STATE OF SOUTH CAROLINA
In the Supreme Court

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On Writ of Certiorari to the Court of Appeals

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APPEAL FROM RICHLAND COUNTY
The Honorable James W. Johnson, Jr., Circuit Court Judge
2004-GS-40-3753

STATE OF SOUTH CAROLINA, .....Respondent,

v.

JASON MICHAEL DICKEY, .....Petitioner.

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# BRIEF OF RESPONDENT

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## STATEMENT OF THE CASE

Petitioner was indicted in May 2004 in Richland County for murder. (R. p. 45, lines 1-2). He was tried before the Honorable James W. Johnson, Jr., on September 12-15, 2006. (R. p. 1-858). The jury found Petitioner guilty of the lesser offense of voluntary manslaughter. (R. p. 828, lines 4-8). Judge Johnson sentenced Petitioner to sixteen (16) years. (R. p. 858, lines 13-14). A Notice of Appeal was timely served and filed. The South Carolina Court of Appeals affirmed the conviction on October 29, 2008. See State v. Dickey, 380 S.C. 384, 669 S.E.2d 917 (Ct. App. 2008). Mr. Dickey's Petition for Rehearing and Rehearing *En Banc* was denied on December 19, 2008. This Court granted Mr. Dickey's Petition for Writ of Certiorari on October 20, 2010. His Brief timely followed.

## ARGUMENT

### I. The trial judge properly submitted the issue of voluntary manslaughter to the jury where there was evidence in the record from which the jury could reasonably conclude that Petitioner shot the victim in the heat of passion.

A. Error Preservation

At the conclusion of the evidence, defense counsel noted that a charge conference had been held and that the parties had taken "various positions" in this off-the-record conference. (R. p. 713, lines 10-13). Defense counsel did not set forth any particular position regarding the charge of voluntary manslaughter at that time. (See R. p. 713-14). Later, following the jury instructions, the trial judge requested that the parties express any exceptions to the charge. (R. p. 816, lines 20-24). Defense counsel stated that he objected to the manslaughter charge because he "did not think it was appropriate with the facts and circumstances in the case." (R. 816, line 25 – p. 817, line 3). No specific argument regarding "heat of passion" was made. (See R. p. 816-17). The trial judge noted the exception but determined there was evidence supporting the charge. (R. p. 817, lines 6-12).

Despite defense counsel's off-the-record objection to the voluntary manslaughter charge, he was still required to set forth, on the record, the *specific* ground for his objection to the charge which is now raised on appeal, *i.e.*, the absence of evidence that the shooting was in the heat of passion.[1] Defense counsel's general objection on the record was insufficient, and it precludes appellate review of his assignment of error. See York v. Conway Ford, Inc., 325 S.C. 170, 480 S.E.2d 726, 728 (1997) (stating an objection made in an off-the-record conference but not placed on the record does not preserve the issue for appellate review); State v. Prioleau, 345 S.C. 404, 548 S.E.2d 213, 216 (2001); State v.

[1] Even defense counsel's closing argument provided no clue as to why he believed that voluntary manslaughter did not apply to the case. (See R. p. 729, line 17 – p, 730, line 8; p. 750, lines 20-22).

Funderburk, 367 S.C. 236, 241, 625 S.E.2d 248, 250 (Ct. App. 2006); State v. Pauling, 322 S.C. 95, 470 S.E.2d 106, 109 (1996); see also State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000). Therefore, Respondent submits that the Court of Appeals erred in concluding that Petitioner's issue regarding voluntary manslaughter was preserved.

B. Voluntary manslaughter was properly charged

Whether a voluntary manslaughter charge is warranted turns on the facts. State v. Starnes, 388 S.C. 590, 597, 698 S.E.2d 604, 608 (2010). "If the facts disclose *any basis* for the charge, the charge *must* be given." Id (emphasis added). In determining whether the evidence requires a charge of voluntary manslaughter, the trial judge must view the facts in the light most favorable to the defendant. State v. Byrd, 323 S.C. 319, 474 S.E.2d 430 (1996). In order to eliminate the offense of voluntary manslaughter, it should be very clear that there is "no evidence whatsoever" tending to reduce the crime from murder to manslaughter. State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000) (citation omitted); State v. Kahan, 268 S.C. 240, 233 S.E.2d 293, 295 (1977).

Voluntary manslaughter is defined as the intentional killing of a human being in the sudden heat of passion resulting from a sufficient legal provocation. State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997). "'Sudden heat of passion upon sufficient legal provocation' that mitigates a felonious killing to manslaughter must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence." State v. Lowry, 315 S.C. 396, 434 S.E.2d 272, 274 (1993) (*quoting* State v. Gardner, 219 S.C. 97, 64 S.E.2d 130 (1951)).

In Petitioner's case, there was evidence presented supporting that Petitioner acted in the sudden heat of passion.[2] First, evidence supported that Petitioner acted in a sudden explosion of anger. It was undisputed that the victim had been insulting and threatening Petitioner continuously. (See R. p. 102-104; p. 129; 150-160; 192-94). Instead of immediately responding in anger, Petitioner quietly absorbed the insults. (See, e.g., R. p. 102-107). However, evidence supported a reasonable inference that Petitioner was silently brooding as his emotions intensified. Petitioner was angry and irritated at the victim. (R. p. 83; p. 105; p. 233). Petitioner's conduct in following the victim and his friend downstairs and out of the building, and in posting himself outside in a menacing fashion while armed with a loaded gun, could support a reasonable inference that he was still internally seething in anger.[3] (See R. p. 86; p. 132-34; p. 180; p. 233-35; p. 238; p. 243-44; p. 294). The fact that Petitioner left the safety of the locked building could further support that he was not thinking rationally due to his anger. Then, after the victim made more hostile comments to Petitioner outside on the sidewalk, Petitioner's pent-up emotions finally exploded and he shot the victim three times, without warning and from a distance, even though the victim had no weapon and nothing in his hands.[4] (See R. p. 238-341; p. 473-74; p. 496, lines 10-22; p. 625, lines 13-17). A reasonable jury could conclude that such an explosion of anger and outrage temporarily disturbed Petitioner's ability to reason, rendered him incapable of cool reflection, and resulted in his uncontrollable impulse to do violence. See State v. Lowry, *supra*.

