

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
Appellate Case No. 2021-000643

THE STATE,

Respondent-Petitioner,

vs.

ONTAVIOUS DERENTA PLUMER,

Petitioner-Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUES ON CERTIORARI

I.

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II.

Did the Court of Appeals err when it affirmed the trial judge's denial of Plumer's motion to relieve his trial counsel from representation and not considering the option of allowing Plumer to represent himself?

COUNTER-STATEMENT OF ISSUES ON CERTIORARI

I.

Did the Court of Appeals err by affirming the trial judge's decision not to instruct the jury on self-defense when the evidence and testimony presented during trial did not establish any of the required elements of self-defense and, instead, established Plumer unlawfully shot his victim after pulling out a gun and attempting to rob him during the course of a drug transaction?

II.

Did the Court of Appeals err by affirming on appeal when the trial judge neither committed error nor violated Plumer's right to self-representation by denying Plumer's mid-trial request to relieve defense counsel in order to obtain "another lawyer" since that request was untimely and did not constitute a clear and unequivocal assertion of his right to self-representation in light of the fact it was a request to replace defense counsel with a different attorney as opposed to a request for Plumer to be permitted to represent himself?

STATEMENT OF THE CASE

Procedural History

In December of 2015, Petitioner-Respondent Ontavious Derenta Plumer was arrested following an investigation into a shooting that occurred a few months earlier. In July of 2016, the Greenwood County Grand Jury indicted Plumer 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 Plumer indicating the State would seek a sentence of life without parole upon conviction based on Plumer'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 Plumer 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 Plumer to terms of imprisonment of life without parole for attempted murder and five years for possession of a firearm during the commission of a violent crime. Plumer then timely filed and perfected an appeal.

On appeal, the Court of Appeals issued a published decision that unanimously affirmed Plumer's convictions and vacated Plumer's five-year sentence for the firearm offense. State v. Plumer, 433 S.C. 300, 857 S.E.2d 796 (Ct. App. 2021). Thereafter, both the State and Plumer timely filed petitions for rehearing along with returns. On May 20, 2021, the Court of Appeals denied both petitions. Plumer then filed a petition for a writ of certiorari in the Supreme Court.

Factual History

On the evening of October 11, 2015, Oshamar Wells, who was making money at that time by selling marijuana, met up with Plumer 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, Wells 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, and began the transaction. (R. pp. 17-20). After doing so, Wells 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, Plumer suddenly pulled out a gun and began firing it at Wells while "Mel" grabbed the bag of marijuana and fled from the home. (R. pp. 20-21; p. 43; pp. 66-67). In response, Wells 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). Wells then collapsed to the floor, but he was able to fire several shots in Plumer's direction, which caused Plumer 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 Plumer was gone, Wells, 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, Wells's mother, Wenona Wells ("Mother"), quickly responded to the scene along with several young children in her care. (R. pp. 74-75). Upon arriving, Mother found Wells 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,

¹ According to Wells, 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 Wells, but "Jock" was out of town at the time of the incident. (R. pp. 33-34).

Officer Kerry Cooper of the Greenwood Police Department arrived at the residence and was directed inside to Wells's location. (R. pp. 88-90). At that point, Wells reported to the officer he had been shot by two unknown men who tried to rob him. (R. pp. 91-93; pp. 103-104). Wells was then rapidly transported to the hospital by emergency medical personnel. (R. p. 93).

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

Once Wells's condition had been stabilized, Officer Patrick Durkin of the Greenwood Police Department briefly spoke with Wells at the hospital. (R. pp. 228-229; p. 231; p. 234). During that discussion, Wells 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).

At the same time Wells 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 Plumer'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 Plumer'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. (R. pp. 165-166; pp. 211-213).

Meanwhile, in the immediate aftermath of the shooting, Plumer, 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, Plumer 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 Plumer to an apartment complex as directed. (R. p. 304). Thereafter, while at the apartment complex, Plumer sought assistance from several of his family members, and his 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 Plumer based on the fact Plumer had sustained a gunshot injury. (R. pp. 107-108; p. 112). During their conversation, Plumer 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. (R. pp. 109-110).

On the following morning, Detective Wesley McClinton and Detective William Kay of the Greenwood Police Department went to speak with Wells at the hospital in Greenwood. (R. p. 26; p. 47; pp. 115-116; p. 124; p. 130; p. 166). During the conversation, Wells, 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 he did not have anything for them to steal.² (R. p. 27; p. 48; pp. 58-59; p. 117; p. 130).

