RECEIVED

Sep 27 2022

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Dorchester County
Maite Murphy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TRAVIS LATRELL LAWRENCE,

PETITIONER.

Opinion No. 5863 (S.C. Ct. App. filed Oct. 6, 2021)

APPELLATE CASE NO. 2021-001492

BRIEF OF PETITIONER

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ISSUE PRESENTED 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 4

STANDARD OF REVIEW 6

ARGUMENT

The Court of Appeals erred in holding the hazards of self-incrimination were openly apparent for a witness whose proposed testimony was that he and Petitioner went to a home to purchase marijuana, but never completed the purchase, and that he and Petitioner exercised self-defense when the homeowner attacked Petitioner 8

Relevant Facts 8
Discussion 11

CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Allen v. United States, 164 U.S. 492 (1896) 4, 20

Commonwealth v. Carrera, 227 A.2d 627 (Pa. 1967) 14

Estelle v. Smith, 451 U.S. 454 (1981) 13

First Union Nat. Bank v. First Citizens Bank and Trust Co. of South Carolina, 346 S.C. 462, 551 S.E.2d 301 (Ct. App. 2001) 8

Grosshuesch v. Cramer, 377 S.C. 12, 659 S.E.2d 112 (2008) 13, 14, 15

Hoffman v. United States, 341 U.S. 479 (1951) 13, 14

In re Morganroth, 718 F.2d 161 (6th Cir. 1983) 14

Kastigar v. United States, 406 U.S. 441 (1972) 13

Maness v. Mayers, 419 U.S. 449 (1975) 13

North River Ins. Co., Inc. v. Stefanou, 831 F.2d 484 (4th Cir. 1987) 13

State v. Black, 400 S.C. 10, 732 S.E.2d 880 (2012) 8

State v. Edwards, 384 S.C. 504, 682 S.E.2d 820 (2009) 8

State v. Johnson, 291 S.C. 127, 352 S.E.2d 480 (1987) 16

State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017) 4

State v. Lawrence, 435 S.C. 231, 865 S.E.2d 800 (2021) 12, 19, 24

State v. Leonard, 292 S.C. 133, 355 S.E.2d 270 (1987) 16

State v. Mattison, 388 S.C. 469, 697 S.E.2d 578 (2010) 16

State v. Nesbitt, 346 S.C. 226, 550 S.E.2d 864 (Ct. App. 2001) 16, 17

State v. Quick, 199 S.C. 256, 19 S.E.2d 101 (1942) 17

State v. Reid, 383 S.C. 285, 679 S.E.2d 194 (Ct. App. 2009) 16, 17

State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001) 9

State v. Sutton, 340 S.C. 393, 532 S.E.2d 283 (2000) 16

State v. Von Dohlen, 322 S.C. 234, 471 S.E.2d 689 (1996) 8

Stone v. Reddix-Smalls, 295 S.C. 514, 369 S.E.2d 840 (1988) 8

United States v. Pardo, 636 F.2d 535 (D.C. Cir. 1980) 13

Statutes & Constitutional Provisions

S.C. Code Ann. § 44-53-370(a)(1) 16

S.C. Const. art. I, § 12 13

U.S. Const. amend V 13

ISSUE PRESENTED

Did the Court of Appeals err in holding the hazards of self-incrimination were openly apparent for a witness whose proposed testimony was that he and Petitioner went to a home to purchase marijuana, but never completed the purchase, and that he and Petitioner exercised self-defense when the homeowner attacked Petitioner?

STATEMENT OF THE CASE

On February 2, 2017, a Dorchester County grand jury indicted Petitioner for attempted murder. R. 240-241. Additionally, Petitioner was indicted for armed robbery and possession of a firearm by persons unlawful. R. 2, ll. 7-11. The state, represented by Ryan Templeton and Mike Spears, called the case to trial before the Honorable Maite Murphy and a jury on May 21-23, 2018. R. 1. Michelle Williams and John Loy represented Petitioner. R. 1.