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[2] Petitioner concedes that the "sufficient legal provocation" element was met. (See Brief of Petitioner, page 4, footnote 1).

[3] Although Petitioner claimed he went outside to look for the police car, it was obvious that he needed not go outside at all because he had already sent two others downstairs to let the police in. (See R. p. 178, lines 12-25; p. 584, lines 19-23; p. 589-96).

[4] Of course, the jury needed not believe Petitioner's own self-serving testimony stating that he acted in a purely rational manner. (See R. p. 599-616). See State v. Smith, 304 S.C. 129, 131, 403 S.E.2d 162, 163 (Ct. App. 1991) (pointing out a jury may decide to believe portions of a witness's testimony and disbelieve other portions).

Alternatively, the jury could have reasonably concluded from the evidence that, at the time Petitioner shot the victim, he was overcome by an irrational fear that caused him to impulsively react with violence. See State v. Starnes, *supra*. Petitioner argues that the evidence reflected only that he "remained in full control of his faculties" so as to preclude voluntary manslaughter. (See Brief of Petitioner, page 5). However, in fact, Petitioner testified that he was "scared out of his mind" and "petrified" and could not believe the "insanity" of what was happening. (See R. p. 606, lines 12-13; p. 609, line 20; p. 612, line 12). He stated that he was in "complete and total shock." (R. p. 605, line 22). He further stated that he was "scared to death" and didn't know what was going on since he was "pretty terrified." (See R. p. 660, line 14 – p. 661, line 9). See State v. Franklin, 310 S.C. 122, 125, 425 S.E.2d 758, 760 (Ct. App. 1992) (the mind can be rendered incapable of cool reflection by "exasperation, rage, anger, sudden resentment, or *terror*") (emphasis added). He also testified that his "brain stream landed when [the victim's] hand went under his shirt." (R. p. 610, lines 14-15). There was other testimony supporting that Petitioner shot the victim impulsively, without giving any warning, indicating a lack of "cool reflection." (See R. p. 183; p. 238; p. 291-94; p. 334, lines 14-17; p. 341).

If the jurors believed the portions of the testimony described above, they could reasonably conclude that Petitioner was acting under a fear that manifested itself in an "uncontrollable impulse to do violence." State v. Starnes, *supra*, at 599, 698 S.E. at 609; see also State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489 (1998); State v. Gilliam, 296 S.C. 395, 373 S.E.2d 596 (1988), State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997), State v. Lowry, 315 S.C. 396, 434 S.E.2d 272, 274 (1993); compare State v. Smith, 363 S.C. 111, 609 S.E.2d 528, 530 (Ct. App. 2005). A reasonable jury could further conclude that Petitioner's fear was not the type of reasonable fear of imminent death that is required to

establish self-defense, in light of Petitioner's decision to remain outside the safety of the locked building, armed with a gun, and in light of the testimony indicating that the victim was just "talking drunk" and was not in fact armed or reaching for a weapon. (See R. p. 239; p. 247; p. 312; p. 317; p. 598, line 20; p. 640, lines 9-15; p. 648-54). Therefore, because there was evidence in the record supporting that Petitioner acted in the heat of passion, the trial judge properly submitted the voluntary manslaughter charge to the jury.

**II. Petitioner's motion for a directed verdict on the ground of self-defense was properly denied because the State presented evidence to negate the elements of self-defense**.

In order to establish self-defense, a defendant must establish that: (1) he was without fault in bringing on the difficulty; (2) he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) a reasonably prudent person of ordinary firmness and courage would have entertained the same belief; and (4) he had no other probable means of avoiding the danger. State v. Bruno, 322 S.C. 534, 473 S.E.2d 450 (1996); State v. Davis, 282 S.C. 45, 317 S.E.2d 452 (1984). Once a defendant raises self-defense, it is the State's burden to disprove it beyond a reasonable doubt. State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489, 492 (1998). However, if the State presents evidence negating just *one* of the four elements of self-defense, the trial judge must deny the defendant's directed verdict motion. See State v. Bixby, 388 S.C. 528, 554, 698 S.E.2d 572, 586 (2010).

The State's burden was met in Petitioner's case because there was evidence supporting that (1) Petitioner was not without from fault in provoking the final confrontation; (2) Petitioner had an opportunity to, and a duty to, retreat in order to avoid the danger; and (3) Petitioner did not reasonably believe it was necessary to kill in order to protect himself. Therefore, the trial judge could not conclude, as a matter of law, that

Petitioner acted in self-defense.[5] See State v. Starnes, 213 S.C. 304, 49 S.E.2d 209 (1948); State v. Morris, 307 S.C. 480, 415 S.E.2d 819, 822 (Ct. App. 1991); see also State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489, 493 (1998) ("Reversal of a conviction because of the trial court's refusing to give a directed verdict on the ground of self-defense is rare.").

