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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 5955 (filed Dec. 7, 2022)

THE STATE,

RESPONDENT,

V.

PHILIP DAVID GUDERYON,

APPELLANT

APPELLATE CASE NO. 2017-002168

PETITION FOR REHEARING

On December 7, 2022, this Court affirmed Appellant's conviction for assault and battery of a high and aggravated nature (ABHAN). State v. Guderyon, Op. No. 5955 (Howard Adv. Sh. No. 43 at 13) (S.C. Ct. App. filed Dec. 7, 2022). Pursuant to Rule 221(a), SCACR, Philip David Guderyon requests this Court grant rehearing on this matter due to several significant points overlooked and misapprehended by this Court.

Erroneous denial of motion for directed verdict

Despite finding no evidence to support the state's claim that Appellant sucker punched the deceased in the back of the head, the trial judge denied Appellant's motion for a directed

verdict. Likewise, this Court also held there was "no evidence in the record supporting the state's theory that Appellant struck [the deceased] in the back of the head." Nevertheless, this Court affirmed the trial judge's denial of the motion for directed verdict because this Court concluded there was substantial circumstantial evidence that Appellant punched the deceased and the punch resulted in great bodily injury and ultimately death. Appellant respectfully requests rehearing on this matter due to significant points overlooked or misapprehended by this Court.

Multiple witnesses testified that Appellant punched the deceased in the face. The video and still shots tended to corroborate this testimony. No witness claimed Appellant punched the deceased in the back of the head. However, Dr. Joseph Cheatle, who treated the deceased, testified that his injury was the result of a hit to the back of his head.[1] According to Dr. Cheatle, the deceased suffered a subgaleal hematoma on the left side and a subdural hematoma on the right frontal lobe. In Dr. Cheatle's opinion, the deceased "had a force applied to the back of his head" causing the "front of his head on the exact opposite trajectory" to bleed. Further, Dr. Cheatle explained the deceased suffered a vascular skull fracture. Dr. Cheatle explained the force to the back of the deceased's head could have been from human contact or any contact with a hard surface, such as a bat, pipe wrench, or any number of things.

Dr. Cheatle was clear – in his expert opinion, the deceased "had an assault to the back of his head." He opined that a punch to the back of the head would have been sufficient to cause the injury and that there was a single sign of assault. This Court relied upon what it

[1] At some point, the deceased arrived at the Grand Strand Medical Center. Although individuals testified to observing an ambulance at the bar, the state presented no witnesses or other evidence concerning how the deceased arrived at the hospital, who called for the ambulance, the condition in which he was found by emergency medical personnel, or what happened to the deceased between being dumped outside by the bouncers and arriving at the hospital.

characterized as Dr. Cheatle's concession that the deceased's "injuries could have resulted from [the deceased]'s head striking the floor after he fell." However, Dr. Cheatle made no such concession. Rather, he agreed the injury could result from contact with an object, like a bat or pipe wrench. As close as he got to the concession asserted by this Court is when he testified that any abrupt stop in the head can cause a bleed.

A defendant is entitled to a directed verdict when the prosecution fails to provide evidence of the offense charged. State v. Brown, 103 S.C. 437, 88 S.E. 21 (1916); State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006); State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused," the trial judge may deny the motion for directed verdict. State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001); State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000); State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000). When the prosecution relies exclusively on circumstantial evidence, the trial judge must direct a verdict in the defendant's favor unless there is substantial circumstantial evidence which reasonably tends to prove the guilt of the defendant or from which his guilt may be fairly and logically deduced. State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011); State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000).

The state charged Appellant with ABHAN. Thus, the state was required to show Appellant "unlawfully injure[ed] another person and (a) great bodily injury to another person result[ed]; or (b) the act [was] accomplished by means likely to produce death or great bodily injury." S.C. Code Ann. § 16-3-600 (B)(1). "A person cannot be convicted of any crime defined in terms of a result ... unless his act is the proximate cause of the result." William S. McAninch, et al., The Criminal Law of South Carolina 90 (6th ed. 2013). The Supreme Court explained "[t]he proximate cause of an

injury is that cause which, in natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury and without which the result would not have occurred." State v. Des Champs, 126 S.C. 416, 416, 120 S.E. 491, 493 (1923) (internal quotation and citation omitted). Proximate cause "is more broadly, rather than more narrowly, applied against the wrongdoer in a criminal prosecution than against the tort-feasor in a civil action." Id. at 416, 120 S.E. at 493. "Thus, in a criminal action, the wrongdoer whose crime has resulted in injury to another will not be absolved on the ground that the wrongful act or negligence of the person injured contributed to the injury as proximate cause." Id.