During the deliberations, the jurors asked if the "hand of one, hand of all applied to all of the charges." R. 228, ll. 1-3; R. 236. Judge Murphy, with the consent of the parties, informed the jurors that the accomplice liability instruction applied only to attempted murder and armed robbery. R. 228, ll. 4-6; R. 236.[1] After deliberating for approximately one and a half hours, the jury indicated it was deadlocked. R. 227, ll. 11-16; R. 238.[2] Judge Murphy then instructed the jurors pursuant to Allen v. United States, 164 U.S. 492 (1896). R. 228, l. 18 – R. 230, l. 9. Approximately thirty minutes later, the jurors requested the definition of malice aforethought. R. 230, ll. 20-22; R. 239. Thereafter, Judge Murphy read the attempted murder instruction to the jury again. R. 231, l. 8 – R. 232, l. 3. Thirty minutes later, the jury returned with its verdict, finding Petitioner guilty of attempted murder, but not guilty of armed robbery or possession of the weapon. R. 233, l. 23 – R. 234, l. 10. Judge Murphy sentenced Petitioner to thirty years imprisonment. R. 235, ll. 10-12; R. 242.

---

[1] Trial counsel consented to this instruction despite this Court having expressed that "[o]ne cannot be guilty of attempted murder by implied malice because implied malice does not encompass the essential specific intent to kill" approximately seven months prior to Petitioner's trial. See State v. King, 422 S.C. 47, 57, 810 S.E.2d 18, 23 (2017).

[2] The jury's note indicated it was deadlocked on charge of attempted murder with seven jurors voting for guilty and five voting for not guilty. R. 238.

On May 24, 2018, Petitioner served his notice of appeal. On appeal, Petitioner challenged the trial court's erroneous admission of prior bad act evidence concerning Petitioner's co-defendant who was not on trial and the trial court's decision to allow the co-defendant to invoke the Fifth Amendment preventing Petitioner from presenting favorable evidence. Without the benefit of oral argument, the Court of Appeals affirmed in a published opinion. State v. Lawrence, 435 S.C. 231, 865 S.E.2d 800 (2021); App. 1-7. The Court of Appeals agreed with Petitioner that the trial judge erroneously admitted evidence of prior bad acts, but the Court held the error was harmless. State v. Lawrence, 435 S.C. 231, 865 S.E.2d 800 (2021); App. 1-7. However, the Court agreed with the trial judge that the co-defendant's proposed testimony was self-incriminating such that the co-defendant could invoke his right to silence. State v. Lawrence, 435 S.C. 231, 865 S.E.2d 800 (2021); App. 1-7. On October 21, 2021, Petitioner and the state filed petitions for rehearing. App. 8-27. On November 18, 2021, the Court of Appeals denied the petitions. App. 28.

On December 20, 2021, Petitioner filed his petition for writ of certiorari. The state filed its return on January 19, 2022. On September 7, 2022, this Court granted the petition for writ of certiorari. This brief follows.

STATEMENT OF FACTS

On July 2, 2016, Clayton Baxter lived with a friend in a townhouse. R. 12, l. 18 – R. 13, l. 4. At some point that day, Baxter received a telephone call from Terell Bennett allegedly asking to borrow some money. R. 15, ll. 5-19; R. 35, l. 24 – R. 36, l. 2. Baxter helped raise Bennett and considered Bennett his nephew. R. 15, ll. 11-17; R. 35, ll. 19-23. Accordingly, Baxter immediately agreed to loan Bennett money, and he encouraged Bennett to stop by his home soon to pick up the money. R. 15, ll. 20-22; R. 36, ll. 3-9. Later, Bennett called Baxter to let him know that he was outside. R. 17, ll. 5-7. Baxter then opened the door for Bennett. R. 17, ll. 10-11.

Baxter claimed that as Bennett was entering the townhome, Baxter was "looking between his legs" and saw "a set of feet walking behind him, slow." R. 17, ll. 13-14. Baxter asked Bennett who was behind him. R. 17, ll. 14-15. Instead of answering Baxter's question, Bennett moved to the right. R. 17, l. 16. Baxter claimed he then saw Petitioner holding a .38 revolver on him. R. 17, ll. 16-19; R. 19, ll. 7-10. Baxter was familiar with Petitioner because he had met him several times through Bennett. R. 18, ll. 2-10. He claimed the two men never had any problems with each other. R. 18, ll. 11-13. Nevertheless, Baxter alleged Petitioner held a gun on him and demanded money. R. 19, ll. 18-22.