A. Petitioner was not without fault

The first element of self-defense required that Petitioner be without fault in bringing on the conflict. Any act of an accused reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars the right to assert self-defense. State v. Slater, 373 S.C. 66, 644 S.E.2d 50 (2007); see also State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999). In this case, the evidence reflected that Petitioner came to the fourth floor and asked the victim to leave the building. (R. 82-83). The victim was hostile and aggressive, and initially refused to leave. (R. p.128-29). After the police were called, however, the victim and his friend decided to leave the apartment and took the elevator downstairs. (R. p. 84-86; p. 132-34). Petitioner decided to follow them by going down the stairs, and then remained behind them as they walked through the lobby. (R. p. 86; p. 109-111). Although the earlier confrontation had ended at that point, Petitioner elected to leave the safety of the building and instead stood on the sidewalk in a menacing fashion in full view of the victim and his friend. (R. p. 110, line 19 – p. 111, line 15; p. 233-38; p. 294, line 16 – 295, line 12).

Petitioner could have entirely avoided the fatal confrontation by simply staying inside the locked building, having completed his job duty. At the least, he could have avoided the fatal confrontation by going back inside the locked building when the victim

[5] Respondent would note that although defense counsel renewed his directed verdict motion at the close of the State's reply testimony, he failed to do so at the close of the defense. (See R. p. 682-83; p. 712-13). In order to preserve his assignment of error, defense counsel should have renewed the motion at the close of his case. Respondent submits that his failure to do so precludes appellate review of his argument regarding self-defense. State v. Adams, 332 S.C. 139, 504 S.E.2d 124, 126-27 (Ct. App. 1998).

and his friend reached the end of the block, some 70-80 feet away. (See R. p. 244-46; p. 417). Despite Petitioner's disputed testimony that the victim was reaching for a weapon in his shirt, it was undisputed that the victim confronted Petitioner only after Petitioner willingly came out of the building and instigated further confrontation while armed with a gun. (R. p. 237-39; p. 647-53). Under these circumstances, a reasonable jury could conclude that Petitioner was not without fault in bringing on the final difficulty. See State v. Slater, *supra*.

In addition, self-defense is not available to one who kills another in mutual combat. There must be "mutual intent and willingness to fight" to constitute mutual combat. State v. Graham, 260 S.C. 449, 450, 196 S.E.2d 495, 495 (1973). Mutual intent is "manifested by the acts and conduct of the parties and the circumstances attending and leading up to the combat." Id. Because mutual combat requires mutual intent and willingness to fight, if a defendant is found to have been involved in mutual combat, the "no fault" element of self-defense cannot be established. State v. Taylor, 356 S.C. 227, 589 S.E.2d 1 (2003). In State v. Graham, *supra*, the defendant and the deceased quarreled and threatened one another prior to the shooting. The defendant was in a barber shop when he observed the deceased alight from his truck with a pistol in his hand. Inasmuch as the defendant then walked into the street and placed himself in a position where an encounter could be expected, this Court held he could not plead self-defense. State v. Graham, *supra*, at 450, 196 S.E.2d at 495.

As in Graham, Petitioner's plea of self-defense was unavailable, because the evidence arguably showed the shooting resulted from a mutual intent to fight. (See R. p.

R. p. 110, line 19 – p. 111, line 15; p. 233-38; p. 294, line 16 – 295, line 12; p. 244-46; p. 237-38; p. 647-53). Petitioner confronted the victim on the fourth floor and told him to leave. After absorbing the victim's abuse and threats, Petitioner followed behind him as he left the building. Petitioner then continued to follow the victim out of the locked building armed with a loaded gun, where the confrontation continued and the fatal shooting ensued. Based upon this evidence, there was a reasonable inference that Petitioner went outside to settle his dispute with the victim - because he had a gun - and he was mutually willing to fight. This evidence precluded self-defense as a matter of law. See State v. Taylor, *supra*.

B. Petitioner had a duty to retreat

A person may use deadly force in self-defense if he reasonably believes that deadly force is necessary to prevent imminent death or great bodily harm and if he is not without fault in provoking the confrontation. See State v. Bruno, *supra*. Even under these circumstances, however, a person may not resort to deadly force without first using every reasonable means within his or her power to avoid the danger. See id. There are a number of exceptions to the requirement of retreat before using deadly force in self-defense. For example, there is no duty to retreat from one's dwelling or within its curtilage. State v. Jackson, 227 S.C. 87 S.E.2d 681 (1955). In State v. Wiggins, the Supreme Court noted that curtilage includes outbuildings, a yard around dwelling, and a garden. State v. Wiggins, *supra*, at 548, 500 S.E.2d at 494 n.15. There is also no duty to retreat in one's place of business, even if the aggressor has a right to be there. State v. Kennedy, 143 S.C. 318, 141 S.E. 559 (1928). In Wiggins, this Court clarified that, consistent with the "curtilage rule," the absence of a duty to retreat in one's place of business also applies to the business parking lot. Wiggins, *supra*, at 548, 500 S.E.2d at 494 n.15 (*citing* State v. Brooks, 252 S.C. 504, 167 S.E.2d 307 (1969).

The shooting here unquestionably occurred on a public sidewalk in front of the building, as admitted by Petitioner and Petitioner's expert witness. (See R. p. 526-34; p. 654, line 24 – p. 655, line 6; see also State's Exhibits 16, 17, 24, 40, 41, 50). Regardless of where the argument started or who initiated the final encounter, the fatal confrontation occurred on a public sidewalk where, under the circumstances, both Petitioner *and the victim* had the right to be and where Petitioner was under a positive duty to avoid the difficulty before resorting to deadly force. A nonresident could stand on the sidewalk at any time, regardless of the placement of the mat or the overhang. (See R. p. 526-27). Petitioner, an employee and resident of the building, had exclusive control and possession *only* over that part of the building or curtilage from which nonresidents could ordinarily be excluded - through the locked doors. If Petitioner's argument prevails, it would give a public sidewalk or thoroughfare the same protection given to one's home or business premises. Such has never been the law in South Carolina.[6] See State v. McGee, 185 S.C. 184, 193 S.E. 303 (1937) (rejecting the defendant's contention that he had no duty to retreat in his car on a public street before killing the decedent); State v. Boyd, 126 S.C. 300, 119 S.E. 839 (1923) (noting that one charged with assault and battery with intent to kill cannot defend on the ground that the right of castle extends to the middle of the street in front of the defendant's house).