Thus, the statute required the state prove that Appellant's conduct *caused* the deceased's injury. See State v. Greene, 423 S.C. 263p, 814 S.E.2d 496, 498-499 (2018) (discussing causation in the context of a homicide by child abuse case); State v. Dantonio, 376 S.C. 594, 604-606, 658 S.E.2d 337, 343-344 (Ct. App. 2008) (explaining causation in a felony driving under the influence case); State v. Burris, 334 S.C. 256, 265 n.11, 513 S.E.2d 104, 109 n.11 (1999) (noting "the rule the unlawful activity must proximately cause death"); State v. Burton, 302 S.C. 494, 497-498, 397 S.E.2d 90, 92 (1990) (discussing causation in a murder case); State v. Matthews, 291 S.C. 339, 346-347, 353 S.E.2d 444 449 (1986) (discussing causation); State v. Brown, 205 S.C. 514, 32 S.E.2d 825, 827 (1945) (discussing causation). More specifically, the state was required to prove that Appellant's act of hitting the deceased once caused great bodily injury or was likely to produce death or great bodily injury. The state was unable to do so.

As this Court and the trial judge noted, no evidence in the record supported the state's theory that Appellant struck the deceased in the back of the head. The evidence indicated that Appellant struck the deceased in the face with a single punch. The undisputed evidence – the video and still photographs – further indicated that the deceased fell backward, landing with his feet straight up

toward the ceiling, as the judge noted. Additionally, the undisputed evidence – the video and the still photographs – showed two bouncers dragging the deceased from the dance floor to the door. The bouncers deposited the deceased on the floor and re-positioned him. Thereafter, the bouncer dumped him outside. There was no evidence presented regarding where the bouncers put the deceased – was he dropped on his head on a concrete sidewalk by the bouncers? There was no evidence presented regarding how the bouncers handled the deceased – did the bouncers knock his head against walls, doors, or other objects? The state's evidence simply failed to show that Appellant's act of punching the deceased in the face caused the injuries described by Dr. Cheatle. For this reason, the trial judge erred in failing to direct a verdict of acquittal on the charge of ABHAN. Appellant respectfully requests rehearing on this issue, particularly in light of Dr. Cheatle's testimony.

Erroneous self-defense instruction

Appellant respectfully requests this Court rehear Appellant's issue on appeal that the trial judge erred by instructing the jury that in order for self-defense to apply, Appellant, who did not use deadly force, must have been in fear of serious bodily injury or death because this Court's decision provides no definitive ruling on the matter. First, this Court noted that the question presented on appeal was one "our appellate courts may need to address," but this Court declined to do so because the circumstances warranting an appellate decision on the matter did not exist here. The circumstances included this Court questioning whether Appellant was entitled to a self-defense instruction at all and remarking that the trial court provided a specialized and appropriate jury instruction in light of the evidence presented at trial. Appellant respectfully requests hearing on this matter to address the issue directly because the circumstances presented warrant an appellate decision on the matter.

Notably, the state did not object to the judge instructing the jury on self-defense – neither at trial nor in its appellate brief. At all times, the state agreed Appellant was entitled to a jury instruction on self-defense. The state merely objected to changing the language to make clear that Appellant need not fear death or serious bodily injury in order to exercise his right to self-defense.

While it is true that there was evidence in the record that Appellant walked to the dance floor area to where his friend was engaged in a heated verbal altercation with the deceased, Appellant was without fault in bringing on the difficulty. Appellant respectfully requests this Court rehear this aspect in light of the case law regarding bringing on the difficulty. By all accounts, Appellant approached the two men on the dance floor in order to diffuse the situation. "Any act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars the right to assert self-defense." State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999). Not only was Appellant's conduct not in violation of law, but it was not calculated to produce the occasion.

The Supreme Court held Slater engaged in conduct that amounted to bringing on the difficulty when he approached an altercation that was already underway with a loaded weapon by his side. State v. Slater, 373 S.C. 66, 70, 644 S.E.2d 50, 52 (2007). Slater also acted in violation of the law by carrying a weapon, which the Court held was the proximate cause of the homicide.[2] Id. at 71, 644 S.E.2d at 53. Unlike Slater, Appellant was not in unlawful possession of a weapon. In fact, Appellant was not in possession of a weapon at all. In another case, the Supreme Court held Williams was not entitled to a charge on self-defense because he was at fault in bringing on the difficulty when he took a loaded, unlawfully-possessed pistol to an illegal drug transaction. State v.

[2] The Williams Court clarified that the proximate cause question posed in Slater should have been whether the illegally possessed weapon is the proximate cause of the difficulty or occasion that led to the killing. State v. Williams, 427 S.C. 246, 254 n.4, 830 S.E.2d 904, 908 n.4 (2019).