Baxter waited "for them to make one mistake" so he could "capitalize on it." R. 20, ll. 2-7. According to Baxter, Petitioner made this mistake when he put the gun down as he tried to go through Baxter's pockets. R. 20, ll. 7-9. Seizing this opportunity, Baxter, who was six feet and seven inches tall, picked up Petitioner and slammed him on top of the table. R. 20, ll. 9-10; R. 53, ll. 10-13; R. 182, ll. 17-19. Thereafter, according to Baxter, the three men struggled. R. 20, ll. 15-18. While Baxter's finger was on the trigger of the gun, the gun fired. R. 20, l. 23 – R. 21,

l. 5. Baxter claimed Petitioner then got out from underneath him and went into the kitchen. R. 21, ll. 23-24. Baxter could not explain how Petitioner, who was less than six feet tall and weighed significantly less than Baxter's three hundred pounds, managed to get out from under him during this struggle for the gun. R. 53, l. 25 – R. 54, l. 2; R. 182, ll. 22-23. Nevertheless, Baxter claimed Petitioner retrieved a knife from the kitchen and stabbed him with it. R. 21, l. 24 – R. 23, l. 1.[3] According to Baxter, Petitioner told him to let Bennett go, and Baxter did so. R. 23, ll. 1-4. Bennett and Petitioner then left with seventy dollars. R. 24, ll. 5-11.[4]

During the trial, Baxter admitted he smoked marijuana and had some marijuana and a digital scale in his home on July 2, 2016. R. 16, ll. 5-8; R. 50, ll. 11-12; R. 51, ll. 6-12; R. 89, ll. 16-19. However, he claimed that Petitioner and Bennett were *not* at his home to purchase drugs that day. R. 50, ll. 9-10. When questioned about his prior record, Baxter admitted only to having a prior conviction for possession of marijuana. R. 52, ll. 9-14. He was forced to admit he was actually convicted of possession with intent to distribute marijuana. R. 51, l. 18 – R. 52, l. 3. Baxter also claimed that he never used any other drugs. R. 52, l. 16 – R. 53, l. 2. Yet, he was convicted of possession of cocaine, and the state was forced to admit this fact through a stipulation. R. 71, l. 15 – R. 72, l. 21; R. 237.

---

[3] When the police officers arrived, Clayton Baxter told one of the officers that Terell Bennett stabbed him. Defendant's Exhibit #9. During the trial, Baxter repeatedly claimed he never said Bennett stabbed him, but the officer's body cam video showed Baxter told the first responding officer that Bennett "did it" and Petitioner was just there with Bennett. Cf. R. 38, ll. 18-24 with Defendant's Exhibit #9; see also R. 39, ll. 1-9; R. 44, l. 8 – R. 45, l. 7; R. 46, ll. 4-8.

[4] Baxter had over $600 in his home that was not stolen. R. 49, ll. 12-21; R. 89, ll. 14-15; Defendant's Exhibit #3; Defendant's Exhibit #5. This money was "in a whole bunch of different denominations, hundreds, twenties, tens, ones." R. 50, ll. 1-5; Defendant's Exhibit #3; Defendant's Exhibit #5.

STANDARD OF REVIEW

Generally, in criminal cases, appellate courts review errors of law only and are bound by the trial court's findings of fact unless those findings are clearly erroneous. State v. Edwards, 384 S.C. 504, 508, 682 S.E.2d 820, 822 (2009). Thus, appellate review is limited to determining whether the trial court abused its discretion. Id. A trial court abuses its discretion when its decision is unsupported by the evidence or controlled by an error of law. State v. Black, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012).

While Petitioner has been unable to locate the standard of review for determining whether a trial judge erred in permitting a witness to invoke his Fifth Amendment right, the standards of review in similar cases are instructive. In a case reviewing a trial court's decision to hold a party in contempt for asserting his privilege against self-incrimination where the trial court determined the party's assertion was in error, this Court explained an appellate court would reverse a trial court's decision regarding contempt only if it were without evidentiary support or were an abuse of discretion. First Union Nat. Bank v. First Citizens Bank and Trust Co. of South Carolina, 346 S.C. 462, 466, 551 S.E.2d 301, 303 (Ct. App. 2001) (citing Stone v. Reddix-Smalls, 295 S.C. 514, 369 S.E.2d 840 (1988)).