Petitioner was under a duty to retreat after he left the building and walked onto the public sidewalk. Contrary to Petitioner's argument, the mat's location on the public sidewalk did not render it part of the business curtilage. The area was a public space in

[6] Other jurisdictions have similarly refused to hold there is no duty to retreat from a sidewalk in front of a business or residence. See, *e.g.*, Nunn v. State, 19 Ala. App. 619, 99 So. 738 (Ct. App. 1924); State v. Menser, 222 Neb. 36, 382 N.W.2d 18, 20 (1986) (holding a sidewalk outside of defendant's apartment house was not part of defendant's "dwelling" within meaning of law of self-defense; hence, instruction that exception to duty to retreat before employing deadly force exists where one is in his dwelling was inapplicable in prosecution of defendant for shooting at another on a sidewalk after pair had left the defendant's apartment); State v. Provoid, 110 N.J. Super. 547, 266 A.2d 307, 311 (1970)(noting the curtilage of one's residence does not extend to a public thoroughfare running along the boundary of one's property).

which Petitioner did not have a reasonable expectation of seclusion from the outside world. Therefore, Petitioner was not entitled to claim immunity from the law of retreat. See State v. Davis, 214 S.C. 34, 36-37, 51 S.E.2d 86, 87 (1948).

C. Petitioner did not reasonably believe he was in imminent danger

Petitioner's perception of deadly danger must have been based on a reasonable belief. State v. Lee, 293 S.C. 536, 362 S.E.2d 24 (1987). The reasonable cause and necessity to kill in self-defense are determined under the circumstances as they appeared to Petitioner. However, the test of reasonableness is an objective one. State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989). In this case, the evidence was disputed as to whether the victim was in possession of a deadly weapon, and was also disputed as to whether he was reaching for a deadly weapon if he had one. (See R. p. 239; p. 247; p. 264; p. 312; p. 317; p. 605-606; p. 610; p. 614-15; p. 619; p. 666-68; p. 672; p. 682). See State v. Wiggins, *supra*, at 548, 500 S.E.2d at 494 n. 13. The fact that the victim was unarmed would not necessarily have precluded self-defense; however, this fact in dispute was relevant to the reasonableness of Petitioner's belief that he needed to act as he did and rendered his justification a jury issue. Petitioner's perceived fear of the victim must also be considered in light of his willingness to leave the locked building to continue the confrontation on the sidewalk. In that vein, notwithstanding any intoxication on the victim's part, Petitioner was certainly not apprehensive about leaving the building in an attempt to confront him. These facts suggest that Petitioner did not consider himself in any imminent danger. The conflicting evidence on all of these points precluded self-defense as a matter of law, and mandated submission of the issue to the jury. See State v. Hall, 259 S.C. 529, 533, 193 S.E.2d 269, 270 (1972) ("While there was testimony which, if believed, would have warranted the conclusion that . . . [the defendant] . . . acted in self-defense, the . . . facts and circumstances required the submission of that issue to the jury for determination.").

Petitioner argues that his case falls squarely within the ambit of State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978), such that he established self-defense as a matter of law. However, Hendrix is distinguishable for several reasons. First, it was undisputed that the defendant was on his own land when the fatal confrontation occurred. Hendrix at 506, 244 S.E.2d at 658-59. Further, the defendant did not provoke the fatal confrontation but instead warned the deceased three times to "back off" before shooting him. Id. at 506, 244 S.E.2d at 659. In addition, the deceased expressly threatened to kill the defendant while he had a gun pointed at him. Id at 505, 244 S.E. 2d at 657. Thus, the defendant was in actual imminent danger of losing his life and the circumstances were sufficient to warrant a reasonable man of ordinary prudence to strike the fatal blow to save his own life. Id. at 507, 244 S.E.2d at 660.

In contrast, the factual disputes in Petitioner's case regarding (1) whether Petitioner was at fault in bringing on the final difficulty; (2) whether Petitioner had an actual and/or reasonable belief he was in imminent danger of harm, including the dispute over whether the victim was armed or not; and (3) whether Petitioner should have used other means to avoid the difficulty, all precluded a directed verdict of self-defense as a matter of law. Accordingly, the trial judge did not err in submitting the issue to the jury.[7] (See R. p. 504-13; p. 712-13). See State v. Hall, *supra*, State v. Wiggins, *supra.*

[7] Petitioner argues that the Court of Appeals erred in failing to address whether a glass bottle constituted a deadly weapon or not. (See Brief of Petitioner, p. 16-18). Defense counsel argued to the jury that Petitioner saw the victim reaching for what turned out to be a bottle in his pants, and that Petitioner had a right to act on appearances. (See R. p. 751-62). The judge instructed the jury that Petitioner had the right to act on appearances. (See R. p. 809-11). Further, the jury heard that a "deadly weapon" is "any article, instrument, or substance that is likely to cause death or great bodily harm." (R. p. 806, lines 11-12). Respondent submits that whether the bottle was a deadly weapon or not was not an issue specifically raised to the trial court, and further, that it was not an question necessary to resolution of the issues on appeal. (See R. p. 859-83).

## III. The trial court's jury instructions regarding the law of self-defense were legally correct and adequately covered the issues raised at trial.

