35, 753 S.E.2d at 550 (“So long as the defendant makes his request prior to trial, the only proper inquiry is that mandated by Faretta.”); see also Ex parte Jackson, 381 S.C. 253, 259, 672 S.E.2d 585, 588 (Ct. App. 2009) (“It is the trial court’s responsibility to determine whether there was a knowing and intelligent waiver [of the right to counsel] by the accused.” (citation omitted)); Thompson, 355 S.C. at 262-263, 584 S.E.2d at 135 (explaining the preferred method for determining whether the defendant knowingly and voluntarily waived his right to counsel is for the trial judge to conduct a specific inquiry addressing the dangers and disadvantages of pro se representation with the defendant).

However, absent an unambiguous and timely assertion of the right to self-representation, the trial judge is under no obligation to conduct any inquiry on the matter. See United States v. Cromer, 389 F.3d 662, 682 (6th Cir. 2004) (“Faretta procedures are only required when a defendant has clearly and unequivocally asserted his right to proceed pro se.”); see also Benitez, 521 F.3d at 632 (instructing the trial judge has a duty to determine the validity of an attempted waiver of the right to counsel *when the defendant has taken steps to communicate his desire for self-representation*); cf. State v. Winkler, 388 S.C. 574, 587, 698 S.E.2d 596, 603 (2010) (“[Winkler] argues the trial court erred by failing to properly provide [him] with Faretta warnings when [he] sought to proceed pro se at the beginning of the sentencing phase. . . . [Winkler] did not timely

waive his right to counsel and proceed pro se. Hence, [Winkler]’s reliance on Faretta is misplaced. Had [Winkler] moved to proceed pro se before the trial began, then Faretta would apply.”).

In the case at bar, Appellant did nothing to invoke his right to self-representation at any point prior to the beginning of his trial. See Reed, 332 S.C. at 41, 503 S.E.2d at 750 (instructing the right to self-representation must be clearly invoked prior to trial). As a result, Appellant did not make a timely assertion of his right to represent himself, and the trial judge was under no obligation of any kind to permit Appellant to begin representing himself after the trial had begun. See Singleton, 107 F.3d at 1099 (“[T]he court was under no obligation to allow Singleton to begin representing himself *at all* at mid-trial[.]” (emphasis added)); cf. State v. Sims, 304 S.C. 409, 415, 405 S.E.2d 377, 381 (1991) (“Sims . . . argues that the trial judge erred in not allowing him to proceed pro se. We disagree. The right to appear pro se must be clearly asserted by the defendant before trial. Here, Sims gave no indication of a desire to proceed pro se prior to trial. This contention is without merit.” (citation omitted)).

However, even if the trial judge did somehow have an obligation to let Appellant begin representing himself after the trial was underway, Appellant never at any point during the course of trial actually made a clear attempt to assert his right to self-representation as was necessary in order for him to invoke that right. 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, amongst other things, clear and unequivocal in order to be effective). Instead, on the third day of the three-day trial, Appellant sought to relieve defense counsel in order to get “another lawyer.” Cf. State v. Shumaker, 914 So. 2d 1156, 1162 (La. Ct. App. 2005) (“[Shumaker] never expressly asked that he be allowed self-representation. He simply indicated that he wanted to fire his

counsel. That statement certainly does not reach a clear and unequivocal expression requesting the right to represent oneself as required by Faretta.”). As representation by another lawyer is obviously not self-representation for a pro se defendant, Appellant’s request for an opportunity to get new defense counsel—which the trial judge had no duty to grant—did *not* clearly and unequivocally constitute an invocation of the right to represent himself. See State v. Jones, 270 S.C. 587, 588, 243 S.E.2d 461, 462 (1978) (“[A]t least after the trial has begun, a mere disagreement between a defendant and his counsel as to a matter of trial tactics is not sufficient cause, in itself, to require the trial court to replace or to offer to replace court appointed counsel with another attorney at that time.”); cf. United States v. Callwood, 66 F.3d 1110, 1114 (10th Cir. 1995) (recognizing Callwood’s complaints about defense counsel’s performance and suggestion he would prefer for defense counsel not to represent him did “not qualify as an unequivocal request for self-representation”). Under those circumstances, the trial judge was free to presume Appellant was not waiving—or attempting to waive—the right to counsel and was under no obligation to conduct an inquiry to determine if Appellant was knowingly, voluntarily, and intelligently exercising the right to self-representation. See Brewer v. Williams, 430 U.S. 387, 404 (1977) (instructing courts must “indulge in every reasonable presumption against waiver” of the right to counsel); see also Cromer, 389 F.3d at 682 (6th Cir. 2004) (instructing a Faretta colloquy is only necessary when a defendant clearly and unequivocally asserts his right to self-representation); cf. Assa’ad-Faltas, 420 S.C. at 46-47, 800 S.E.2d at 791 (“In light of the record and the constitutional primacy of the right to counsel over the right to self-representation . . . along with the presumption against waiver of the constitutional right to counsel, . . . we cannot say that the municipal court erred in failing to construe [Assa’ad-Faltas]’s musings as a waiver of the right to counsel.” (citations and internal quotations omitted)).

Accordingly, because Appellant did not make a timely and unequivocal invocation of his right to self-representation at any point during trial, the trial judge neither erred through the manner in which he addressed Appellant's motion to relieve defense counsel nor infringed in any way upon Appellant's constitutional right to represent himself. See Frazier-El, 204 F.3d at 559 ("In ambiguous situations created by a defendant's vacillation or manipulation, we must ascribe a 'constitutional primacy' to the right to counsel because the right serves both individual good and collective good, as opposed to only the individual interest served by protecting the right of self-representation." (citations omitted)); see also Fields v. Murray, 49 F.3d 1024, 1029 (4th Cir. 1995) (instructing a trial judge is allowed "safely to presume that the defendant should proceed with counsel absent an unmistakable expression by the defendant that so to proceed is contrary to his wishes"); cf. Benitez, 521 F.3d at 632 (holding the appellate decisions addressing the right to self-representation were inapplicable because "[t]he record in the present case clearly demonstrates that Benitez did not attempt to waive his right to counsel by requesting self-representation"); United States v. Nunez, 877 F.2d 1475, 1478 (10th Cir. 1989) (holding Nunez's request to invoke his right to self-representation on the third day of trial was untimely and, thus, properly denied). Appellant's convictions should be affirmed.

III.

Any issue with the trial judge's exclusion of the testimony of a purported expert witness on gunshot residue was not properly preserved for appellate review because defense counsel never proffered or attempted to proffer the substance of the witness's intended testimony. However, notwithstanding any issue preservation concerns, the trial judge did not abuse his broad discretion by refusing to qualify the witness as an expert so the witness could testify about the results of a gunshot residue analysis he did not personally perform because that testimony would have simply constituted improper and inadmissible hearsay disguised as an expert opinion.

Appellant contends the trial judge committed reversible error by refusing to qualify Dr. Bennett as an expert witness. In support of that contention, Appellant maintains Dr. Bennett personally met the requirements to testify as an expert and should have been permitted to present the results of a gunshot residue analysis that he admittedly did not actually perform. Initially, any issue with the exclusion of Dr. Bennett's testimony was not properly preserved for appellate review because defense counsel never proffered or attempted to proffer the substance of Dr. Bennett's intended testimony. Absent such a proffer, it is not clear what Dr. Bennett would have testified to if he had, in fact, been qualified as an expert, and the prejudice resulting from the exclusion of that evidence cannot accurately be evaluated on appeal. Therefore, the issue was simply not preserved for appellate review and cannot appropriately be considered or reviewed on appeal. However, even assuming the issue had somehow been preserved for appellate review despite the fact no proffer was made or attempted, Dr. Bennett's testimony was not admissible during trial because he merely intended to relay the results of a gunshot residue analysis he did not personally conduct and, thus, was attempting to present the out-of-court conclusions of another individual for the truth of the matter asserted under the guise of offering an expert opinion. Accordingly, the trial judge did not abuse his broad discretion by refusing to qualify Dr. Bennett as an expert merely so Dr. Bennett could present inadmissible hearsay evidence. Appellant's convictions should be affirmed.

RELEVANT FACTS

On the date of the shooting, evidence was collected from the hands of both Victim and Appellant for potential gunshot residue testing.¹² (R. pp. 232-233; pp. 323-324; pp. 332-333). After the evidence was collected from Victim's hands, it was secured and later transported to SLED. (R. p. 233; pp. 244-245). However, the evidence was never ultimately analyzed. (R. p. 244). Meanwhile, the evidence collected from Appellant's hands was secured by the Greenville County Sheriff's Office until it was transferred to the Greenwood Police Department a few months later. (R. pp. 319-320; pp. 324-325; p. 327; p. 337). After that, the Greenwood Police Department released the evidence to a private investigator working for defense counsel, and the investigator delivered the evidence to Dr. Robert Bennett, a forensic scientist from Charleston, South Carolina, who had been retained by defense counsel. (R. pp. 350-351). Dr. Bennett then sent the evidence to an "accredited facility" identified as "RJ Regroove," and an unidentified individual at that facility purportedly analyzed the evidence to determine if gunshot residue was present. (R. pp. 360-362).

Later on during trial, Agent Megan Fletcher, a forensic scientist at SLED, testified—without objection—as an expert on gunshot residue. (R. p. 236; p. 238). Through her testimony, Agent Fletcher explained gunshot residue analysis involved looking for particles associated with a gunshot, including lead, barium, and antimony, and, to conduct such an analysis, she indicated she used a scanning electron microscope with an energy dispersive x-ray detector, which magnified the microscopic particles associated with gunshot residue so they could be seen. (R. pp. 238-239). Additionally, Agent Fletcher instructed gunshot residue could travel up to twenty

¹² Significantly, the evidence from Appellant's hands was collected roughly four hours after the shooting in an entirely different county from where that shooting took place. (R. pp. 13-15; p. 41; pp. 107-108; pp. 323-324; pp. 332-333).

feet in a forward direction and a few feet in the opposite direction when a gun was fired, and she noted anyone in the vicinity of a fired gun could get gunshot residue on them. (R. pp. 239-240). Likewise, Agent Fletcher explained gunshot residue was very fragile, could be washed or wiped away, and would begin to dissipate within a few hours of a gun being fired. (R. p. 240). She also noted gunshot residue was ordinarily found on and expected to be present on gunshot *victims*. (R. p. 241; pp. 246-247). Furthermore, Agent Fletcher explained the presence of gunshot residue meant a person either was in the vicinity of a shooting, shot a firearm, or had touched something with gunshot residue on it, and she indicated it was only possible to eliminate one of those alternatives in rare circumstances. (R. p. 248). Meanwhile, Agent Fletcher explained the absence of gunshot residue could not eliminate the possibility an individual was involved in a shooting because any residue that had been present could have simply been removed or washed away. (R. p. 242).