Similarly, when reviewing whether an individual waived his privilege against self-incrimination when speaking with law enforcement, the appellate courts review the trial court's decision using an abuse of discretion standard. State v. Von Dohlen, 322 S.C. 234, 243, 471 S.E.2d 689, 695 (1996). Specifically, "[o]n appeal, the conclusion of the trial judge as to the voluntariness of a confession will not be reviewed unless so erroneous as to show an abuse of discretion." Id. "When reviewing a trial court's ruling concerning voluntariness, [the appellate court] does not reevaluate the facts based on its own view of the preponderance of the evidence,

but simply determines whether the trial court's ruling is supported by any evidence." State v. Saltz, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001).

Thus, in light of the general standard of review in criminal cases, and the standard of review in cases involving the invocation of one's right against self-incrimination, Petitioner asserts the proper standard of review in the present case is an abuse of discretion. Furthermore, Petitioner contends the trial judge abused her discretion by committing a legal error. Her conclusion that Bennett's proposed testimony would be incriminating of Bennett constituted a legal error.

ARGUMENT

The Court of Appeals erred in holding the hazards of self-incrimination were openly apparent for a witness whose proposed testimony was that he and Petitioner went to a home to purchase marijuana, but never completed the purchase, and that he and Petitioner exercised self-defense when the homeowner attacked Petitioner.

Relevant facts

Petitioner wanted to call Terell Bennett, as a witness. R. 127, ll. 7-9. However, Bennett indicated he wanted to invoke his right to silence. R. 128, ll. 4-8; R. 135, ll. 17-19. Therefore, Judge Murphy held an *in camera* hearing to determine whether Bennett could invoke his right to silence – whether the proposed testimony would be incriminating. R. 127, ll. 18-25; R. 129, ll. 1-6; R. 135, ll. 23-24; R. 136, ll. 9-12. Neither the solicitor nor defense counsel were present for the hearing; however, Bennett's counsel was present.

The solicitor met with Bennett twice prior to Petitioner's trial. R. 148, ll. 1-10; R. 152, l. 25 – R. 153, l. 12. Eric Melendez, the solicitor's investigator, was present for these meetings. R. 146, ll. 20-24. These meetings were not memorialized. R. 147, ll. 19-21. While the first meeting was considered unproductive by the state's investigator, the second meeting bore greater fruit. R. 148, ll. 6-21; R. 149, l. 4 – R. 150, l. 20. When defense counsel learned about these meetings from Bennett's counsel, counsel contacted the solicitor. R. 153, l. 23 – R. 154, l. 16; R. 156, ll. 6-8. The solicitor informed counsel that he had not taken any notes during the meetings; therefore, the solicitor provided defense counsel with no information about what took place during the meetings. R. 154, ll. 18-21. After learning from Bennett's counsel that Melendez was present for the meetings, defense counsel contacted the investigator prior to the trial. R. 155, ll. 3-8. What occurred during this contact was disputed as demonstrated by defense counsel's

questioning of the investigator during an *in camera* hearing. Most importantly, the investigator denied telling defense counsel that Bennett stated that Baxter rushed or lunged at Petitioner. R. 151, ll. 5-17. The investigator also did not recall telling defense counsel that Bennett's statement indicated Petitioner acted in self-defense. R. 151, l. 22 – R. 152, l. 16.

Outside the presence of both counsel and Petitioner, Judge Murphy questioned Bennett. Bennett explained that he spoke with the solicitor shortly before Petitioner's case was called to trial. R. 136, l. 23 – R. 139, l. 17. The judge asked Bennett to tell her what he told the solicitor during that meeting. R. 139, ll. 18-21. Bennett told "the truth of what happened," including that he was "being held against [his] will and falsely accused." R. 139, ll. 22-25. Bennett and Petitioner went to Baxter's home to buy marijuana. R. 140, ll. 1-2. When Bennett and Petitioner went to Baxter's home, Baxter attacked them. R. 139, l. 25 – R. 140, l. 1. Bennett believed Petitioner and Baxter had a "history." R. 140, ll. 2-3. As soon as Bennett and Petitioner went into Baxter's house, Baxter "attacked [Petitioner] first." R. 140, ll. 8-9. As soon as Baxter saw Petitioner, "his whole demeanor just flip out of nowhere like he was frustrated." R. 140, ll. 17-20.