At the conclusion of the trial judge's instructions, defense counsel argued the trial judge did not adequately charge the jury on the right to act on appearances as set forth in his requests to charge. (R. p. 818-19; p. 865-66). He also objected to the failure to charge his requested instruction on curtilage. (R. p. 820; R. p. 879). The trial judge held that his charge on appearances was adequate and refused to give the jury further instructions on the issue. (R. p. 820). However, the trial judge agreed to re-charge the jury regarding a defendant's right to continue to shoot until the danger was abated, and regarding the fact that a defendant has no duty to retreat if doing so would increase the danger. (R. p. 820-24). He also re-instructed the jury that the "no duty to retreat" rule applied to both employees and employers in a place of business. (See R. p. 823-24). No further exceptions were raised. (R. p. 824-25).

A. Error preservation

A jury charge issue is not preserved for appellate review unless a defendant either requested the charge and obtained a ruling, or objected on specific grounds to the charge as given. When an instruction as given is inadequate, a defendant must request further instructions or specifically object at the completion of the instructions in order to preserve the issue for appellate review. See State v. Avery, 333 S.C. 284, 509 S.E.2d 476 (1999); State v. Hoffman, 312 S.C. 386, 440 S.E.2d 869 (1994)(to preserve error for appellate review, a defendant must make a contemporaneous objection on a specific ground); see also State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000) (a party may not argue one ground at trial and an alternate ground on appeal); State v. Bray, 342 S.C. 23, 535 S.E.2d 636 (2000)(it is error for an appellate court to consider issues not raised to it).

On appeal, Petitioner contends the trial judge erred by refusing his request to charge on curtilage, arguing that the testimony showed the area outside the building was part of the business premises. At the conclusion of all the evidence, defense counsel noted an earlier off-the-record charge conference and stated, "we have various positions that have been taken in the charge conference." (R. p. 713; see also p. 879). No specific argument regarding the curtilage charge was made on the record. Following the jury instructions, defense counsel raised the failure to charge on "curtilage" in general, but failed to set forth the specific grounds in support of the requested charge which he now argues on appeal. (R. p. 820, lines 1-2). His general objection regarding the curtilage charge was insufficient, and it precludes appellate review of his assignment of error. See York v. Conway Ford, Inc., 325 S.C. 170, 480 S.E.2d 726, 728 (1997) (stating an objection made in an off-the-record conference but not placed on the record does not preserve the issue for appellate review); see also State v. Wigington, 375 S.C. 25, 649 S.E.2d 185, 190 (Ct. App. 2007) (noting a defendant must set forth a specific reason for his entitlement to a lesser-included offense charge to preserve issue for appellate review).

B. The instructions were proper

The law to be charged to the jury is determined by the evidence presented at trial. State v. Hill, 315 S.C. 260, 433 S.E.2d 848 (1993). A trial judge has a duty to give a requested instruction that correctly states the law applicable to the issues and which is supported by the evidence. State v. Peer, 320 S.C. 546, 466 S.E.2d 375 (Ct. App. 1996). In charging self-defense, the trial judge must consider the facts and circumstances of the case and fashion an appropriate charge. State v. Starnes, 340 S.C. 312, 531 S.E.2d 907, 913 (2000); see also State v. Fuller, 297 S.C. 440, 377 S.E.2d 328, 330 (1989). The trial judge is required to charge only the current and correct law of South Carolina. Sheppard v. State, 357 S.C. 646, 594 S.E.2d 462 (2004); State v. Burkhart, 350 S.C. 252, 565 S.E.2d

298 (2002); see also State v. Buckner, 341 S.C. 241, 534 S.E.2d 15 (Ct. App. 2000) (holding jury charge is proper if, as a whole, it is free from error and reflects the current and correct law of South Carolina). The substance of the law is what must be charged to the jury, not any particular verbiage. State v. Burkhart, *supra*, at 262, 565 S.E.2d at 303; State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994).

In reviewing jury charges for error, the appellate court must consider the trial judge's jury charge as a whole in light of the evidence and issues presented at trial. State v. Adkins, 353 S.C. 312, 577 S.E.2d 460 (Ct. App. 2003). A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law. In re McCracken, 346 S.C. 87, 551 S.E.2d 235 (2001); State v. Johnson, 315 S.C. 485, 445 S.E.2d 637 (1994); see also State v. Burton, 302 S.C. 494, 397 S.E.2d 90 (1990)(charge is sufficient if, when considered as a whole, it covers the law applicable to the case). A jury charge which is substantially correct and covers the law does not require reversal. State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996); State v. Hoffman, 312 S.C. 386, 440 S.E.2d 869 (1994). To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant. State v. Hughey, 339 S.C. 439, 529 S.E.2d 721 (2000), *overruled on other grounds by* Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009); State v. Adkins, supra, at 319, 577 S.E.2d at 464. Failure to give requested jury instructions is not prejudicial when the instructions given afford the proper test for determining the issues. State v. Burkhart, *supra*, at 263, 565 S.E.2d at 304; see also State v. Hughey, *supra*, at 452, 529 S.E.2d at 727 (trial judge's refusal to provide specific jury instructions is not reversible error if the general instructions are sufficiently broad to enable the jury to understand the law and the issues involved).

In State v. Fuller, *supra*, the defendant requested a charge that he had the right to act on appearances. Quoting State v. Jackson, 227 S.C. 271, 87 S.E.2d 681, 684-685

(1955), the Supreme Court set forth an appropriate charge on the right to act on appearances:

> A defendant must show that he believed he was in imminent danger, not that he was actually in such danger, because he had the right to act on appearances, and under the circumstances as they appeared to him, he believed he was in such danger and a reasonable prudent man of ordinary firmness and courage would have entertained the same belief.