Subsequently, as part of the defense's case, defense counsel offered the testimony of Dr. Bennett. (R. p. 298; p. 356). During his testimony, Dr. Bennett noted he had received a pharmacy degree, a doctorate in drug sciences with a focus on toxicology, and "a couple" of training certifications from the United States Department of Justice in the area of firearms, which included "a basic primer" on gunshot residue analysis. (R. p. 357). Additionally, Dr. Bennett explained he had previously "worked" with gunshot residue in the past, was familiar with it, had learned to test it, and had made it a part of his "core study" for approximately twenty years. (R. pp. 359-360). However, he conceded he had never previously testified or been qualified as an expert on gunshot residue analysis. (R. p. 359; p. 363). Likewise, Dr. Bennett conceded his gunshot residue analyses were actually performed by an "accredited facility," which he asserted conducted the "mechanistic" and "technical" function of "proving the gunshot residue stuff on

the instrument.” (R. pp. 360-361). Similarly, Dr. Bennett conceded a “visual examination” was part of the analysis process, and he acknowledged the visual examination—like the other parts of the analysis—was conducted solely by the laboratory staff. (R. pp. 360-361). He further noted he did not put the evidence in the instrument used to conduct the analysis in Appellant’s case and was not, in fact, present when that process was performed. (R. p. 362). Moreover, Dr. Bennett acknowledged he had *never* actually conducted a gunshot residue analysis personally, but he asserted he had witnessed the testing being performed at some unspecified point in the past. (R. p. 362). Furthermore, he claimed any report of the results he received following an analysis had been reviewed by “the professionals at the laboratory” before it was given to him. (R. pp. 361-362).

Following the presentation of that testimony, the solicitor indicated she objected to Dr. Bennett testifying as an expert in light of the facts he had never personally performed a gunshot residue analysis, did not conduct the analysis of the evidence collected from Appellant’s hands, was not present when that evidence was placed into the testing instrument, and did not know how the evidence was handled since he was not present for the actual analysis. (R. p. 362). Based on those factors, the solicitor asserted Dr. Bennett would merely be interpreting another person’s results and, therefore, could neither qualify as an actual expert nor establish a complete chain of custody regarding the evidence. (R. p. 362). In rebuttal, defense counsel asserted Dr. Bennett intended to testify “about the test that he had run” and had brought the report he received with him. (R. p. 364). However, the trial judge pointed out Dr. Bennett had simply interpreted a report prepared by a laboratory from which no one was present for trial and, if permitted to testify, would be offering an opinion without even looking through the electron microscope used

to conduct the analysis in Appellant's case. (R. p. 364). Nevertheless, defense counsel asked the trial judge to let Dr. Bennett "give the results of the test." (R. p. 364).

After considering the arguments of counsel and taking a brief recess, the trial judge declined to permit Dr. Bennett to testify as an expert. (R. p. 364). Defense counsel then urged the trial judge to reconsider his ruling while contending Dr. Bennett was "clearly" personally qualified as an expert. (R. pp. 364-365). However, in seeking reconsideration, defense counsel acknowledged "[a]ll [Dr. Bennett] [was] doing [was] looking at the report that was run that he asked to have run at the place that he worked where he knows it's a controlled situation." (R. p. 365). Following defense counsel's remarks, the trial judge reaffirmed his ruling excluding the evidence, and the trial proceeded forward without any proffer being made or attempted in regard to the substance of Dr. Bennett's intended testimony. (R. p. 365).

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Trial judges have considerable discretion in ruling on the admission or exclusion of evidence, and an appellate court will not reverse a trial judge's ruling on evidentiary matters absent a clear abuse of that discretion resulting in prejudice to the defendant. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) ("The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court."); State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) ("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."); see also Bixby, 388 S.C. at 556, 698 S.E.2d at 587 ("[D]eference is due to the trial court's admission of the evidence."). Likewise, a decision

as to whether to admit or exclude expert testimony rests within the trial judge's sound discretion and will not be reversed on appeal absent a prejudicial abuse of that discretion. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006); see State v. White, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009) ("A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion."); see also State v. Myer, 301 S.C. 251, 255, 391 S.E.2d 551, 554 (1990) ("The qualification of a witness as an expert falls largely within the discretion of the trial judge."). "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); see Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) ("A trial court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion when the ruling is manifestly arbitrary, unreasonable, or unfair.").

ANALYSIS

A. Appellant's Failure to Preserve Any Issue with the Exclusion of the Purported Expert's Testimony for Appellate Review

In South Carolina, issue preservation requirements are a fundamental component of appellate procedure. Gaddy v. Douglass, 359 S.C. 329, 350, 597 S.E.2d 12, 23 (Ct. App. 2004). The key purpose of those requirements is "to give the trial court a fair opportunity to rule on the issues, and thus provide [the appellate court] with a platform for meaningful appellate review." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). Through their enforcement and application, the trial court is guaranteed a fair opportunity "to rule properly after it considered all relevant facts, law, and arguments." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

When an issue arises during trial involving the exclusion of evidence or testimony, a party is required to proffer the evidence or testimony sought to be admitted in order to preserve any issue related to its exclusion for appellate review. See Santiago, 370 S.C. at 163, 634 S.E.2d at 29 (“[A] proffer of testimony is required to preserve the issue of whether testimony was properly excluded by the trial judge, and an appellate court will not consider error alleged in the exclusion of testimony unless the record on appeal shows fairly what the excluded testimony would have been.”). By proffering the disputed testimony and evidence, the party enables an appellate court to accurately review the issue and discern any prejudice that may have resulted in the event an error occurred. State v. King, 367 S.C. 131, 137, 623 S.E.2d 865, 868 (Ct. App. 2005). Critically, “[f]ailure to make an offer of proof precludes the appellant from raising the issue on appeal.” State v. Cabbagestalk, 281 S.C. 35, 36, 314 S.E.2d 10, 11 (1984).

In Appellant’s case, Appellant seeks to challenge on appeal the trial judge’s decision to exclude Dr. Bennett’s testimony about the results of an analysis purportedly performed by an unidentified individual who was not present to offer any testimony during trial. However, once that testimony was ruled to be inadmissible during trial, Appellant did *not* proffer Dr. Bennett’s intended testimony, did *not* proffer the report of the test results, and did *not* ask the trial judge to permit any proffer to occur. Cf. State v. Simmons, 360 S.C. 33, 46, 599 S.E.2d 448, 454 (2004) (finding no issue was preserved for appellate review regarding the trial judge’s refusal to allow a defense witness to testify further where “no proffer was made as to what [the defense witness’s] testimony would have been had he been allowed to continue”). Without such a proffer, the substance of Dr. Bennett’s testimony remains entirely unclear, and the findings of the absent analyst who supposedly conducted the gunshot residue analysis remain wholly unknown. See King, 367 S.C. at 137, 623 S.E.2d at 868 (“The reason for the rule requiring a proffer of

excluded evidence is to enable the reviewing court to discern prejudice.”). Under those circumstances, any issue related to the exclusion of Dr. Bennett’s intended testimony was not properly preserved for appellate review and cannot appropriately be reviewed on appeal. See State v. Roper, 274 S.C. 14, 20, 260 S.E.2d 705, 708 (1979) (“[I]t should be pointed out that such an exception was waived in that no proffer of testimony was made. It 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.”); see also Taylor v. Taylor, 294 S.C. 296, 299, 363 S.E.2d 909, 911 (Ct. App. 1987) (“The burden is on the appellant to furnish a sufficient record on appeal from which this court can make an intelligent review.”). Appellant’s convictions should be affirmed.

B. Propriety of the Trial Judge’s Decision to Exclude the Purported Expert’s Testimony

During trial, an expert’s testimony “may be used to help the jury to determine a fact in issue based on the expert’s specialized knowledge, experience, or skill and is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge.” Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010). Pursuant to the South Carolina Rules of Evidence, such testimony is admissible under the following circumstances:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 702, SCRE. Therefore, before admitting expert testimony, the trial judge must find: (1) the expert’s testimony will assist the trier of fact; (2) the expert has the required knowledge, skill, experience, training, or education; and (3) the testimony is reliable. State v. Martin, 391 S.C. 508, 514, 706 S.E.2d 40, 42 (Ct. App. 2011).

In order for a witness to properly be qualified as an expert, the witness must have “acquired by study or practical experience such knowledge of the subject matter of his testimony as would enable him to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the jury’s good judgment and common knowledge.” State v. Henry, 329 S.C. 266, 273, 495 S.E.2d 463, 467 (Ct. App. 1998). When determining whether a witness’s knowledge, skill, training, or experience qualifies the witness as an expert, no mandatory set of qualifications is required. Id. at 274, 495 S.E.2d at 467. Instead, an expert can become sufficiently skilled or knowledgeable to be able to provide an opinion helpful to the jury in a multitude of ways. Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 556, 658 S.E.2d 80, 86 (2008). Significantly, “[t]he test for qualification [as an expert] is a relative one that is dependent on the particular witness’s reference to the subject[,]” and “defects in the amount and quality of education and experience go to the weight of the expert’s testimony and not its admissibility.” Lee v. Suess, 318 S.C. 283, 285-286, 457 S.E.2d 344, 346 (1995).

Assuming a witness is personally qualified to testify as an expert and the other requirements for the admission of expert testimony are satisfied, an expert witness ordinarily may offer an opinion *based on* hearsay evidence that is not itself admissible *if* the evidence is the type of evidence ordinarily and reasonably relied upon by experts to form their opinions or inferences. See Rule 703, SCRE (“The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type *reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject*, the facts or data need not be admissible in evidence.” (emphasis added)). Importantly though, an expert’s ability to base their own independent opinions on hearsay evidence in certain situations does *not* allow the admission of

hearsay evidence simply because an expert used it in forming an opinion. Jones v. Doe, 372 S.C. 53, 62-63, 640 S.E.2d 514, 519 (Ct. App. 2006); see State v. Kromah, 401 S.C. 340, 358, 737 S.E.2d 490, 499 (2013) (“[Rule 703] does not . . . make hearsay automatically admissible simply because it was relied upon by the expert.”). Thus, an expert witness may not simply transmit and repeat inadmissible hearsay evidence under the guise of offering an expert opinion. See United States v. Mejia, 545 F.3d 179, 197 (2nd Cir. 2008) (“The expert may not . . . simply transmit that hearsay to the jury. Instead, the expert must form his own opinions by applying his extensive experience and a reliable methodology to the inadmissible materials. Otherwise, the expert is simply repeating hearsay evidence without applying any expertise whatsoever, a practice that allows [a party] to circumvent the rules prohibiting hearsay.” (citations and internal quotations omitted)); see also Price, 368 S.C. at 498, 629 S.E.2d at 365 (concluding the testimony of a witness qualified as an expert violated the prohibition against out-of-court statements being offered for the truth of the matter asserted where the witness “did not testify to his expert opinion, but rather relayed information from informants”).