Bennett's counsel admitted Bennett's testimony would "provide or bolster" a self-defense case for Petitioner. R. 143, ll. 6-8. Further, she admitted that she would "probably call" Bennett to testify in his defense at his trial. R. 145, ll. 2-8. However, she argued, without providing an specifics, Bennett would be asked to give information "that could potentially be used against him." R. 143, ll. 8-10.

Judge Murphy indicated that Bennett's statement that he was going to Baxter's home to buy marijuana would implicate him in a crime. R. 141, ll. 1-5. She also indicated that Bennett was "putting [himself] at the scene of this alleged crime." R. 141, ll. 11-14. Nevertheless, she

agreed that Bennett's testimony showed his actions and Petitioner's actions were in self-defense. R. 141, ll. 15-20. Judge Murphy found Bennett's answers to the questions she posed "would be indicative that would establish a hazard of incrimination for him." R. 159, ll. 2-5. She further held "his silence [was] certainly justified in this matter" because "if he were allowed to testify, that he would incriminate himself." R. 159, ll. 5-8. She concluded that even if "those specific single questions may not be overtly incriminating" they "would be incriminating through any further confessional proof." R. 159, ll. 8-11. Thus, she permitted Bennett to assert his Fifth Amendment right to silence *in toto* and prohibited Petitioner from calling him as a witness. R. 159, ll. 11-13.

The Court of Appeals affirmed Judge Murphy's determination. With no details, the Court concluded "[t]he hazard of incrimination was openly apparent." State v. Lawrence, 435 S.C. 231, 241, 865 S.E.2d 800, 805 (2021). The Court provided no insight into what portions of Bennett's proposed testimony were self-incriminating. Further, the Court held "Bennett was not facing just a risk of prosecution; he was already being prosecuted as [Petitioner]'s indicted co-defendant." Id. While true, the fact that a person is being prosecuted does not give the person carte blanche to assert the Fifth Amendment. Boldly, the Court of Appeals declared, "Almost anything Bennett could utter about the incident would likely be used against him at his upcoming trial." Id. This is simply not the test.

Although the Court of Appeals recognized that "Bennett's proposed testimony was at odds with what the State was contending was the truth," which implicitly acknowledged that Bennett's testimony would have supported Petitioner's claim of self-defense, the Court appeared to reason that this fact supported a finding that Bennett's testimony was self-incriminating. The

state's contention of what constitutes "the truth" is not the determining factor, or any factor, of whether proposed testimony is self-incriminating.

Discussion

No person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend V.[5] "The essence of this basic constitutional principle is the requirement that the state which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips." Estelle v. Smith, 451 U.S. 454, 462 (1981); see also Kastigar v. United States, 406 U.S. 441, 444 (1972) (explaining the privilege "reflects a complex of our fundamental values and aspirations, and marks an important advance in the development of our liberty"). The privilege is "accorded liberal construction in favor of the right it was intended to secure," and may be claimed when a witness "has reasonable cause to apprehend danger from a direct answer." Hoffman v. United States, 341 U.S. 479, 486 (1951). "The settled law provides that the privilege extends not only to answers that would themselves support a criminal conviction, but also to answers furnishing a link in the chain of evidence needed to prosecute an individual." Grosshuesch v. Cramer, 377 S.C. 12, 659 S.E.2d 112 (2008) (citing Hoffman, 341 U.S. at 486); see also Maness v. Mayers, 419 U.S. 449, 461 (1975); United States v. Pardo, 636 F.2d 535, 544 (D.C. Cir. 1980) (explaining that "a witness does not lose his Fifth Amendment right to refuse to testify concerning other matters or transactions not included in his conviction or plea arrangement").

"The privilege against self-incrimination, one of our most cherished fundamental rights, is jealously guarded by the courts." North River Ins. Co., Inc. v. Stefanou, 831 F.2d 484, 486

[5] The South Carolina Constitution also provides for protection against compelled self-incrimination. S.C. Const. art. I, § 12.