Fuller, 377 S.E.2d at 331; see also State v. Gandy, 113 S.C. 147, 101 S.E. 644 (1919)("A man may act, however, from appearances, and if it turns out, if the appearances are such that a man of ordinary courage, firmness, and prudence would have been justified in coming to the conclusion that the necessity did then and there exist to strike to save himself from serious bodily harm or death that would be sufficient, although it turned out afterwards that there was no actual danger present, and that the necessity to strike did not exist").

In this case, the trial judge sufficiently instructed the jury that Petitioner had the right to act on appearances and, as set forth in Fuller, explained "it is enough if the defendant believed he was in imminent danger and a reasonably prudent person of ordinary firmness and courage would have had the same belief." (See R. p. 809-812; p. 823-24; p. 810, lines 12-15). He told the jury that Petitioner could act on appearances, "even though the defendant's beliefs may have been mistaken," and that it was for the jury "to decide whether the defendant's fear of immediate danger of death or serious bodily injury was reasonable and would have been felt by an ordinary person in the same situation." (R. p. 810, lines 15-20). Besides the specific appearances charge issued by the trial judge, he also charged the jury that words accompanied by hostile acts could establish self-defense, and that prior difficulties and threats, the disparity of the parties, the number of people involved, and the victim's intoxication could all be considered in determining whether

Petitioner had a reason to believe a threat existed and how serious the threat may have been. (See R. p. 810, line 20 – p. 811, line 13). The jury was further instructed Petitioner did not have to wait before acting in self-defense, and that he could continue to fire until the threat was mitigated. (R. p. 812, line 1-13; p. 823, lines 12-16). Because the instructions to the jury regarding the right to act on appearances adequately covered the contents of the proposed charges and were a correct statement of the law, there was no error. (See R. p. 861-83).

Further, the trial judge properly charged the jury on the duty to retreat. He instructed that a person has no duty to retreat if by doing so the danger of being killed or suffering serous bodily injury would increase. (R. p. 811, lines 20-23; p. 823, line 23 – p. 824, line 2). He also instructed that a person has no duty to retreat if he is on the premises of his place of business, and that this applied whether the person was an employer or an employee of a business. (R. p. 811, line 17 – p. 812, line 1; p. 823, line 23- p. 824, line 6). These instructions were a correct statement of the law as it applied to the circumstances of the case. See Fuller, supra.

Petitioner's requested instruction regarding curtilage defined the term as "the area of land adjoining a dwelling or business, which includes porches, outbuildings, yards, gardens and parking lots." (See R. p. 879). As previously discussed, it was undisputed that Petitioner shot the victim while standing on a public sidewalk. (See R. p. 526-34; p. 654, line 24 – p. 655, line 6). The public sidewalk area adjoining the building would not be deemed to be part of the curtilage as defined in Petitioner's requested charge. Therefore, because Petitioner was not in the "curtilage" of the business when the fatal confrontation occurred, the requested charge was inapplicable and properly refused. See State v. Starnes, *supra*, at 320-21, 531 S.E.2d at 912 (holding the defendant was not entitled to an appearance charge where there was no evidence he was acting on

appearances). In any event, the substance of the requested charge was adequately covered in the court's charge on "business premises." (See R. p. 811, line 17 – p. 812, line 1; p. 824, lines 2-14; see also p. 518-25). The trial judge, therefore, did not err by refusing to give Petitioner's requested charge on curtilage. See State v. Peer, *supra*.

**IV. The trial judge's illustration regarding voluntary manslaughter was not erroneous where a reasonable juror would not have interpreted that portion of the charge as a comment on the facts of the case.**

Petitioner contends the trial judge erred by improperly commenting on the facts of the case during his jury charge. In his instruction on voluntary manslaughter, the trial judge charged as follows:

> Now, what is voluntary manslaughter. Voluntary manslaughter is the felonious taking of a life of another human being taken in sudden heat and passion upon a sufficient legal provocation. The law recognizes that fact that the sudden heat and passion made for the time being affects one self control, temporarily disturbs the sway of reason and thus reduce the crime of murder to voluntary manslaughter where the homicide was done in sudden heat of passion provided there was a sufficient legal provocation. Sufficient legal provocation must be such as would be calculated to cause a person of ordinary reason and prudence, sometimes described as the average person to become enraged. That is to experience sudden heat and passion and hence to lose control of himself temporarily. *By way of illustration and I would point out this is by illustration alone, that if an unjustifiable assault is made with violence with the circumstances of indignity upon a man's person and the party so assaulted kills the aggressor the crime will be reduced to manslaughter*. If it appears that the assault was presented immediately and the aggressor was killed in the heat of blood. For it will be observed that the killing must be in sudden heat and passion. And if, in fact, passion had cooled or if there was sufficient time between the provocation and the killing before the passion could cool the killing would not be attributed to the heat of passion but to malice. The sufficiency of cooling time would depend upon whether there was time, all circumstances must be considered, for a person of ordinary reason and prudence to cool off. Again, each of those elements must be proven by the State beyond a reasonable doubt before the defendant

> could be convicted of the offense of voluntary manslaughter.
> (R. 807-08) (emphasis added).

Petitioner argues the illustration given by the trial judge constituted an impermissible comment on the facts of the case. Article V, §21 of the South Carolina Constitution states: "Judges shall not charge juries in respect to matters of fact, but shall declare the law." South Carolina law dictates that a trial judge should refrain from any comment tending to indicate to the jury his opinion on the credibility of the witnesses, the weight of the evidence, or the guilt of the accused. State v. Jackson, 297 S.C. 523, 377 S.E.2d 570, 572 (1989); State v. Smith, 288 S.C. 329, 342 S.E.2d 600, 601 (1986). However, jury instructions must be considered in their entirety and, if in their entirety they are free from error, any potentially misleading portions do not constitute reversible error. State v. Hoffman, 312 S.C. 386, 440 S.E.2d 634, 636 (1994); see also State v. Rabon, 275 S.C. 459, 272 S.E.2d 634, 636 (1980)(a jury charge which is substantially correct and covers the law does not require reversal).