² In addition to being involved in a drug transaction, Wells 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, Plumer had been

After speaking with Wells, Detective McClinton went to speak with Plumer's grandfather at his home in Starr, South Carolina, along with Lieutenant Mike Dixon, who was the supervisor of the investigations unit at the Greenwood Police Department. (R. p. 174; p. 176; p. 178). During that conversation, Plumer'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 Plumer. (R. p. 175; p. 177; p. 182). Plumer'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 Wells again, and Wells 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, Wells 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, Wells revealed he shot at Plumer during the incident, but he consistently indicated he only fired his weapon after Plumer first began shooting. (R. pp. 116-117; p. 133; pp. 148-149; pp. 164-165). Wells 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 to Wells, and Wells immediately identified Plumer from that lineup as the person who shot him. (R. pp. 27-28; pp. 118-119; pp. 121-122; pp. 132-133).

Thereafter, the investigating officers obtained an arrest warrant for Plumer in connection to the shooting, but they were initially unable to locate him despite searching "quite a few

convicted of a violent felony. (R. p. 429; p. 444). Therefore, Plumer *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.").

places.” (R. p. 183; pp. 345-346). However, a few months later, Plumer was finally apprehended and arrested. (R. p. 184). Following his arrest, Plumer was brought before a judge for a bond hearing, and, during the hearing, Plumer 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 Plumer’s DNA was collected for comparative purposes, and, upon analysis, Plumer’s DNA profile was conclusively matched to the DNA profile developed from the blood recovered at the crime scene. (R. pp. 213-214; pp. 271-276).

Subsequently, Plumer was indicted for attempted murder, armed robbery, and possession of a firearm during the commission of a violent crime, and he elected to proceed forward to trial. (R. pp. 3-4; pp. 438-443). At the conclusion of trial, the jury convicted Plumer solely of attempted murder and the firearm charge. (R. p. 426). The trial judge then sentenced Plumer to an aggregate sentence of life without parole as required. (R. pp. 429-430).

Following that, Plumer appealed while raising a number of issues, including ones concerning the trial judge’s decision not to instruct the jury on self-defense and denial of his mid-trial motion to relieve defense counsel. (App. Br. p. 1; pp. 9-15). On appeal, the Court of Appeals affirmed Plumer’s convictions. State v. Plumer, 433 S.C. 300, 304, 857 S.E.2d 796, 797 (Ct. App. 2021). In doing so, the Court of Appeals found the trial judge committed no error by declining to instruct the jury on self-defense “because the record contain[ed] no evidence that Plumer was without fault for bringing on the difficulty.” Id. at 310, 857 S.E.2d at 801. Likewise, the Court of Appeals found the trial judge committed no error in regard to Plumer’s right to self-representation because Plumer never clearly asserted that right during trial. Id. at 312, 857 S.E.2d at 802.

ARGUMENT

I.

The Court of Appeals correctly affirmed the trial judge’s decision not 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 Plumer unlawfully shot his victim after pulling out a gun and attempting to rob him during the course of a drug transaction.

Plumer contends the Court of Appeals erroneously affirmed the trial judge’s decision not to instruct to the jury on self-defense. In support of that contention, Plumer maintains the evidence and testimony presented during trial warranted such a jury instruction, and he points to a variety of things he alleges support an inference his victim—Wells—first produced a gun during the incident.³ To the contrary, the testimony and evidence presented during trial established Plumer attempted to rob Wells at gunpoint during the course of a drug transaction and unlawfully shot him when Wells turned to retrieve his own gun to protect himself, and Plumer 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, and the Court of Appeals correctly affirmed that ruling on appeal. Plumer’s petition for a writ of certiorari should be denied.

³ While raising such a contention, Plumer seeks to incorporate by reference some currently-unspecified allegations raised in filings *other than* his petition for a writ of certiorari. (Plumer’s Pet. for Cert. p. 9; p. 14). Notably, Plumer’s attempt to incorporate by reference allegations that he has chosen *not* to specifically include in the petition itself is improper and, therefore, should be ignored and rejected. See, e.g., Norfleet v. Walker, 684 F.3d 688, 690-691 (7th Cir. 2012) (“The incorporation of arguments by reference in an appellate brief is forbidden. The main reasons are to prevent evasion of the limits on the length of such briefs and to ensure that the party’s arguments engage with the findings and analysis in the decision appealed from.” (citations omitted)); cf. Shantha v. City of Atlanta, 246 S.E.2d 194, 195 (Ga. 1978) (“Appellant in his brief in this court has attempted to incorporate by reference 19 errors he enumerated and argued in his brief in support of his writ of certiorari to the superior court. That is impermissible.”).