(4th Cir. 1987). Examining the validity of the assertion of the privilege, the Sixth Circuit held a valid assertion "exists where a witness has reasonable cause to apprehend a real danger of incrimination." In re Morganroth, 718 F.2d 161, 167 (6th Cir. 1983). "While the privilege is to be accorded liberal application, the court *may* order a witness to answer if it *clearly* appears that he is mistaken as to the justification for the privilege in advancing his claim as a subterfuge." Id. (emphasis added).

For a court to "overrule the claim of privilege, it must be [p]erfectly clear from a careful consideration of all the circumstances, that the witness is mistaken in the apprehension of self-incrimination and the answers demanded [c]annot possibly have such tendency." Commonwealth v. Carrera, 227 A.2d 627, 629 (Pa. 1967). "[I]f the witness, upon interposing his claim, were required to prove the hazard [of self-incrimination] in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee." Hoffman, 341 U.S. at 486.

According to this Court, "[i]n determining whether the information is incriminating," there are "at least two categories of potentially incriminating questions." Grosshuesch, 377 S.C. at 23, 659 S.E.2d at 117. "First, there are questions whose incriminating nature is evident on the questions' face in light of the question asked and the surrounding circumstances." Id. at 23, 659 S.E.2d at 117-118. "Second, there are questions which though not overtly incriminating, can be shown to be incriminating through further contextual proof." Id. at 23, 659 S.E.2d at 118. A court must answer "whether there is a reasonable possibility that requiring a party to answer a certain question would provide information that could be used against the party in a criminal proceeding or would lead to the discovery of such information." Id. at 24, 659 S.E.2d at 118.

"[T]he guiding principle in a self-incrimination inquiry is the objective reasonableness of a witness's claimed fear of future prosecution." Id. at 26, 659 S.E.2d at 119.

In light of the Court of Appeals not detailing its holding that "[t]he hazard of incrimination was openly apparent," Petitioner must examine the trial court's rulings as to what criminal exposure Bennett faced if he were to testify in accordance with his *in camera* hearing testimony. The trial judge found that Bennett's testimony that he and Petitioner were going to Baxter's home to buy marijuana would be self-incriminating. Further, the trial judge found Bennett's testimony overall was self-incriminating because it placed him at the scene of a crime. Petitioner will address each reason in turn to show the error of each.

Presence at the scene of a crime

In ruling that Bennett could invoke his right against self-incrimination and refuse to testify, Judge Murphy determined that Bennett was exposing himself to criminal liability by admitting his presence at the scene of a crime. As an initial matter, Bennett did not admit to being present at the scene of a crime. Bennett admitted to being present when Petitioner acted in self-defense against Baxter's unprovoked attack. As Bennett explained, Baxter attacked and Petitioner acted in self-defense. Thus, there was no crime for which Bennett was present as Petitioner's conduct was justified as self-defense.

Respondent mischaracterized Petitioner's argument on this point. Respondent argued that Petitioner "seem[ed] to assert that a confession of guilt is the only possible reason to assert the Fifth Amendment privilege." Ret. at 11. Petitioner's argument is decidedly not that an individual may only invoke the Fifth Amendment privilege against self-incrimination if the individual answering the questions would confess to a crime by doing so. Instead, Petitioner argued that Bennett's testimony regarding his presence at the scene is not self-incriminating

because it does not implicate Bennett in a crime. The death of Baxter was justifiable, meaning no crime was committed. Here, it is not simply an assertion of a defense to a crime. Rather, Bennett's testimony showed the absence of a crime altogether.

Additionally, merely being present at the scene of a crime is not incriminating – even under an accomplice liability theory. State v. Johnson, 291 S.C. 127, 129, 352 S.E.2d 480, 482 (1987). "'Mere presence at the scene is not sufficient to establish guilt as an aider or abettor.'" State v. Mattison, 388 S.C. 469, 480, 697 S.E.2d 578, 584 (2010) (quoting State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 272 (1987)). The trial judge erred in finding Bennett's mere presence at the scene of a crime was self-incriminating.

Attempting to purchase marijuana

Likewise, Judge Murphy's determination that Bennett's testimony that he went to Baxter's residence to purchase marijuana exposed him to criminal liability was legal error. Bennett did not admit to buying or possessing marijuana; thus, the only consideration left is whether his testimony incriminating him in attempting to purchase marijuana in violation of section 44-53-370 of the South Carolina Code. Under South Carolina law, it is unlawful for a person to attempt to purchase a controlled substance. S.C. Code Ann. § 44-53-370(a)(1).