In State v. Smith, *supra*, the trial judge improperly commented on the facts during the jury charge when he described the State's burden of proof for the admission of the Breathalyzer exam results and then immediately stated, "You have heard such evidence." State v. Smith, *supra*, at 331, 342 S.E.2d at 601. By contrast, in Petitioner's case, the trial judge's illustration served only an explanatory function and did not offer an improper comment regarding the facts of the case. The trial judge prefaced a comment with the statement that it was only an illustration. (R. p. 807, lines 20-21). While it was designated by the trial judge as an "illustration," it was actually nothing more than a general statement of the law and did not constitute a comment on the specific facts of Petitioner's case. Furthermore, the judge's illustration was not error in light of the voluntary manslaughter instruction as a whole and the entire jury charge. The jury was instructed several times

that it was the sole arbiter of facts and the credibility of witnesses. (See R. p. 49, lines 10-23; p. 795, lines 10-12; p. 801, lines 19-23; p. 802, lines 9-18). Further, the judge specifically told the jury that he was not permitted to have any opinions regarding the facts of the case and that the jury should not construe anything he said during trial as an opinion regarding the facts. (See R. p. 801-802; see also p. 815, lines 15-17).

The appellate court must ascertain what a reasonable juror would have understood the charge to mean. Sheppard v. State, 357 S.C. 646, 594 S.E.2d 462, 472 (2004); State v. Jackson, *supra*, 377 S.E.2d at 572. Here, a reasonable juror would not have singled out the challenged portion of the charge and interpreted it as the trial judge's opinion on the facts of the case or as an instruction as to the weight to be given the evidence. The illustration used by the trial judge, when considered in context of the instructions as a whole, did not reflect any conclusions or opinions on the facts of this particular case. Accordingly, the trial judge's instructions to the jury, when considered as a whole, are not reversible.[8] See State v. Sheppard, *supra*, at 663-64, 594 S.E.2d at 472.

Finally, even if this Court were to determine that the trial judge's illustration amounted to a comment on the facts, Petitioner was not prejudiced. Petitioner was convicted of voluntary manslaughter, yet he concedes the existence of legal provocation. (See Brief of Petitioner, p. 4, footnote 1.) Because the trial judge's illustration only pertained to the "legal provocation" element, there was no reversible error. (See R. p. 807, line 14 – p. 808, line 3). See State v. Kerr, 330 S.C. 132, 498 S.E.2d 212 (Ct. App. 1998) (holding the proper inquiry for a harmless error analysis of an improper jury charge is whether the erroneous charge contributed to the verdict rendered).

[8] In his argument regarding this issue, Petitioner also asserts that the charge regarding the inference of malice from the use of a deadly weapon was improper pursuant to State v. Belcher. (See Brief of Petitioner, p. 26). First, Respondent submits that any issue regarding the malice charge was entirely separate from the issue raised on appeal regarding the trial judge's illustration on voluntary manslaughter. Second, Petitioner was not prejudiced by the malice charge since the jury obviously concluded there was not evidence of malice. (See R. p. 807, lines 1-6; p. 828, lines 5-6).

## V. Petitioner was not entitled to immunity from prosecution based upon the provisions of the "Protection of Persons and Property Act" since the Act did not apply retroactively to Petitioner's case.

The murder with which Petitioner was charged occurred on April 29, 2004, and Petitioner was indicted on May 21, 2004. (R. p. 45, line 1). His trial was held on September 12-15, 2006. At the beginning of trial, Petitioner made a motion to dismiss the case against him based upon the provisions of S.C. Code Ann. § 16-11-450(A), effective date June 9, 2006. (R. p. 43, line 6 – p. 44, line 6). Petitioner argued that "the facts as provided in discovery by the State" showed that he was justified in using deadly force and was therefore acting in self-defense and was entitled to immunity from prosecution under section (A) of § 16-11-450. (R. p. 43, lines 9-12).

Petitioner asserted that this statute codified existing law and was procedural in nature; therefore, it should have retroactive application and should apply to Petitioner's case. (R. p. 43, line 15 – p. 44, line 6; p. 45, lines 15-19). The trial court ruled, based upon the clear intent of the legislature as expressed in the savings clause in § 4 of the Act, that the Act did not apply to Petitioner's case because the case had been pending since 2004. (R. p. 46, lines 7-19). Petitioner's counsel stated that if the court felt the Act was applicable, he would present evidence in support of his motion. (R. p. 46, line 20 – p. 47, line 4). However, no further arguments were made with respect to any other sections of the Act, and no mention of the Act was made again throughout the rest of trial. (See R. p. 47-858).

The trial court's pre-trial ruling was proper. The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. State v. Pittman, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007). Thus, in interpreting statutes, courts look to the plain meaning of the statute and the intent of the legislature. State v. Gaines, 380 S.C. 23, 32, 667 S.E.2d 728, 733 (2008). A statute's language must be construed in light of

its intended purpose. Id. at 33, 667 S.E.2d at 733. Whenever possible, legislative intent should be found in the plain language of the statute itself. Id. "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." State v. Pittman, *supra*, 373 S.C. at 561, 647 S.E.2d at 161(*citing* Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)).