In the case sub judice, defense counsel sought to introduce the testimony of Dr. Bennett, who had *never* personally conducted a gunshot residue analysis at any point in his lifetime, for the expressly-stated purpose of “giv[ing] the results of [a] test.” However, that test was *not* conducted by Dr. Bennett and, instead, was conducted by one of the unidentified “professionals at the laboratory,” who might—or might not—have actually placed the evidence collected from Appellant’s hands into a testing instrument and conducted a *visual examination* of that evidence before generating the results Dr. Bennett wanted to relay to the jury. Significantly though, since Dr. Bennett was *not* present for the test, he—and, thus, the jurors—had no way of knowing—outside of blind faith in the experts retained to generate the test results—whether Appellant’s

sample was actually tested, whether an accurate and complete chain of custody was maintained prior to the analysis, and whether the appropriate protocols were followed in generating the analysis results. Cf. Young v. United States, 63 A.3d 1033, 1045 (D.C. 2013) (“Because Craig was not personally involved in the process that generated the profiles, she had no personal knowledge of how or from what sources the profiles were produced. She was relaying, for their truth, the substance of out-of-court assertions by absent lab technicians that, employing certain procedures, they derived the profiles from the evidence furnished by Villatoro or [Young]. Those assertions were hearsay. Without them, what would have been left of Craig’s testimony—that she matched two DNA profiles she could not herself identify—would have been meaningless.” (footnote omitted)).

Under such circumstances, Dr. Bennett could not properly “give the results of the test” by virtue of testifying as an expert because he would have merely been relaying the out-of-court statements and conclusions of a non-testifying witness purely for the truth of the matter asserted.¹³ See Marvel Characters, Inc. v. Kirby, 726 F.3d 119, 136 (2nd. Cir. 2013) (explaining “a party cannot call an expert simply as a conduit for introducing hearsay under the guise that the testifying expert used the hearsay as the basis of his testimony” (citation and internal quotations omitted)); see also People v. Sanchez, 374 P.3d 320, 334 (Cal. 2016) (“When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert’s opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth.”). Therefore, regardless of whether Dr. Bennett personally had the minimum level of training and experience necessary to qualify as an expert, the trial judge properly declined to qualify Dr. Bennett as an expert and

¹³ Importantly, “giv[ing] the results of the test” was the *only* purpose for Dr. Bennett’s testimony that was identified by defense counsel. (R. p. 364).

allow him to serve as a mere conduit for inadmissible hearsay in Appellant’s case, and the trial judge’s ruling in that regard in no way constituted an abuse of discretion.¹⁴ See Jones, 372 S.C. at 62-63, 640 S.E.2d at 519 (recognizing our evidentiary rules governing expert testimony do “not allow for the unqualified admission of hearsay evidence merely because an expert has used it in forming an opinion”); see also Engebretsen v. Fairchild Aircraft Corp., 21 F.3d 721, 728 (6th Cir. 1994) (recognizing the federal evidentiary rules regarding expert testimony—which are identical to the related South Carolina evidentiary rules—“do not . . . permit the admission of materials, relied on by an expert witness, for the truth of the matters they contain if the materials are otherwise inadmissible”); cf. Price, 368 S.C. at 498, 629 S.E.2d at 365 (concluding the testimony of a witness qualified as an expert violated the prohibition against out-of-court statements being offered for the truth of the matter asserted where the witness “did not testify to his expert opinion, but rather relayed information from informants”). Appellant’s convictions should be affirmed.

¹⁴ Even assuming the trial judge somehow erred by excluding Dr. Bennett’s testimony, it is quite possible any error in the exclusion of that testimony—regardless of what the testimony revealed—would have been entirely harmless since: (1) the presence of gunshot residue would have been expected based on the fact Appellant had indisputably been shot during the incident; (2) the absence of gunshot residue would have been virtually meaningless based on the fact the evidence was not collected from Appellant’s hands until hours after the shooting; and (3) the presence of gunshot residue following a shooting would have only revealed a range of possibilities that could not ordinarily be narrowed further. See State v. Lyles, 379 S.C. 328, 345, 665 S.E.2d 201, 210 (Ct. App. 2008) (recognizing an error resulting from the exclusion of evidence can be harmless where the excluded evidence “would have no impact on the outcome of the case”). However, due to the lack of an evidentiary proffer, it is not possible for such a harmless error analysis to be conducted, which emphatically demonstrates why our issue preservation requirements are so fundamentally important. Cf. Cabbagestalk, 281 S.C. at 36, 314 S.E.2d at 11 (“We are unable to determine from the record whether the testimony was so material as to render its exclusion prejudicial. Failure to make an offer of proof precludes the appellant from raising the issue on appeal.”).

IV.

Any issue with Appellant's five-year sentence for possession of a firearm during the commission of a violent crime was not properly preserved for appellate review because defense counsel did not raise any objections to Appellant's sentence during trial.

Appellant contends the trial judge erred by sentencing him to a five-year term of imprisonment for possession of a firearm during the commission of a violent crime. In support of that contention, Appellant maintains he could not lawfully be sentenced for the firearm conviction because he was sentenced to life without parole for his other conviction. Pursuant to South Carolina law, Appellant should not have been sentenced to five years for possession of a firearm during the commission of a violent crime since he received a life without parole sentence for attempted murder. However, defense counsel did *not* object to Appellant's five-year sentence at any point during trial. As a result, any issue with Appellant's five-year sentence—which could not result in Appellant being incarcerated for longer than permissible for his crimes—was not properly preserved for appellate review and cannot appropriately be raised or addressed for the first time on appeal. Appellant's convictions and sentence should be affirmed.

RELEVANT FACTS

At the conclusion of trial, the jury convicted Appellant of attempted murder and possession of a firearm during the commission of a violent crime, and the trial judge sentenced him to terms of imprisonment of life without parole for attempted murder and five years for the firearm offense. (R. p. 426; p. 430). After the sentences were imposed, neither Appellant nor defense counsel raised any objections of any kind. (R. p. 430).

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Palmer, 415 S.C. 502, 511, 783 S.E.2d 823, 827 (Ct. App. 2016); see generally State v. Kimbrough, 212 S.C.

348, 353, 46 S.E.2d 273, 275 (1948) (“The power of an appellate court to review a sentence for the purpose of determining whether it offends the constitutional provision against cruel and unusual punishment may be sustained under the grant of power to correct errors of law in the judgment appealed from.”). As a result, an appellate court is limited to determining on appeal whether the trial judge abused his discretion, which occurs when the trial judge’s decision is unsupported by the evidence or controlled by an error of law. Palmer, 415 S.C. at 511, 783 S.E.2d at 827.

ANALYSIS

For an issue to be preserved for appellate review pursuant to our issue preservation requirements, the 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. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004); see also JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 185 (3rd ed. 2016) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review). If an issue is not presented to and ruled upon by the trial judge, it cannot be raised for the first time on appeal. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005); see State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) (“Appellant is limited to the grounds raised at trial.”). Critically, as our appellate courts have repeatedly recognized, plain error review is simply not permitted in South Carolina. See State v. Sheppard, 391 S.C. 415, 421, 706 S.E.2d 16, 19 (2011) (“[T]he plain error rule does not apply in South Carolina state courts.”); State v. Burroughs, 328 S.C. 489, 496, 492 S.E.2d 408, 411 (Ct. App. 1997) (“South Carolina has no ‘plain error’ rule.”).

Therefore, based on our issue preservation rules, a criminal defendant is required to contemporaneously object to an alleged sentencing error during trial in order to preserve an issue with a sentence for appellate review. State v. Salisbury, 330 S.C. 250, 276, 498 S.E.2d 655, 669 (Ct. App. 1998). Importantly, a defendant’s failure to timely object to or seek modification of a sentence in the trial court precludes him from pursuing the issue on appeal. State v. Winestock, 271 S.C. 473, 475, 248 S.E.2d 307, 308 (1978); see State v. Garner, 304 S.C. 220, 222, 403 S.E.2d 631, 632 (1991) (“No objection to sentencing was raised at trial and this issue is not properly before the court.”); State v. Shumate, 276 S.C. 46, 47, 275 S.E.2d 288, 288 (1981) (“A defendant’s failure to timely object to or seek modification of his sentence in the trial court precludes him from presenting his objection for the first time on appeal. Appellant’s contention was not advanced at the probation revocation hearing where the results were most favorable to him. By failing to object to or seek modification of the revocation sentence in the trial court he is now foreclosed from doing so on appeal.” (citations omitted)).

Notably though, in State v. Johnston, 333 S.C. 459, 463-464, 510 S.E.2d 423, 425 (1999), our Supreme Court crafted a very specific and limited exception to our issue preservation requirements. In that case, Johnston was convicted of conspiracy to possess marijuana with intent to distribute and was sentenced—without objection—to a term of imprisonment of ten years for that offense despite the fact the maximum sentence statutorily authorized was only five years. Id. at 462, 510 S.E.2d 424. Johnston subsequently appealed her sentence, and, on appeal, this Court affirmed on issue preservation grounds since no objections were raised during trial. Id. at 461, 510 S.E.2d at 424. Thereafter, the Supreme Court granted a petition for a writ of certiorari and reversed. Id. In reversing, the Supreme Court noted it had “consistently held that a challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate

review.” Id. at 462, 510 S.E.2d at 425. However, the Supreme Court found Johnston’s case involved “exceptional circumstances” because: (1) the State had conceded error in regard to the sentence; *and* (2) a “real threat” existed Johnston would be incarcerated beyond the permissible sentencing range for her conviction if she was forced to pursue relief through a post-conviction relief action.¹⁵ Id. at 463-464, 510 S.E.2d at 425. Based on those limited circumstances, the Supreme Court remanded Johnston’s case for resentencing despite the fact the sentencing issue had not been preserved during trial. Id. at 464, 510 S.E.2d at 425. Importantly though, the Supreme Court expressly cautioned its holding in Johnston’s case was based on the “unique” facts involved, which “demand[ed] an expedited result,” and was “not intended to disrupt our settled rules on issue preservation and PCR applications.” Id. at 464, n. 3, 510 S.E.2d at 425.

In the case at bar, Appellant was convicted of attempted murder and possession of a firearm during the commission of a violent crime, and he was respectively sentenced to terms of imprisonment of life without parole and five years for those convictions. However, pursuant to

¹⁵ Subsequent to the decision in Johnston, this Court has recognized the limited nature of that case’s holding and has declined to apply its carefully-crafted exception broadly. See State v. Passmore, 363 S.C. 568, 585-586, 611 S.E.2d 273, 282-283 (Ct. App. 2005) (“We find the exceptional circumstance carefully carved out by the Johnston court is not present here. [Passmore] has already served the duration of her sentence; therefore, she does not face the threat of continuing incarceration beyond the legal sentence. Johnston does not control. . . . Regrettably, [Passmore] has suffered a violation of her right to a jury trial in this case. However, because she failed to raise an objection at trial, we are compelled to let the unconstitutional sentence stand.”). However, at other times, this Court has addressed unpreserved sentencing issues that did not squarely fall within the limited exception created in the Johnston decision. See State v. Bonner, 400 S.C. 561, 564, 735 S.E.2d 525, 526 (Ct. App. 2012) (“[A]n exception to the general rule of issue preservation exists authorizing the appellate court to consider an unpreserved issue in the interest of judicial economy under appropriate circumstances.”); State v. Vick, 384 S.C. 189, 202, 682 S.E.2d 275, 282 (Ct. App. 2009) (“While the case at hand does not present a threat that Vick will remain incarcerated beyond the legal sentence as in Johnston, our courts have, in the past, ‘summarily vacated’ sentences for kidnapping where such sentences were precluded by § 16-3-910 because the defendant received a concurrent sentence under the murder statute.” (citations omitted)); but see Johnston, 333 S.C. at 462, n. 2, 510 S.E.2d at 425 (“[N]one of these cases addressed error preservation. Thus, they provide no support for Defendant’s position here.”).