"Generally, the mens rea of an attempt crime is one of specific intent such that the act constituting the attempt must be done with the intent to commit that particular crime." State v. Reid, 383 S.C. 285, 292, 679 S.E.2d 194, 198 (Ct. App. 2009) (citing State v. Sutton, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000)). "'In the context of an attempt crime, specific intent means that the defendant consciously intended the completion of acts comprising the choate offense.'" Id. (quoting State v. Nesbitt, 346 S.C. 226, 231, 550 S.E.2d 864, 866 (Ct. App.

2001)). Additionally, "the defendant's specific intent" must be "accompanied by some overt act, beyond mere preparation, in furtherance of the intent." Id.

In Reid, the Court of Appeals discussed how "[c]ourts have struggled to determine the point at which conduct moves beyond the preparatory stage to the perpetration stage." Id. at 293, 679 S.E.2d at 198. Further, the Court explained that "[c]ases in South Carolina do not clearly establish any absolute guiding test for our trial courts to employ in resolution of this issue." Id. After discussing other tests used by other courts, the Court looked to *dicta* from this Court in State v. Quick, 199 S.C. 256, 259-260, 19 S.E.2d 101, 102-103 (1942). Id. at 296, 679 S.E.2d at 199. The Court of Appeals relied upon this Court's notation that "'preparation consists in devising or arranging the means or measures necessary for the commission of the crime; the attempt or overt act is the direct movement toward the commission, after the preparations are made.'" Id. (quoting Quick, 199 S.C. at 260, 19 S.E.2d at 103). Further, "'the act' is to be liberally construed, and in numerous cases it is said to be sufficient that the act go far enough toward accomplishment of the crime to amount to the commencement of its consummation." Id. (quoting Quick, 199 S.C. at 259, 19 S.E.2d at 102). Finally, "'the act need not be the last proximate step leading to the consummation of the offense.'" Id. (quoting Quick, 199 S.C. at 259, 19 S.E.2d at 102).

According to the Court of Appeals, "no definite rule as to what constitutes an overt act for attempt purposes can safely be laid down and each case is dependent upon its particular facts and the inferences which the jury may reasonably draw therefrom." Id. at 298, 679 S.E.2d at 200. The only way to construe the trial court's and Court of Appeals' rulings on this aspect is that Bennett went to Baxter's house to buy marijuana. There was no evidence from his testimony that he acted in any way in furtherance of that act. At most, his testimony indicated

that his purpose in going to Baxter's house was to purchase marijuana, but that is far cry from an overt act. Perhaps going to Baxter's home could be preparation as it may be "arranging the means or measures necessary" to purchase the marijuana, but it was not a direct movement toward the commission of a crime. In light of Baxter's testimony that he did not sell drugs and the officer's testimony that less than one ounce of marijuana was found in Baxter's residence, there seems to have been no pre-arrangement made by Bennett in hopes of buying marijuana from Baxter – there was none to buy and he did not sell it.

The trial judge erred in finding Bennett's testimony would expose him to criminal liability. Furthermore, the Court of Appeals erred in affirming the trial judge's finding in this regard. The Court of Appeals relied too heavily upon the fact that Bennett had been charged as a co-defendant to determine that "[a]lmost anything Bennett could utter about the incident would likely be used against him at his upcoming trial." If the decision of the Court of Appeals stands, prosecutors will simply initiate criminal charges against any witness favorable to the defense as a way to prevent the witness from testifying.

Here, Bennett's testimony was limited to his admission that he went to Baxter's house to purchase marijuana, but did not complete the purchase, and his admission that he and Petitioner exercised self-defense when Baxter attacked Petitioner. Thinking about purchasing marijuana is not a crime. Exercising self-defense is not a crime. The simple fact that the prosecutor charged Bennett with criminal offenses could not allow Bennett to invoke blanket protection of the Fifth Amendment. Furthermore, the existence of the pending criminal charges could not shield the trial judge's ruling on his right to invoke the Fifth Amendment from appellate review as the Court of Appeals appeared to hold.