Where the legislative intent is not clear, courts adhere to the presumption that statutory enactments are to be given prospective rather than retroactive application. See State v. Varner, 310 S.C. 264, 266, 423 S.E.2d 133, 134 (1992). However, the South Carolina Supreme Court has frequently recognized that "[a] statute is not to be applied retroactively unless that result is so clearly compelled as to leave no room for doubt." Am. Nat. Fire Ins. Co. v. Smith Grading and Paving, 317 S.C. 445, 454 S.E.2d 897, 899 (1995); see Hercules, Inc. v. S.C. Tax Comm'n, 274 S.C. 137, 262 S.E.2d 45 (1980)(prospective application is presumed absent a specific provision or clear legislative intent to the contrary). The exception to the presumption of prospective operation arises when the statute is remedial or procedural in nature. State v. Davis, 309 S.C. 326, 334, 422 S.E.2d 133, 139 (1992), *overruled on other grounds by* Brightman v. State, 336 S.C. 348, 352 n. 2, 520 S.E.2d 614, 616 n. 2 (1999). However, legislative intent is paramount in determining whether a statute will have prospective or retroactive application. Jenkins v. Meares, 302 S.C. 142, 146, 394 S.E.2d 317, 319 (1990).

First, Respondent submits that the "Protection of Persons and Property Act" creates substantive rights for the citizens of South Carolina. See S.C. Code Ann. § 16-11-420-450. Second, the Act specifically states it was not effective until approved by the Governor, which occurred on June 9, 2006. 2006 S.C. Act No. 379, §6. Additionally, §4 of the 2006 Act provides the following savings clause:

> The repeal or amendment by this act of any law, whether temporary or permanent or civil or criminal, *does not affect pending actions*, rights, duties, or liabilities founded thereon, or alter, discharge, release or extinguish any penalty, forfeiture, or liability incurred under the repealed or amended law, unless the repealed or amended provision shall so expressly provide. After the effective date of this act, all laws repealed or amended by this act must be taken and treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, special proceeding, *criminal prosecution*, or appeal *existing as of the effective date of this act*, and for the enforcement of rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws. (emphasis added).

Therefore, because the legislature clearly and unambiguously specified that the Act be applied prospectively, the Act cannot be applied retroactively to Petitioner's case. See also State v. Bolin, 381 S.C. 557, 673 S.E.2d 885 (Ct. App. 2009).

On appeal, Petitioner made a different argument than the one he made in his pre-trial motion. (See R. p. 43-47; see Final Brief of Appellant, pages 28-33; Brief of Petitioner, pages 27-30). On pages 28-30 of his Brief, Petitioner argues that, under the Act, "the trial court should have held Dickey had no duty to retreat as a matter of law, rather than submitting the issue for the jury to determine because he remained on the doormat under the overhang just in front of the Cornell Arms door, where he both lived and was employed." This argument was never made to the trial court at any time and was not made as a part of the argument in support of a directed verdict.[9] (See R. p. 43-47; p. 504-13; p. 712-13; p. 818-25; p. 876-79). Petitioner also never asked the trial judge to apply the presumptions listed in S.C. Code Ann. § 16-11-430 and -440, and never requested that those presumptions be charged to the jury. (See R. p. 43-47; p. 504-13; p. 712-13; p. 818-25; p. 876-79).

As discussed above, the *only* mention of the Act came at the beginning of trial in

[9] The issue of "duty to retreat" in the context of Petitioner's directed verdict motion is addressed above in Issue II.

the form of a motion to dismiss the case pursuant to S.C. Code Ann. § 16-11-450(A), which provides for immunity from criminal prosecution. Therefore, Petitioner's arguments regarding "no duty to retreat" pursuant to the Act are not preserved. See State v. Dickman, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000) (citations omitted) (a party may not argue one ground at trial and an alternate ground on appeal); State v. Williams, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991) (defendant must object at his first opportunity in order to preserve an issue for review); State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004) (to preserve an issue for review, appellant must timely raise the issue to the trial court, with sufficient specificity, and receive a ruling from the trial court on that issue); State v. Adams, 332 S.C. 139, 144-145, 504 S.E.2d 124, 126-27 (Ct. App. 1998) (argument not preserved for appeal where precise issue not presented to the trial court) (citations omitted); State v. Prioleau, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) (citation omitted) (in order to preserve an alleged error for review, a specific objection must be made to alert the court regarding the precise nature of the error); State v. Tucker, 319 S.C. 425, 462 S.E.2d 263 (1995)(where defendant failed to object to a jury charge, issue is not preserved for consideration on appeal); State v. Stone, 285 S.C. 386, 330 S.E.2d 286 (1985)(the defendant's failure to object to charge as given, or to request an additional charge when the opportunity to do so had been afforded, waived the right to complain on appeal).

Even assuming the Act did apply to Petitioner's case, Petitioner was not entitled to immunity pursuant to S.C. Code Ann. § 16-11-450(A) as a matter of law because there was evidence presented at trial to rebut the necessary elements under S.C. Code Ann. § 16-11-440(c), the only section arguably applicable to Petitioner's case.[10] First, there was

[10] On page 29 of his Brief, Petitioner cites to the presumption of reasonable fear listed in § 16-11-440(A). This section is clearly not applicable to Petitioner's case because there was no unlawful intruder involved.

evidence presented that Petitioner was on a public sidewalk when he shot the victim, not in "his place of business." (R. p. 526-31; p. 654-55). Second, as discussed previously, there was evidence presented that would dispute that Petitioner had a reasonable belief that deadly force was necessary to prevent death or great bodily harm. Even assuming Petitioner had a *genuine* belief that deadly force was necessary, it was within the jury's province to determine whether his belief was "reasonable" under the circumstances. Therefore, even if the Act did apply to Petitioner's case, he was not entitled to immunity from prosecution under S.C. Code Ann. § 16-11-450(A).

## CONCLUSION

For all of the reasons discussed in detail above, this Court should affirm Petitioner's conviction and sentence.

Respectfully submitted,

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