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 in Plumer'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 Wells's injuries after the shooting, and, during his testimony, he indicated Wells "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 Wells's injuries was caused first or last. (R. p. 297).

Furthermore, regarding the shooting itself, Wells consistently and unwaveringly testified Plumer 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 Plumer'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 Wells after the shooting testified about his various out-of-court accounts of the incident, and, in those accounts, Wells never indicated he reached for his own weapon at any point before Plumer 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, Plumer 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 Plumer 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 Plumer assert he acted in self-defense. (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 Plumer “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 Plumer 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 Plumer 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 Wells. (R. p. 372). At that point, defense counsel incorrectly claimed Dr. Ladd testified Wells 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. (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 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.”). 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 when asked to do so. State v. Hill, 315 S.C. 260, 261, 433 S.E.2d 848, 849 (1993); see Stone 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).

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 Wells’s trial testimony and the testimony regarding Wells’s out-of-court accounts of the shooting established Plumer pulled out a firearm during the course of an attempt to rob Wells, and no testimony was presented to establish a contrary version of events in which Plumer was not the person responsible for the gunfight that ensued. And, perhaps even more importantly, the testimony presented during trial *indisputably* established Plumer intentionally brought a loaded, concealed, and illegally-possessed firearm to a prearranged drug transaction. Under those circumstances, the evidence and testimony presented only supported a conclusion Plumer

brought about the difficulty that transpired, which meant Plumer could not validly raise a claim of self-defense. Cf. State v. Williams, 427 S.C. 246, 254, 830 S.E.2d 904, 908 (2019) (“Williams’ actions proximately caused the difficulty as a matter of established law because his act of *taking a loaded, unlawfully-possessed pistol into an illegal drug transaction* was not ‘merely incidental’ to the act of arming himself in self-defense.” (emphasis added and footnote omitted)); 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 Plumer regarding his account of the shooting, there was no evidence or testimony presented establishing Plumer shot Wells in order to defend himself from imminent danger of losing his life or sustaining serious bodily injury. See Williams, 427 S.C. at 249, 830 S.E.2d at 906 (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)); 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, Plumer 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, Plumer first contends a charge on self-defense was supported by the fact Wells had a gun nearby at the time of the drug transaction and was willing to use it. However, Wells's act of keeping a holstered gun in close proximity for defensive purposes in no way constituted evidence *Plumer* was acting in self-defense at the time he shot Wells as individuals can unquestionably arm themselves for protection. See, e.g., State v. Burriss, 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, Plumer maintains a charge on self-defense was warranted because some testimony, including the testimony establishing Wells would have fallen when his femur was broken, could have supported a conclusion Wells reached for his gun before he was shot. Importantly though, the testimony presented during trial only established Wells reached for his gun *after* Plumer pulled out his own gun and tried to rob him. In light of that testimony, Wells's act of reaching for his gun—even if it occurred before he was actually shot—could not have justified Plumer shooting Wells in self-defense since Wells was only responding to an unlawful provocation from Plumer when he reached for his own weapon. 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, Plumer contends a charge on self-defense was warranted because Wells allegedly conspired to hide the gun he used during the incident with Mother. However, notwithstanding the fact no testimony was actually presented to establish Wells conspired with his mother for any purpose, Wells's actions after the shooting—even if they were designed to conceal or minimize his own criminal responsibility—simply did not constitute evidence of Plumer'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 speculation based on the possibility “the jury may believe some of the evidence and disbelieve other evidence” is not sufficient to warrant a jury 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, Plumer maintains self-defense should have been charged because there was evidence establishing he retreated at some point. While unquestionable the evidence established Plumer fled after the shooting, the fact Plumer fled did not establish he attempted to retreat *before* shooting Wells 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 Plumer'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, Plumer 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 Plumer 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 Plumer was acting in self-defense at the time he shot Wells, a self-defense instruction was not warranted in Plumer’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, and the Court of Appeals correctly affirmed the trial judge’s ruling on appeal. 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. . . . Accordingly, [Bryant] was not entitled to a self-defense charge and the trial judge correctly refused the charge.”). Plumer’s petition for a writ of certiorari should be denied.

II.