South Carolina law, the five-year sentence statutorily authorized for possession of a firearm during the commission of a violent crime is *not* applicable when a criminal defendant is sentenced to life without parole for the underlying violent crime. See S.C. Code Ann. § 16-23-490(a) (“This five-year sentence does not apply in cases where the death penalty or a life sentence without parole is imposed for the violent crime.”). Therefore, in light of his life without parole sentence for attempted murder, Appellant could not properly be sentenced to five years for the firearm offense, and the five-year sentence that was actually imposed was unquestionably objectionable. See Palmer, 415 S.C. at 525, 783 S.E.2d at 835 (vacating Palmer’s five-year sentence for possession of a weapon during the commission of a violent crime where Palmer was sentenced to life without parole for murder *and* “Palmer objected to the [five-year] sentence”).

Critically though, defense counsel did *not* object to Appellant’s objectionable five-year sentence—which in no way could create a “real threat” Appellant would be incarcerated for a longer period of time than he permissibly could be incarcerated since he was also sentenced to life without parole—at any point during trial, and no arguments were raised to or ruled upon by the trial judge in regard to the propriety of the five-year sentence. See In re Walter M., 386 S.C. 387, 392, 688 S.E.2d 133, 136 (Ct. App. 2009) (“Generally, an issue must be both raised to and ruled upon by the trial court in order to be preserved for appellate review.”); see also Johnston, 333 S.C. at 463-464, 510 S.E.2d at 425 (addressing an unpreserved sentencing issue where a “real threat” existed Johnston would be incarcerated beyond the permissible sentencing range for her conviction if she was forced to pursue relief through a post-conviction relief action). Because defense counsel did not raise the sentencing issue Appellant is now attempting to raise on appeal, the sentencing judge was wholly denied an opportunity to consider, address, or rule upon it during trial. See Queen’s Grant, 368 S.C. at 372-373, 628 S.E.2d at 919 (“Issue

preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review.” (citations omitted)); see also State v. Torrence, 305 S.C. 45, 64, 406 S.E.2d 315, 326 (1991) (Toal, J., concurring in result for the majority) (“[A] contemporaneous objection requirement to preserve legal errors operates to procedurally preclude a defendant from allowing error to occur at trial and then complaining of it on appeal.”). Under those circumstances, Appellant’s appellate challenge to his sentence is not properly preserved for appellate review and simply cannot appropriately be raised or addressed for the first time on appeal.¹⁶ See State v. Head, 330 S.C. 79, 87, 498 S.E.2d 389, 393 (Ct. App. 1997) (instructing an appellate court “cannot address unpreserved errors”); cf. State v. Walker, 252 S.C. 325, 327-328, 166 S.E.2d 209, 210 (1969) (declining to address Walker’s appellate contention the sentence he received could not have properly been imposed “on the elementary ground that the question was not raised below”). Otherwise, any appellate review of Appellant’s sentencing issue would constitute plain error review, which is not permitted in South Carolina. See Sheppard, 391 S.C. at 421, 706 S.E.2d at 19 (instructing plain error review is not applicable in South Carolina). Appellant’s convictions and sentence should be affirmed.

¹⁶ Although Appellant’s sentencing issue was not properly preserved for appellate review on direct appeal, Appellant will in no way be prevented from seeking a remedy for that issue through the post-conviction relief process, which has been specifically designed to address and remedy the exact situation involved in Appellant’s case. See S.C. Code Ann. § 17-27-20(A)(3) (recognizing one of the express grounds upon which a person may seek and obtain post-conviction relief is when “the sentence exceeds the maximum authorized by law”); see also Johnston, 333 S.C. at 464, n. 3, 510 S.E.2d at 425 (“Our holding today is not intended to disrupt our settled rules on issue preservation and *PCR applications*. The facts here are unique and demand an expedited result.” (emphasis added)); cf. Passmore, 363 S.C. at 586, 611 S.E.2d at 283 (“Appellant will be forced to seek redress through the avenue of post-conviction relief.”).

CONCLUSION

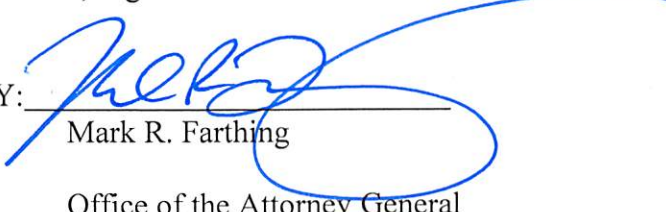
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

November 19, 2018

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.

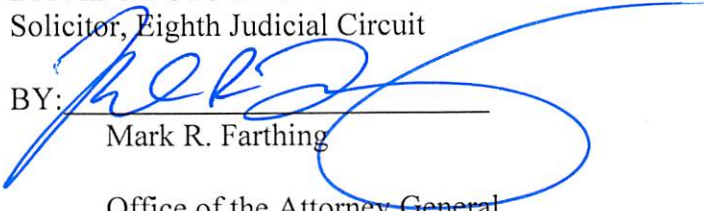
CERTIFICATE OF COUNSEL

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

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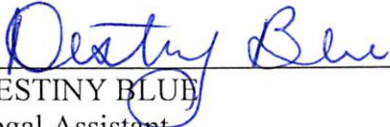
Appellant.

PROOF OF SERVICE

I, Destiny Blue, certify I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

E. Charles Grose, Jr., Esq.
Grose Law Firm
404 Main St.
Greenwood, SC 29646

I further certify that all parties required by Rule to be served have been served.
This 19th day of November, 2018.



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**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Ontavious Derenta Plumer, Appellant.

Appellate Case No. 2017-000481

Appeal From Greenwood County
Edward W. Miller, Circuit Court Judge

Opinion No. 5806
Heard February 11, 2020 – Filed March 3, 2021

AFFIRMED IN PART AND VACATED IN PART

E. Charles Grose, Jr., of Grose Law Firm, of Greenwood,
for Appellant.

Attorney General Alan McCrory Wilson and Assistant
Attorney General Mark Reynolds Farthing, both of
Columbia; and Solicitor David Matthew Stumbo, of
Greenwood, Respondent.

LOCKEMY, C.J.: Ontavious Derenta Plumer appeals his convictions for attempted murder and possession of a weapon during the commission of a violent crime, arguing the trial court erred by (1) refusing to charge the jury on the law of self-defense, (2) denying his motion to relieve trial counsel, (3) refusing to qualify a witness as an expert in gunshot residue analysis, and (4) sentencing him to an additional five years' imprisonment in addition to his sentence of life without parole. We affirm in part and vacate in part.

FACTS

On October 11, 2015, Oshamar Wells was shot during the course of a drug transaction. Wells later identified Plumer in a photographic lineup as the person who shot him. In July 2016, Plumer was indicted for attempted murder, armed robbery, and possession of a weapon during the commission of a violent crime. He proceeded to a jury trial on February 6, 2017.¹

At trial, Wells testified that he had arranged to meet two men, who were supposed to purchase a pound of marijuana from him, around 6:00 p.m. on the evening of October 11.² Wells explained someone he knew setup the deal, he had never met the men before, and he did not know their names. Wells testified he planned to meet the two men at a convenience store in Greenwood and then have them follow him to his cousin's residence because the men were unfamiliar with the area. The men followed Wells in their black Mercedes and parked behind him in the driveway.³ After they arrived at the home, they smoked marijuana so that the two men could "try the product" before proceeding with the purchase. Wells explained that after some time passed, he began to wonder when the men were going to pull out cash to pay for the marijuana. Plumer pulled out a gun instead. Wells testified that as soon he saw what Plumer was doing, he turned around and retrieved a handgun from the cabinet behind him.⁴ He stated he shot at Plumer in defense of his life. Wells explained that Plumer then began firing at him and recalled he was "already getting hit when [he] reached to grab the gun out of the cabinet. And from the[n] on, he] just returned fire." Wells stated that after the shooting began, the third man got up, took the marijuana, and ran. Wells did not recall seeing the

¹ Prior to trial, the State served Plumer with a notice of intent to seek life imprisonment without the possibility of parole based on his previous conviction for a most serious offense. See S.C. Code Ann. § 17-25-45(A)(1)(a) (2015) (providing that "upon a conviction for a most serious offense . . . a person must be sentenced to a term of imprisonment for life without the possibility of parole if that person has . . . one or more prior convictions for . . . a most serious offense"); S.C. Code Ann. § 17-25-45(C)(1) (2015 & Supp. 2020) (stating offenses defined as "most serious" include attempted murder and attempted armed robbery).

² Wells testified a pound of marijuana carried a street value of about \$3,600.

³ No one else was present at the home when the three men arrived.

⁴ Wells testified the gun belonged to his mother and he saw her place the holstered gun there earlier that day.

third man with a gun. Wells testified that as he returned fire at Plumer, Plumer continued to fire at him while backing out of the door.

Bullets struck Wells in his back, buttocks, and legs. He testified that as soon as the men were gone, he called his mother and an ambulance. Wells was taken to the local hospital in Greenwood, where Dr. Ricky Ladd treated him for his gunshot injuries. Dr. Ladd testified Wells was admitted with potentially life-threatening injuries. He explained Wells suffered six gunshot wounds consisting of wounds to the left upper buttock, the lower back region, the left anterior thigh, the right lateral thigh, and an entrance and exit wound to the left lower leg.

The same night, Plumer received treatment at Greenville Memorial Hospital for a gunshot wound to his kneecap. A Greenville County law enforcement officer interviewed him at the hospital that evening. Plumer told the officer that as he was walking down the street after leaving a friend's apartment in Greenville, a man he did not know approached him from behind and started shooting at him. Plumer stated he ran away when the shooting started. The officer testified that, at the time, law enforcement had no reason to suspect Plumer had fired a gun that night.

Wenona Wells, Wells's mother, testified the gun in the cabinet, which she identified at trial, belonged to her. She explained that when she went to the home the night of the shooting, her young grandson was with her and he found and picked the gun up off the floor. Ms. Wells testified she took the gun from him and when they left, she placed it in the trunk of her car. However, she testified she did not know Wells had used it during the altercation. Ms. Wells stated that about three days later, she turned the gun over to law enforcement at Wells's request.

Wells acknowledged that when law enforcement first approached him, he was not forthcoming because he was afraid they would charge him with selling drugs. Investigator William Kay, of the Greenwood Police Department, testified he took a statement from Wells the day after the shooting. Investigator Kay stated that in his first statement to law enforcement, Wells said that "two random guys came in the front door and tried to rob him" while he was sitting at his kitchen table and "ended up shooting him." He testified Wells gave a second statement to law enforcement in which he explained that he met two men to sell them marijuana, that they ended up trying to rob him, that he reached for a gun to defend himself, and that they began shooting and he returned fire. Law enforcement showed Wells a photographic lineup and he selected Plumer from the lineup as the person who shot him.