Not directly addressed by the Court of Appeals or Respondent was the fact that to the extent Bennett's testimony was self-incriminating, the trial judge engaged in a proceeding[6] that elicited the self-incriminating testimony on the record although she told Bennett that his testimony during the *in camera* hearing was "not out there for them to use against [him]." R. 136, ll. 4-7.[7] Furthermore, and importantly, Bennett had provided this information to the state during two meetings; thus, to the extent it was incriminating of Bennett, the state already had these self-incriminating statements. Notably, when speaking with the state, Bennett placed himself at the scene, placed the gun in his possession, and placed the gun in his possession when it fired. R. 149, l. 4 – R. 150, l. 20. In fact, Bennett's counsel claimed that everything Bennett said during the *in camera* hearing should have been provided to the defense during discovery, but oddly "it wasn't." R. 142, ll. 21-25. Bennett's counsel explained that Bennett met with the state in a "very informal meeting" in an "attempt[] to cooperate and ... obtain a better deal for himself." R. 143, ll. 15-18.

Bennett's proposed testimony that was revealed during the in camera hearing was not self-incriminating, and the trial judge erred in allowing him to invoke his Fifth Amendment right against self-incrimination. This was a close case. The state's key witness – Baxter – denied

---

[6] The Court of Appeals noted that the instant case did not present "a challenge to the procedure the trial court used." State v. Lawrence, 435 S.C. 231, 239, 865 S.E.2d 800, 805 (Ct. App. 2021). Defense counsel did not object to the procedure used by the trial court; thus, no issue on appeal concerning that procedure could be presented. Furthermore, in light of the trial judge excluding defense counsel from the *in camera* hearing, defense counsel could not have objected to anything specific that transpired during that hearing.

[7] The Court of Appeals observed that the "trial court's examination of Bennett may have been too specific." State v. Lawrence, 435 S.C. 231, 241, 865 S.E.2d 800, 805 (Ct. App. 2021). Notably, Bennett's lawyer was present for the examination and did not object. As mentioned, the trial judge stated that Bennett's statements during the *in camera* hearing were not going to be used against him; however, the judge was not in a position to grant Bennett any type of immunity from prosecution or immunize his statements. Again, Bennett's lawyer did not object to the questioning.

telling the police that Bennett was the culprit when irrefutable proof showed that he did. He also misrepresented his criminal history – twice. At some unknown period, the jury questioned whether "the hand of one, hand of all applied to all of the charges." R. 228, ll. 1-3. The jurors were erroneously instructed that the accomplice liability theory applied to attempted murder and armed robbery. R. 228, ll. 4-6. The jury deliberated for approximately ninety minutes before revealing to the judge the jurors were "deadlocked." R. 227, ll. 11-16. The judge instructed the jury pursuant to Allen v. United States, 164 U.S. 492 (1896) then. R. 228, l 18 – R. 230, l. 9. Yet, the jury still had questions. This time, the jury wanted to know about malice aforethought. R. 230, ll. 20-22. Thereafter, the judge simply repeated her instruction on malice. R. 231, l. 8 – R. 232, l. 3. Although this instruction defined attempted murder as requiring express malice, the judge previously instructed the jury that accomplice liability – which is a theory of implied intent – applied to attempted murder. At best, the judge's instructions were confusing.

After deliberating for three and one-half hours, asking two questions and being given the dynamite charge, the jury reached a split verdict – some might call it an inconsistent verdict. The jury found Petitioner guilty of attempted murder, and acquitted him of armed robbery and possession of a firearm by a person convicted of a crime of violence, even where it was stipulated that Petitioner was not permitted to possess a handgun because he had been convicted of a crime of violence. Quite simply, the evidence against Petitioner was not overwhelming.

It was undisputed that Bennett's proposed testimony would have supported Petitioner's contention that he had not attacked Baxter. Defense counsel skillfully attacked the credibility of the state's sole witness against Petitioner – Baxter. Had defense counsel been able to present Bennett as a witness to strengthen Petitioner's claim that he did not attack Baxter, this would have further eroded Baxter's credibility in the eyes of the jury. Where the credibility of a single

eyewitness was of the greatest importance to the state's case, additional evidence attacking the witness's credibility could not be harmless.

CONCLUSION

Petitioner respectfully requests this Court reverse his conviction and remand for a new trial.

Respectfully Submitted,

Susan B. Hackett
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

This 27th day of September, 2022.