The Court of Appeals correctly affirmed on appeal because the trial judge neither committed error nor violated Plumer’s right to self-representation by denying Plumer’s mid-trial request to relieve defense counsel in order to obtain “another lawyer” since that request was untimely and did not constitute a clear and unequivocal assertion of his right to self-representation in light of the fact it was a request to replace defense counsel with a different attorney as opposed to a request for Plumer to be permitted to represent himself.

Plumer contends the Court of Appeals erroneously affirmed his convictions because the trial judge purportedly 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, Plumer 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, Plumer was required to assert that right in a clear, unequivocal, and timely manner. Since Plumer 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 Plumer was knowingly, voluntarily, and intelligently invoking a right he never sought to invoke. Accordingly, the trial judge committed no error through the manner in which he handled Plumer’s mid-trial request to relieve defense counsel and in no way violated Plumer’s constitutional right to represent himself, and the Court of Appeals correctly affirmed on appeal. Plumer’s petition for a writ of certiorari should be denied.

RELEVANT FACTS

On the third day of Plumer’s trial, Plumer 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 Plumer had appeared competent throughout the

proceedings, and defense counsel confirmed he did not have any concerns about Plumer's competency. (R. p. 314). Plumer 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, Plumer 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. 315). Plumer 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 Plumer and also discussed the life without parole sentence with him. (R. pp. 315-316).

At that point, the trial judge asked Plumer if he wanted to go forward with the trial, and Plumer responded he wanted "to get [himself] another lawyer."⁴ (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 Plumer to get a new attorney. (R. p. 316). The trial judge then again asked Plumer if he wanted to go forward with the trial, and Plumer confirmed he did while stating he had "no choice." (R. p. 316). Immediately in response, the trial judge advised Plumer he did, in fact, have a choice of which he was aware, and Plumer replied he had a constitutional right to relieve his counsel whenever he wanted to do

⁴ Notably, Plumer'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).

so. (R. p. 316). The trial judge then again asked Plumer if wanted to go forward with the trial while noting Plumer was aware of his choices, and, once again, Plumer claimed he did not have a choice. (R. p. 316). Thereafter, the trial judge advised Plumer the solicitor was willing to remove the prospect of mandatory life without parole in the event he elected to plead guilty, but Plumer 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, Plumer 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 Plumer he was facing his “last chance” to avoid a mandatory life without parole sentence and asked him if he understood, which Plumer confirmed he did. (R. p. 318). The trial judge then provided one final warning to Plumer before giving him an opportunity to confer with defense counsel. (R. p. 319). Following a brief pause in the proceedings, defense counsel indicated Plumer wished to proceed forward with the trial. (R. p. 319). The jury then returned to the courtroom, and the trial continued on without Plumer ever making any actual request to represent himself. (R. pp. 313-319).

STANDARD OF REVIEW

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.” State v. Mazique, 419 S.C. 282, 288, 797 S.E.2d 730, 733 (Ct. App. 2016).

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 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. Barnes, 407 S.C. 27, 35, 753 S.E.2d 545, 550 (2014). 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.” State v. Thompson, 355 S.C. 255, 262, 584 S.E.2d 131, 134 (Ct. App. 2003) (citation and internal quotations 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)). 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.”); 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]’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, Plumer 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, Plumer 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 Plumer 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) (“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 Plumer begin representing himself after the trial was underway, Plumer never at any point during the course of trial actually made an attempt—clear or otherwise—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, Plumer 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] 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, Plumer’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.”). Under those circumstances, the trial judge was free to presume Plumer was not waiving—or attempting to waive—the right to counsel and was under no obligation to conduct an inquiry to determine if Plumer 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); 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).

Accordingly, because Plumer 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 Plumer’s motion to relieve defense counsel nor infringed in any way upon Plumer’s constitutional right to represent himself, and the Court of Appeals correctly found no error—reversible or otherwise—on appeal. 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)). Plumer’s petition for a writ of certiorari should be denied.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted Plumer's petition for a writ of certiorari should be denied.

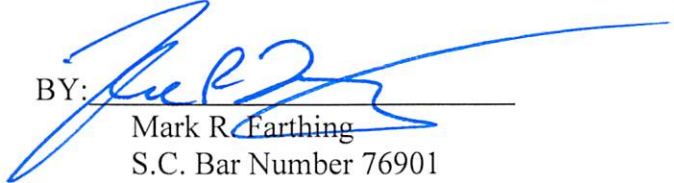
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