Thereafter, law enforcement arrested Plumer, and Plumer gave a statement admitting he was at the residence at the time of the incident and had also been shot. In addition, Greenwood officers determined the Mercedes parked behind Wells's car in the driveway belonged to Plumer's grandfather, who had loaned it to Plumer on the night of the shooting, and a blood sample retrieved from the sidewalk in front of the home matched Plumer's DNA profile.

Plumer did not testify at trial, but he called several defense witnesses. Shameka Hawes testified that on the evening of the shooting, she was sitting in her car when Plumer ran up to her and asked for a ride to the hospital. She stated she could see he had been shot. Hawes explained that on the way to the hospital, Plumer asked her to drop him off at his baby's mother's apartment instead. Hawes stated she did not know Plumer before this encounter and never saw him again afterwards. Plumer's cousin, Vanjarvis Martin, testified that on October 11, 2015, he picked Plumer up from his baby's mother's house and drove him to the hospital. Martin stated Plumer did not want to go to the Greenwood hospital, so he drove him to Greenville Memorial Hospital instead.

Deputy Wesley Smith, of the Greenville County Sheriff's Office, testified the sheriff's office performed a gunshot residue collection kit on and collected some evidence, including clothing, from Plumer at approximately 11:15 p.m. on October 11, 2015. He recalled that some of the evidence was covered in blood. Deputy Smith stated that between the time Plumer was admitted to the hospital at 10:55 p.m. and when he was released, there was a period of up to twenty-five minutes during which no one from law enforcement was with him. Deputy Smith explained the sheriff's office never completed an examination of the evidence and ultimately transferred it to Detective McClinton a few months later. The defense recalled Detective McClinton, who confirmed he received this evidence but it was never sent to the South Carolina Law Enforcement Division for analysis.

Joseph Best, a private detective hired by the defense, testified he collected the evidence from the Greenwood Police Department on January 6, 2017, and transferred it to Dr. Robert Bennett on January 10, 2017. Best testified the evidence included a gunshot residue kit that was collected from Plumer's hands, a tennis shoe, jeans, and a tee shirt.

The defense then called Dr. Robert Bennett, who testified he was a forensic scientist and held a pharmacy degree and a doctorate in drug sciences with a focus in toxicology. He stated he had "a number of training certifications from the Department of Justice, [including] a couple in the are[a] of firearms." Dr. Bennett

explained that the firearms training included "looking at a variety of subjects such as different types of ballistics, which include[d] gunshot residue analysis" and that he was "familiar" with gunshot residue and had "learned to test gunshot residue." Dr. Bennett explained that he worked with a lab that performed gunshot residue analysis as one of their "basic core service provisions." He admitted he had never personally performed a gunshot residue test and was instead interpreting the results of the test the lab performed. The State objected to Dr. Bennett's qualification, and the court refused to qualify him as an expert witness. Plumer did not attempt to proffer Dr. Bennett's testimony.

At the close of the defense's case, Plumer renewed his motion for a directed verdict, which the trial court denied. Plumer requested a jury charge on the law of self-defense, which the trial court denied, finding there was "insufficient evidence from which a reasonable inference could be drawn" that Plumer acted in self-defense.

The jury acquitted Plumer of armed robbery but found him guilty of attempted murder and possession of a weapon during the commission of a violent crime. Plumer moved for a new trial, arguing the jury returned an inconsistent verdict. The trial court denied the motion and sentenced Plumer to life imprisonment without parole for attempted murder and five years' imprisonment for the weapon offense. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006).

ANALYSIS

I. Self-Defense Instruction

Plumer argues the trial court erred by refusing to instruct the jury on the law of self-defense. He contends the following facts would have supported an inference that Wells was the first person to introduce a firearm and was therefore responsible for bringing on the difficulty: (1) Wells admitted he was prepared to use his gun during the drug transaction and placed himself in a position that would allow him to stand up and reach his gun; (2) according to Investigator Kay, Wells stated he reached for his gun before Plumer fired any shots; (3) according to Dr. Ladd, Wells would have fallen down when the bullet struck his femoral neck, meaning he stood

up and retrieved his handgun before Plumer fired that shot; (4) Wells and Ms. Wells conspired to hide the gun and cover up his culpability; (5) Plumer retreated from the violence; and (6) the jury acquitted Plumer of armed robbery, which removed the motive to commit murder. We disagree.

"A self-defense charge is not required unless it is supported by the evidence." *State v. Light*, 378 S.C. 641, 649, 664 S.E.2d 465, 469 (2008). "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." *State v. Slater*, 373 S.C. 66, 70, 644 S.E.2d 50, 52 (2007).

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.

Id. at 69-70, 644 S.E.2d at 52; *see also State v. Muller*, 282 S.C. 10, 10, 316 S.E.2d 409, 409 (1984) (holding when the defendant testified he shot the victim after the victim "took out a gun and began shooting at him," the trial court erred by refusing to charge the law of self-defense because the defendant's testimony "constituted sufficient evidence from which the jury could infer that [he] acted in self-defense"); *State v. Smith*, 406 S.C. 547, 555, 752 S.E.2d 795, 798 (Ct. App. 2013) (stating that "going to a drug deal while armed with a deadly weapon is evidence of fault in bringing on the difficulty"); *State v. Jackson*, 227 S.C. 271, 278, 87 S.E.2d 681, 684 (1955) (stating "one cannot through his own fault bring on a difficulty and then claim the right of self-defense").

In *Slater*, our supreme court found there was no evidence to show the defendant was "without fault in bringing on the difficulty" and he was therefore not entitled to a self-defense instruction. 373 S.C. at 71, 644 S.E.2d at 53. There, the court concluded the defendant's actions of carrying a "cocked weapon, in open view, into an already violent attack in which he had no prior involvement . . . proximately caused the exchange of gunfire, and ultimately the death of the victim." *Id.*

We conclude the trial court did not err by refusing to charge the law of self-defense because the record contains no evidence that Plumer was without fault for bringing on the difficulty. *See Light*, 378 S.C. at 649, 664 S.E.2d at 469 ("A self-defense charge is not required unless it is supported by the evidence."); *State v. Goodson*, 312 S.C. 278, 280, 440 S.E.2d 370, 372 (1994) ("The law to be charged to the jury is determined by the evidence presented at trial."); *Light*, 378 S.C. at 649, 664 S.E.2d at 469 (providing self-defense requires the defendant to "be without fault in bringing on the difficulty"). Of the three individuals present when the shooting occurred, only Wells testified at trial. Although it is undisputed Wells fired a gun during the encounter, he consistently testified Plumer was the first to draw and fire a gun. The record contains no evidence to contradict Wells's testimony that he stored a holstered handgun in a cabinet prior to the meeting and did not retrieve it until after Plumer pulled out a gun. Further, the record contains no evidence Wells was visibly armed or that Plumer knew Wells had a gun nearby when Plumer pulled out his own gun. Wells stated he shot at Plumer because Plumer was shooting at him and that if Plumer had not pulled out his gun first, he would not have retrieved the gun from the cabinet. Even though Wells's treating physician agreed the gunshot injury to his hip would likely have caused him to fall immediately, he testified it was impossible to determine which of Wells's gunshot injuries occurred first or otherwise discern the timing of those injuries. In addition, Wells testified that bullets were already striking him when he turned to retrieve the gun from the cabinet. As to Investigator Kay's testimony, he testified only that Wells initially told law enforcement that two random men came into his home, tried to rob him, and ended up shooting him. This testimony does nothing to suggest Wells, rather than Plumer, was at fault for bringing on the difficulty. As to Plumer's contention that Wells and Ms. Wells conspired to hide the gun, Wells admitted he initially withheld the truth from law enforcement because he was afraid he would get in trouble for dealing marijuana, and he admitted to shooting a gun that night. Further, Ms. Wells explained she took possession of the gun the night of the shooting because it belonged to her; she was concerned for the safety of her young grandson, who had just picked the gun up off of the floor; she did not know it was involved in the shooting; and she was most concerned with Wells's

condition at the time. In addition, Ms. Wells testified she turned the gun over to law enforcement within days of the incident. Regardless, the suggestion that Wells conspired to hide the gun made it no more or less likely that Wells was the first to present a gun or that Plumer was without fault in bringing on the difficulty.

Next, as to Plumer's contention he retreated from the violence, the evidence shows he only did so after firing his gun multiple times. Moreover, such facts pertain to whether he had a means of avoiding the danger rather than whether he was at fault for bringing on the difficulty. Finally, we find Plumer's argument regarding his acquittal for the charge of armed robbery is without merit. The lack of motive to commit murder is not an element of self-defense, nor does it negate Wells's testimony that Plumer drew a gun without any prior act of provocation or aggression on Wells's part.

Based on the foregoing, we find the only evidence presented at trial suggested that Plumer was at fault for bringing on the difficulty. Therefore, the record contained no evidence from which a jury could have inferred Plumer acted in self-defense, and we find the trial court did not err by refusing to give a self-defense instruction.⁵

II. Motion to Relieve Trial Counsel

Plumer argues the trial court should have treated his insistence to relieve his trial counsel as a motion to represent himself and the court denied him his Sixth Amendment right to represent himself by permitting counsel to continue representing him. We disagree.

"A South Carolina criminal defendant has the constitutional right to represent himself under both the federal and state constitutions." *State v. Barnes*, 407 S.C. 27, 35, 753 S.E.2d 545, 550 (2014). Thus, "[a]n accused may waive the right to counsel and proceed *pro se*." *State v. Winkler*, 388 S.C. 574, 586, 698 S.E.2d 596, 602 (2010); *see also Faretta v. California*, 422 U.S. 806 (1975) (holding a criminal defendant has the right to waive his right to counsel and proceed *pro se* when he chooses to do so voluntarily and intelligently). "The request to proceed *pro se* must be clearly asserted by the defendant prior to trial." *Winkler*, 388 S.C. at 586,

⁵ We note Plumer asserts the trial court inappropriately involved itself in plea negotiations. Because Plumer raised no exception on this basis at trial, this argument is unpreserved for our review. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("Issues not raised and ruled upon in the trial court will not be considered on appeal.").

698 S.E.2d at 602 (quoting *State v. Fuller*, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999)); see also *Barnes*, 407 S.C. at 35, 753 S.E.2d at 550 ("So long as the defendant makes his request prior to trial, the only proper inquiry is that mandated by *Faretta*.").

Here, Plumer informed the court on the morning of the third day of trial that he wished to relieve his trial counsel and presented a written motion to relieve counsel or, in the alternative, for a competency evaluation. After the court confirmed Plumer had no competency issues, Plumer stated he wished to relieve counsel and find another lawyer. He alleged his trial counsel failed to relay a plea offer of seven years' imprisonment and he was unaware he faced a mandatory sentence of life without parole. Plumer's counsel denied this, and the trial court refused to suspend the trial to allow Plumer to hire new counsel.

We find Plumer did not clearly assert his right to self-representation. Plumer's written motion was styled as a "motion declining or terminating representation," and he told the trial court he wanted another lawyer. We acknowledge Plumer argued he had "a constitutional right to relieve [his] lawyer when [he] want[ed] to relieve him"; however, he never stated he wished to represent himself for the remainder of the trial. Rather, he repeatedly stated he wanted to hire a different lawyer. Because we conclude Plumer failed to clearly assert his right to proceed without counsel, *Faretta* warnings were not required, and the trial court did not deprive Plumer of his right to self-representation.

III. Expert Witness

Plumer argues the trial court erred by refusing to allow Dr. Bennett to testify as an expert in gunshot residue. He contends the record established Dr. Bennett had the necessary education, training, and experience to testify as an expert and the exclusion of this expert testimony denied Plumer his constitutional right to a complete defense. We find Plumer failed to preserve this issue for appellate review.

"The trial court's decision to admit expert testimony will not be reversed on appeal absent an abuse of discretion." *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or a factual conclusion that is without evidentiary support." *Id.* "For an error to warrant reversal, however, the error must result in prejudice to the appellant." *State v. Santiago*, 370 S.C. 153, 162, 634 S.E.2d 23, 28 (Ct. App. 2006).

We find this issue is unpreserved for appellate review because Plumer made no request or attempt to proffer Dr. Bennett's testimony at trial. *See id.* at 163, 634 S.E.2d at 29 ("[A] proffer of testimony is required to preserve the issue of whether testimony was properly excluded by the trial judge, and an appellate court will not consider error alleged in the exclusion of testimony unless the record on appeal shows fairly what the excluded testimony would have been."); *see also State v. King*, 367 S.C. 131, 137, 623 S.E.2d 865, 868 (Ct. App. 2005) ("The reason for the rule requiring a proffer of excluded evidence is to enable the reviewing court to discern prejudice.").

IV. Sentencing

Plumer argues the trial court erred by sentencing him to an additional five years' imprisonment for the weapons charge pursuant to section 16-23-490. We agree.

If a person is in possession of a firearm or visibly displays what appears to be a firearm . . . during the commission of a violent crime and is convicted of committing or attempting to commit a violent crime as defined in Section 16-1-60, he must be imprisoned five years, in addition to the punishment provided for the principal crime. *This five-year sentence does not apply in cases where the death penalty or a life sentence without parole is imposed for the violent crime.*

S.C. Code Ann. § 16-23-490(A) (2015) (emphasis added); *see also* S.C. Code Ann. § 16-1-60 (2015 & Supp. 2020) (defining attempted murder as a violent crime).

"[T]his Court has consistently held that a challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review." *State v. Johnston*, 333 S.C. 459, 462, 510 S.E.2d 423, 425 (1999), *disapproved of by State v. Vick*, 384 S.C. 189, 682 S.E.2d 275 (Ct. App. 2009). In *Johnston*, our supreme court vacated an illegal sentence notwithstanding preservation rules. *See id.* at 463-64, 510 S.E.2d at 425. There, the court found there were exceptional circumstances in that the State conceded "the trial court committed error by imposing an excessive sentence," and there was a "real threat" that the defendant would "remain incarcerated beyond the legal sentence due to the additional time it w[ould] take to pursue [post-conviction relief]." *Id.*

In *Vick*, this court acknowledged the holding in *Johnston*, but addressed the sentencing issue even though there was no "threat" that the appellant would "remain incarcerated beyond the legal sentence." *Vick*, 384 S.C. at 202-03, 682 S.E.2d at 281-82. The court reasoned, "[O]ur courts have, in the past, 'summarily vacated' sentences for kidnapping whe[n] such sentences were precluded by [statute] because the defendant received a concurrent sentence under the murder statute." *Id.* at 202, 682 S.E.2d at 282. The court also noted that "our courts have at times considered an issue in the interest of judicial economy." *Id.* In *Vick*, we held:

[B]ecause the State concede[d] the kidnapping sentence was erroneously imposed, and in light of the fact our courts recognize there may be exceptional circumstances allowing the appellate court to consider an improper sentence even though no challenge was made to the sentence at trial and have further summarily vacated in matters such as the one at hand, in the interest of judicial economy we vacate the clearly erroneous kidnapping sentence.

Id. at 203, 682 S.E.2d at 282.

In *Bonner*, we vacated a defendant's sentence notwithstanding preservation rules when both parties fully briefed the issue, and we stated, "[T]his case presents an exceptional circumstance because the State concedes in its brief that the trial court committed error by imposing an improper sentence." *See State v. Bonner*, 400 S.C. 561, 567, 735 S.E.2d 525, 528 (Ct. App. 2012).

Plumer was convicted of attempted murder, a violent crime under section 16-1-60. The trial court sentenced him to life without parole for attempted murder and an additional five years' imprisonment for possession of a weapon during the commission of a violent crime. *See* § 16-23-490(A) (providing the five-year sentence required for possessing a firearm during the commission of a violent crime does not apply when the trial court imposes a sentence of life imprisonment without parole for the violent offense). Although the State argues the issue is unpreserved because Plumer failed to object at trial, it concedes the trial court erred by imposing the five-year sentence and acknowledges that under certain circumstances, our appellate courts have decided such issues on the merits notwithstanding preservation rules. The State argues, however, that the appropriate procedure for raising the issue is in post-conviction relief. Although

there is no "real threat" Plumer will remain incarcerated beyond the length of his legal sentence, because the State concedes error, we believe it is appropriate under these circumstances and as a matter of criminal equity to vacate the sentence pursuant to our holdings in *Bonner* and *Vick*. See *Bonner*, 400 S.C. at 567, 735 S.E.2d at 528 (opining a "case present[ed] an exceptional circumstance because the State concede[d] in its brief that the trial court committed error by imposing an improper sentence"). We therefore vacate the five-year sentence Plumer received for the weapons charge.

CONCLUSION

For the foregoing reasons, we affirm Plumer's convictions but vacate the trial court's imposition of the five-year sentence for the weapons charge.

AFFIRMED IN PART AND VACATED IN PART.

GEATHERS and HEWITT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of General Sessions
Edward W. Miller, Circuit Court Judge

Appellate Case No. 2017-000481

The State, ...Respondent

v.

Ontavious Plumer,.....Appellant.

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Ontavious Plumer petitions for rehearing because this Court overlooked or misapprehended the matters set forth in this pleading.

Question 1

Did the trial judge err as a matter of law by denying Ontavious Plumer's request for a jury instruction on self-defense when the jurors acquitted Mr. Plumer of armed robbery and direct and circumstantial evidence established the elements of self-defense?

This Court “conclude[d] the trial court did not err by refusing to charge the law of self-defense because the record contains no evidence that Plumer was without fault for bringing on the difficulty.” *State v. Plumer*, No. 2017-000481, 2021 WL 800607, at 4 (S.C. Ct. App. Mar. 3, 2021). In reaching this conclusion, this Court committed three errors of law.

First, this Court shifted the burden to Mr. Plumer to prove self-defense when it held:

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.

Id. (citing *State v. Slater*, 373 S.C. 66, 69-70, 644 S.E.2d 50, 52 (2007)). Although citing *Slater* for the “elements” of self-defense, these “elements” have been part of our state’s jurisprudence going back, at least, to *State v. Hendrix*, 270 S.C. 653, 657–58, 244 S.E.2d 503, 505-06 (1978). It is elementary that “elements” identify what a party must prove in order to prove a claim or offense. Indeed, our Supreme Court decided *Hendrix* during an error when an accused had the burden of proving self-defense. Today, a “defendant need not establish self-defense by a preponderance of the evidence but must merely produce evidence which causes the jury to have a reasonable doubt regarding his guilt.” *State v. Bellamy*, 293 S.C. 103, 105, 359 S.E.2d 63, 64-65 (1987), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991); *see also In re Winship*, 397 U.S. 358 (1970). “Once raised by the defense, the State must disprove self-defense beyond a reasonable doubt.” *State v. Bixby*, 388 S.C. 528, 553, 698 S.E.2d 572, 585 (2010) (citing *State v. Burkhardt*, 350 S.C. 252, 260, 565 S.E.2d 298, 302 (2002)). Thus, this Court erred by shifting the burden to Mr. Plumer to prove self-defense.

Second, in reaching its holding, this Court reasoned, “Of the three individuals present when the shooting occurred, only Wells testified at trial,” *Plumer*, at 4, thereby imposing a requirement that an accused testify or call witnesses in order to receive a self-

defense instruction. An accused is entitled to a self-defense instruction if there is any evidence to support the instruction. *State v. Light*, 378 S.C. 641, 651, 664 S.E.2d 465, 470 (2008); *see also Stone v. State*, 294 S.C. 286, 287, 363 S.E.2d 903, 904 (1988) (“petitioner presented sufficient evidence at trial to entitle him to a jury instruction on self-defense”). There is not requirement that the evidence supporting any jury instruction—including a self-defense jury instruction—come from the accused or a witness called by the accused.

Third, despite identifying evidence in the record supporting providing a self-defense instruction, this Court held, “[T]he trial court did not err by refusing to charge the law of self-defense because the record contains no evidence that Plumer was without fault for bringing on the difficulty.” *Plumer*, at 4. This Court’s opinion recognized Mr. Plumber brief identified

the following facts would have supported an inference that Wells was the first person to introduce a firearm and was therefore responsible for bringing on the difficulty: (1) Wells admitted he was prepared to use his gun during the drug transaction and placed himself in a position that would allow him to stand up and reach his gun; (2) according to Investigator Kay, Wells stated he reached for his gun before Plumer fired any shots; (3) according to Dr. Ladd, Wells would have fallen down when the bullet struck his femoral neck, meaning he stood up and retrieved his handgun before Plumer fired that shot; (4) Wells and Ms. Wells conspired to hide the gun and cover up his culpability; (5) Plumer retreated from the violence; and (6) the jury acquitted Plumer of armed robbery, which removed the motive to commit murder.

Id., at 3. Thus, this Court erred by overlooking these facts.

Question 2

Did the trial judge err as a matter of law by denying Ontavious Plumer’s motion to relieve his trial counsel from representation and allowing Mr. Plumer to represent himself?

Although recognizing Mr. Plumer had the constitutional right to represent himself, this Court held Mr. “Plumer did not clearly assert his right to self-representation.” *Plumer*, at 5. Mr. Plumer argued to this Court:

[T]he attorney-client relationship had deteriorated because of the lack of communication. The trial judge incorrectly told Mr. Plumer his only options were to plead guilty or continue the trial. Mr. Plumer correctly informed the trial judge his only choice as to continue trial. Had Mr. Plumer allowed the trial judge to persuade him to plead guilty, then the jurors would not have acquitted Mr. Plumer of armed robbery, and this issue—and the other issues raised in the brief—would not have been preserved for appeal. Continuing the trial presented the trial judge two options. First, trial counsel would continue representing Mr. Plumer through the conclusion of the trial. Second, after giving Mr. Plumer his *Faretta*¹ warnings, the trial could have continued with Mr. Plumer representing himself. The trial judge chose the former option, which denied Mr. Plumer his Sixth Amendment right to represent himself.

Brief of Appellant, at 15 (footnote added).

The trial judges have an obligation to “safeguard the rights of litigants.” *State v. Langford*, 400 S.C. 421, 429, 735 S.E.2d 471, 475 (2012). Here, safeguarding Mr. Plumer’s rights included providing him the *Feretta* warnings and allowing him to represent himself.

Question 3

Did the trial judge err as a matter of law when by not qualifying Dr. Robert Bennett as expert in gunshot residue when the record establishes the witness has the necessary education, training and experience, and the exclusion of this expert testimony denied Ontavious Plumer his constitutional right to present a complete defense?

This Court held “this issue is unpreserved for appellate review because Plumer made no request or attempt to proffer Dr. Bennett’s testimony at trial.” *Plumer*, at 6. However, the error Mr. Plumer asked this court to address occurred during the first two

¹ *Faretta v. California*, 422 U.S. 806 (1975).

prongs of *Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010). Mr.

Plumer requested alternate relief from this Court:

This Court, accordingly, should order a new trial. In the alternative, this Court should remand this case for a hearing to determine whether Dr. Bennett's testimony is admissible under the third prong of *Watson*. See, e.g., *State v. Hughes*, 346 S.C. 339, 343, 552 S.E.2d 35, 37 (Ct. App. 2001) ("remand[ed] for an evidentiary hearing to determine whether Hughes was entitled to access to the notes as outlined in Rule 612," SCRE.). If the trial court find Dr. Bennett's testimony admissible and its exclusion impaired Mr. Plumer's defense, then the trial court should be allow[e]d to grant a new trial. *Hughes*, 346 S.C. at 343-44, 552 S.E.2d at 37.

Brief of Appellant, at 18. This Court overlooked ruling on Mr. Plumer's motion for a remand.

CONCLUSION

For the foregoing reasons, this Court should rehear this matter, withdraw its opinions, reverse the trial court, and remand for a new trial.

IT IS SO MOVED.

Respectfully submitted,

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March 11, 2021
Greenwood, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of General Sessions
Edward W. Miller, Circuit Court Judge

Appellate Case No. 2017-000481

The State, ...Respondent

v.

Ontavious Plumer,.....Appellant.

Certificate of Service

I certify that I have served a copy of this pleading on the State of South Carolina, pursuant to South Carolina Supreme Court Order No. 2020-12-16-01, Section (c)(13), by emailing at copy to counsel, at their AIS email address, as reflected below:

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March 11, 2021
Greenwood, South Carolina

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.

RESPONDENT'S PETITION FOR REHEARING

Through a published decision issued on March 3, 2021, this Court affirmed Appellant Ontavious Derenta Plumer's convictions for the crimes of attempted murder and possession of a weapon during the commission of a violent crime along with his accompanying life-without-parole sentence but vacated his concurrent five-year sentence for the weapon charge. State v. Plumer, Op. No. 5806 (S.C. Ct. App. filed Mar. 3, 2021). In arriving at that result, this Court correctly rejected most of Plumer's four allegations of legal error after explicitly recognizing its role was limited to reviewing for errors of law only in light of the standard of review applicable to criminal cases. This Court further correctly applied our state's issue preservation requirements to the third of Plumer's allegations and determined the issue was not properly preserved for appellate review due to Plumer's failure to take the steps needed to preserve the issue at the trial level. However, when reviewing the fourth and final allegation of error raised by Plumer, this Court indicated it believed it was appropriate to address that particular issue—

which was unquestionably neither raised to nor ruled upon by the trial judge and, thus, was not properly preserved for appellate review under well-established South Carolina law— “notwithstanding issue preservation rules” because the State did not dispute an error had occurred *and also* “as a matter of criminal equity.” This Court then went on to vacate Plumer’s concurrent sentence for the weapon charge even though no challenge to that sentence was ever previously lodged. Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Respondent (“the State”) respectfully petitions for rehearing because this Court appears to have overlooked and misconstrued several important points when vacating Plumer’s weapon charge sentence.

First, this Court appears to have overlooked the fact our Supreme Court’s issue preservation precedent bound this Court to find Plumer’s sentencing challenge was unpreserved for appellate review. That is true because—despite appearing to recognize the limits of the highly-specific and unique issue preservation exception our Supreme Court created in State v. Johnston, 333 S.C. 459, 510 S.E.2d 423 (1999)—this Court found it could address Plumer’s appellate challenge to his weapon charge sentence even though it did not fall within the parameters of the Johnston exception based solely on its *own* precedent that it described as *disapproving of* our Supreme Court’s holding in Johnston. See State v. Vick, 384 S.C. 189, 202, 682 S.E.2d 275, 282 (Ct. App. 2009) (addressing an unpreserved sentencing issue related to an improper concurrent sentence despite the fact “the case at hand does not present a threat that Vick will remain incarcerated beyond the legal sentence as in Johnston”). Critically though, this Court is *constitutionally* bound to follow the precedent of our Supreme Court and cannot validly ignore that precedent simply because it disapproves of it. See S.C. Const. art. V, § 9 (“The decisions of the Supreme Court shall bind the Court of Appeals as precedents.”); cf. Daniels v.

City of Goose Creek, 314 S.C. 494, 501, 431 S.E.2d 256, 260 (Ct. App. 1993) (“Of course, the decisions of the Supreme Court bind this Court as precedents. Thus, any modification or limiting of Abbeville Arms must be done by the Supreme Court.” (citation omitted)). As a result, this Court should reconsider its decision to ignore our Supreme Court’s precedent in favor of its own, faithfully adhere to the limits of the decision in Johnston just as it has correctly done in the past, and find Plumer’s issue with his concurrent five-year sentence for the weapon charge was not properly preserved for appellate review since it was indisputably neither raised to nor ruled upon by the trial judge.¹ Cf. State v. Passmore, 363 S.C. 568, 585-586, 611 S.E.2d 273, 282-283 (Ct. App. 2005) (“We find the exceptional circumstance carefully carved out by the Johnston court is not present here. [Passmore] has already served the duration of her sentence; therefore, she does not face the threat of continuing incarceration beyond the legal sentence. Johnston does not control. . . . Regrettably, [Passmore] has suffered a violation of her right to a jury trial in this case. However, because she failed to raise an objection at trial, we are compelled to let the unconstitutional sentence stand.”).

Second, in addition to failing to faithfully follow our Supreme Court’s Johnston decision, this Court appears to have overlooked the fact “criminal equity” is not a recognized or proper

¹ As this Court readily acknowledged in its decision in Plumer’s case, there is no “real threat” Plumer will remain incarcerated beyond the length of his aggregate sentence due to the fact he was sentenced to life without parole for attempted murder, so a delay in the resolution of his sentencing challenge until it can be raised in the proper venue of post-conviction relief will not result in any harm at all to Plumer. See Johnston, 333 S.C. at 463-464, 510 S.E.2d at 425 (addressing Johnston’s appellate challenge to her sentence despite issue preservation rules because there was a “real threat” she would be incarcerated beyond the permissible sentencing range for her conviction if she was not immediately granted relief). Meanwhile, inconsistent application of procedural rules can itself result in harm because such inconsistency undermines the integrity of the rules and can actually foster non-compliance by removing the disincentives that exist to ensure the purpose of the rules is achieved. See I’On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (recognizing procedural rules—through their enforcement and application—ensure the trial court is *guaranteed* a fair opportunity “to rule properly after it considered all relevant, facts, law, and arguments”).

basis for a grant of relief in a criminal appeal in South Carolina when relying on it as an *additional* ground upon which it was permitted to vacate the weapon charge sentence. Significantly, the phrase “criminal equity” has *never*—prior to the decision in Plumer’s case—appeared even a single time in any published South Carolina decision issued at any point throughout the long history of our state’s jurisprudence, and it does not have a defined meaning in South Carolina law due to the fact it has never previously been recognized or applied.² See, e.g., Ezell v. Ritholz, 188 S.C. 39, 198 S.E. 419, 422 (1938) (recognizing the existence of “the established rule that equity has no criminal jurisdiction”). In fact, the phrase “criminal equity” does not even appear in Black’s Law Dictionary, which is a more-than-a-century-old comprehensive source widely used by judges and lawyers in our nation to determine the accepted definition of any known legal term regardless of how common or obscure it may be.³ See BLACK’S LAW DICTIONARY (9th ed. 2009) (containing many definitions for different forms of equity but containing no definitions whatsoever for “criminal equity”); see also United States v. Nason, 269 F.3d 10, 16 (1st Cir. 2001) (recognizing Black’s Law Dictionary as a predictably-used source for ascertaining “the most widely accepted legal meaning” of terms). Therefore, “criminal equity”—whatever it may be—is simply not something that constitutes an accepted exception to South Carolina’s well-settled issue preservation rules, and, respectfully, this Court

² Notably, during the oral argument held in Plumer’s case, this Court described “criminal equity” as “a new term” it “*just created*.” (State v. Plumer Oral Argument Recording, 34:00 to 34:05) (emphasis added). This Court further appeared to suggest it viewed “criminal equity” as something separate and distinct from judicial economy. (State v. Plumer Oral Argument Recording, 29:21 to 29:29).

³ Beyond that, this Court itself did *not* provide a definition or any clear explanation as to what the phrase “criminal equity” means despite explicitly identifying the phrase as a basis upon which Plumer’s sentence could be and was vacated, which only adds to the confusion caused by this Court’s reliance upon “criminal equity” as a ground for appellate relief in a criminal—as opposed to an equity—case. State v. Plumer, Op. No. 5806 (S.C. Ct. App. filed Mar. 3, 2021).

is constitutionally prohibited from manufacturing “criminal equity” as a means by which it can ignore our Supreme Court’s binding precedent articulating those rules whenever it wishes to do so. See S.C. Const. art. V, § 9 (“The decisions of the Supreme Court shall bind the Court of Appeals as precedents.”); Johnston, 333 S.C. at 463-464, 510 S.E.2d at 425 (reaffirming the existence of “settled” issue preservation rules that require a challenge to a sentence to be raised to and ruled upon by the trial judge in order to be preserved for appellate review but applying a limited exception to those rules in Johnston’s “unique” case based on its “exceptional circumstances” because: (1) the State had conceded error in regard to the sentence; *and* (2) a “real threat” existed Johnston would be incarcerated beyond the permissible sentencing range for her conviction if she was forced to pursue relief through a post-conviction relief action); cf. United States v. Reyes, 945 F.2d 862, 866 (5th Cir. 1991) (explaining there “seems to be no adequate statutory or historical warrant to authorize federal courts to” vacate a criminal conviction on equitable grounds and further instructing: “Absent a clearer statutory or historical basis, an article III court *should not arrogate such power unto itself*. We, too, operate under the law.” (emphasis added)).

Third and finally, this Court appears to have overlooked the fact “criminal equity”—which, presumably, is something that must surely have been intended to be equitable in nature based on its name alone—should not entitle Plumer to relief when the circumstances of his case are considered with principles of equity in mind. Specifically, pursuant to equitable principles, Plumer would not be entitled to equitable relief because he did *nothing* which ought to have been done to obtain the sentencing relief he has sought on appeal before he first tried to obtain it from this Court. Cf. Regions Bank v. Wingard Properties, Inc., 394 S.C. 241, 254, 715 S.E.2d 348, 355 (Ct. App. 2011) (“A court of equity should scrutinize the conduct of the plaintiff with the

utmost care, to ascertain *he has done everything which ought to have been done* to secure the action requested.” (emphasis added)). Instead, Plumer remained silent regarding his sentence at the trial level and raised no objections to the concurrent term of imprisonment he received for the weapon charge even though he recognized—at least based on the arguments he has raised on appeal—that sentence was “expressly prohibit[ed]” by statute.⁴ (Final App. Br. p. 19). Under such circumstances, Plumer’s actions concerning the sentencing issue should not be rewarded with sentencing relief as a matter of equity since equitable principles would *deny* him that relief in an equitable action due to his failure to take the steps that ought to have been taken at the trial level when presented with an undeniable opportunity to do so. See Upton v. Tribilcock, 91 U.S. 45, 55 (1875) (“Equity will not assist a man whose condition is attributable only to that want of diligence which may be fairly expected from a reasonable person.”); Hemingway v. Mention, 228 S.C. 211, 216, 89 S.E.2d 369, 371 (1955) (instructing “equity aids the vigilant”); Regions Bank, 394 S.C. at 260, 715 S.E.2d at 358 (recognizing the importance of the issue preservation rule requiring an issue to be raised to and ruled upon before it can properly be raised on appeal in a case involving *an action in equity*); see also State v. Penland, 275 S.C. 537, 538, 273 S.E.2d 765, 766 (1981) (“One may not preserve a vice until he learns what the result will be and then, take advantage of the error on appeal.”). Accordingly, even if this Court believes its new creation—“criminal equity”—can be legitimately applied in a criminal case in South Carolina, this Court should not find “criminal equity” trumps our state’s issue preservation rules and other controlling precedent since such a finding would itself be plainly incompatible with well-

⁴ Interestingly, Plumer elected *not* to include any facts or statements in his appellate brief that would have alerted this Court the argument he raised on appeal in support of his request for sentencing relief was being raised for the first time, which—at least based on existing South Carolina precedent—would have been exceedingly pertinent to the matter of whether appellate review of the issue was proper. (Final App. Br. pp. 1-19).

established principles of equity.⁵ See Regions Bank, 394 S.C. at 254, 715 S.E.2d at 355 (“When providing an equitable remedy, the court may not ignore statutes, rules, and other precedent.”); cf. Lonchar v. Thomas, 517 U.S. 314, 323 (1996) (“[T]he fact that the writ [of habeas corpus] has been called an equitable remedy . . . does not authorize a court to ignore this body of statutes, rules, and precedents. There is no such thing in the Law, as Writs of Grace and Favour issuing from the Judges. Rather, courts of equity must be governed by rules and precedents no less than the courts of law. As Selden pointed out so many years ago, the alternative is to use each equity chancellor’s conscience as a measure of equity, which alternative would be as arbitrary and uncertain as measuring distance by the length of each chancellor’s foot.”).

For all the foregoing reasons, the State respectfully urges this Court to reconsider this matter pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, vacate its prior opinion, strike its highly-confusing reference to the newly-created—and totally undefined—field of “criminal equity,” and issue a new opinion correctly affirming Plumer’s convictions along with both his life-without-parole sentence for attempted murder and his *unobjected-to* five-year sentence for possession of a weapon during the commission of a violent crime. By doing so, this

⁵ Relatedly, while equity abhors a wrong without a remedy, the remedy of post-conviction relief will remain available to Plumer to obtain the sentencing relief he has prematurely sought from this Court through his unpreserved allegation of error even if this Court reconsiders its decision to create a new field of law—“criminal equity”—to award such relief to him at this juncture. Lane v. New York Life Ins. Co., 147 S.C. 333, ___, 145 S.E. 196, 207 (1928); see S.C. Code Ann. § 17-27-20(A)(3) (recognizing one of the express grounds upon which a person may seek and obtain post-conviction relief is when “the sentence exceeds the maximum authorized by law”); Johnston, 333 S.C. at 464, n. 3, 510 S.E.2d at 425 (explaining its decision based on the “unique” circumstances of Johnston’s case was “not intended to disrupt our settled rules on issue preservation and PCR applications”). And, a post-conviction action already appears inevitable regardless of whether this Court does or does not address Plumer’s unpreserved sentencing error for the first time on appeal based on Plumer’s appellate counsel’s representations during the oral argument, which seems to raise some compelling questions about whether any judicial efficiency concerns would truly be served by ignoring our long-standing issue preservation rules and precedent in Plumer’s case. (State v. Plumer Oral Argument Recording, 32:42 to 32:54).

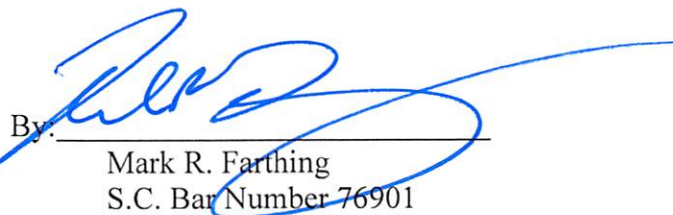
Court will ensure it has faithfully complied with our Supreme Court's precedent as it is duty-bound to do, adhered to our State's previously well-settled issue preservation rules, and remained within the constitutional limits that have been established for it by our citizenry. S.C. Const. art. V, § 9; see State v. Wise, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004) ("In criminal cases, the appellate court sits only to review *errors of law which have been properly preserved*, i.e., the issue has been raised to and ruled on by the trial court." (emphasis added)); see also Marbury v. Madison, 5 U.S. 137, 176-177 (1803) ("To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation.").

Respectfully submitted,

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March 16, 2021

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.

PROOF OF SERVICE

I, Shana Montgomery, certify I have served the within Respondent'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.
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I further certify all parties required by Rule to be served have been served.
This 16th day of March, 2021.


SHANA MONTGOMERY
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of General Sessions
Edward W. Miller, Circuit Court Judge

Appellate Case No. 2017-000481

The State, ...Respondent

v.

Ontavious Plumer,.....Appellant.

RETURN TO STATE’S PETITION FOR REHEARING

On March 16, 2021, the State petitioned this Court for rehearing regarding the section of this Court’s opinion vacating the five-year sentence for possession a firearm during the commission of a violent crime, even though the State acknowledges the trial judge imposed this sentence contrary to S.C. Code § 16-23-490(A). On April 7, 2021, this Court requested Ontavious Plumer respond to the State’s petition for rehearing. This return follows. This Court should deny the State’s petition for four reasons.

First, this Court correctly identified cases in which our appellate courts correct obvious sentencing errors of this very nature, to wit: *State v. Johnston*, 333 S.C. 459, 510 S.E.2d 423 (1999); *State v. Bonner*, 400 S.C. 561, 567, 735 S.E.2d 525, 528 (Ct. App. 2012); *State v. Vick*, 384 S.C. 189, 682 S.E.2d 275 (Ct. App. 2009). Thus, the State is not correct when it accuses this Court of not following binding precedent of our Supreme Court.

Second, the State’s criticism of this Court for using the term “criminal equity,” *e.g.* Petition for Rehearing, at 3, is a red herring. As discussed above, this Court’s opinion vacating the sentence for the weapons charge resulted from correct application of our state’s precedent.

Third, the State argues, “[P]ursuant to equitable principles, Plumer would not be entitled to equitable relief because he did nothing which ought to have been done to obtain the sentencing relief he has sought on appeal before he first tried to obtain it from this Court.” Petition for Rehearing, at 5. Notably, Mr. Plumer did not do anything to place himself in this predicament as he was relying on his trial counsel to object to any illegal sentence. Judicial economy—as recognized by *Johnston*, *Bonner*, and *Vick*—militates in favor of correcting this error at this stage. Nothing is served by pushing resolution of this issue into post-conviction relief, as the State advocates. *See, e.g.*, Petition for Rehearing, at 7, fn. 5 (“while equity abhors a wrong without a remedy, the remedy of post-conviction relief will remain available to Plumer to obtain the sentencing relief”).

Fourth, the State is not prejudiced by this Court vacating a sentence that it concedes is contrary to law. Brief of Respondant, at 39 (“Pursuant to South Carolina law, Appellant should not have been sentenced to five years for possession of a firearm during the commission of a violent crime since he received a life without parole sentence for attempted murder.”).

(conclusion on next page)

CONCLUSION

For the foregoing reasons, this Court should deny the State's petition for rehearing.

Respectfully submitted,

By E. Charles Grose, Jr.

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Attorney for Appellant

April 8, 2021
Greenwood, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of General Sessions
Edward W. Miller, Circuit Court Judge

Appellate Case No. 2017-000481

The State, ...Respondent

v.

Ontavious Plumer,.....Appellant.

Certificate of Service

I certify that I have served a copy of this pleading on the State of South Carolina, pursuant to South Carolina Supreme Court Order No. 2021-03-04-01, Section (c)(13), by emailing at copy to counsel, at their AIS email address, as reflected below:

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April 8, 2021
Greenwood, South Carolina

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 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.

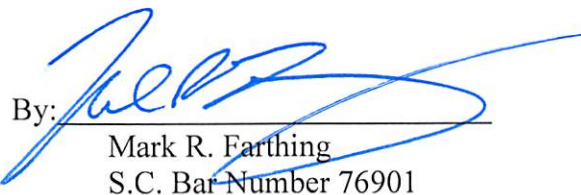
Rules, vacate its prior opinion, strike its reference to “criminal equity,” and issue a new opinion correctly affirming Plumer’s convictions *and* sentences, including his unobjected-to five-year sentence for possession of a weapon during the commission of a violent crime.

Respectfully submitted,

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April 19, 2021

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,

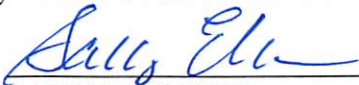
Appellant.

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
404 Main St.
Greenwood, SC 29646

I further certify all parties required by Rule to be served have been served.
This 19th day of April, 2021.



SALLY ELLISON
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The South Carolina Court of Appeals

The State, Respondent,

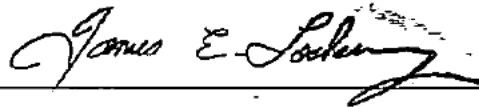
v.

Ontavious Derenta Plumer, Appellant.

Appellate Case No. 2017-000481

ORDER

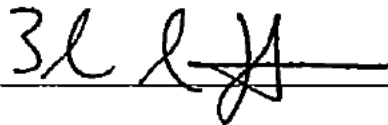
After careful consideration of the petitions for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petitions for rehearing are denied.



C.J.



J.



J.

Columbia, South Carolina

cc:

Alan McCrory Wilson, Esquire
E. Charles Grose, Jr., Esquire
Mark Reynolds Farthing, Esquire
David Matthew Stumbo, Esquire
The Honorable Edward W. Miller

FILED
May 20 2021

APP'X 574