Williams, 427 S.C. 246, 250-251, 830 S.E.2d 904, 906 (2019). Unlike Williams, Appellant was not in unlawful possession of a pistol and he was not involved in an illegal drug transaction. Appellant did not "arm[] himself for the purpose of entering into a situation he knew to be rife with violence." See id. at 253, 830 S.E.2d at 908. Appellant's act of going to the altercation involving his friend – unarmed – was not unlawful and was not calculated to produce the difficulty.

Regarding the duty to retreat, this Court stated that Appellant could have simply walked off the dance floor. Appellant respectfully requests this Court rehear this aspect as this Court may have overlooked case law stating that an individual has no duty to retreat if by doing so the danger of being injured would increase. See State v. Jackson, 227 S.C. 271, 279, 87 S.E.2d 681, 685 (1955). Additionally, this Court may have overlooked persuasive authority discussed infra that an individual who does not use deadly force need not retreat.

Having addressed the applicability of self-defense to the facts presented at trial, Appellant respectfully requests this Court address the novel issue presented – whether a person who does not use deadly force must fear serious bodily injury or death in order to invoke self-defense. The general consensus is that when a person does not use deadly force, the person "need not anticipate serious bodily harm before responding with non-deadly force." William S. McAninch, et al., The Criminal Law of South Carolina 620 (6th ed. 2013). Additionally, the person "need not retreat before responding with non-deadly force." Id. To support this proposition, the authors explained that "the key to self-defense is proportionality of the response." Id. (citing State v. Wood, 1 S.C.L. (1 Bay) 351 (1794)). After recounting the facts of the case, the authors explained "that one need not submit to every assault." Id. Rather, "[a] person is entitled to defend against reasonably anticipated unlawful bodily harm even though it would not be serious, but in defending, he must respond proportionally." Id.

Persuasive authority from other jurisdictions supports Appellant's contention. "The general rule is that where a person reasonably believes he is threatened with bodily harm he may use whatever force appears to be reasonably necessary to protect himself." Byrd v. Isgitt, 338 So.2d 374, 375 (La. Ct. App. 1976). "The general rule at common law is that a person may use reasonable force to protect himself against one who threatens him with physical injury." Note, Justification for the Use of Force in the Criminal Law, 13 Stan. L. Rev. 566, 566-567 (1961). "For the purposes of self-defense which stops short of killing or attempting to kill, there is no duty to retreat, and no need for the apprehension of serious bodily harm." Beyer v. Birmingham Ry., Light & Power, Co., 64 So. 609, 611 (Ala. 1914); see also Adams v. State, 75 So. 641, 641 (Ala. Ct. App. 1917); Hartley v. Oldtman, 410 S.W.2d 537, 543 (Mo. Ct. App. 1966) (explaining that "[w]here a person has reasonable grounds to believe, and does believe that another is about to assault him, or do bodily harm to one to whom he owes a duty to protect, he need not wait until the other person actually strikes or makes an assault before resorting to the application of reasonable force to repel the attack" and that "where the person does not use a deadly weapon, fear of bodily harm only is sufficient to support a justification by self-defense); Silfast v. Matheny, 136 P.2d 260, 262 (Ore. 1943) (approving a jury charge that the intentional infliction of bodily harm by a means not intended or likely to cause death or serious bodily harm is privileged for the purpose of preventing the other from inflicting bodily harm upon the actor in certain circumstances); Anders v. Clover, 165 N.W. 640, 641 (Mich. 1917) (explaining "[t]here can be no doubt that one assaulted may justly exercise such reasonable force as may be, or as appears to him at the time to be, necessary to protect himself from bodily harm in repelling said assault."); Shires v. Bogges, 77 S.E. 542, 545 (W. Va. 1913) (holding the law did not limit self-defense to situations in which the person feared some great bodily harm); Michel v. State, 989 So.2d 679, 681 (Fla. Dist. Ct. App. 2008); Commonwealth v. Nobel,

707 N.E.2d 819, 821 (Mass. 1999) (explaining that an individual may use nondeadly force in self-defense when he has a reasonable concern over his personal safety); State v. Ouellette, 37 A.3d 921, 927 (Me. 2012) (providing for the elements of justified use of non-deadly force); State v. Rost, 429 S.W.3d 444 (Mo. Ct. App. 2014) (discussing the use of non-deadly force in self-defense).

Despite the South Carolina Supreme Court's long line of cases directing a trial court to craft a self-defense charge tailored to the facts of the case presented, the trial judge failed to do so here. State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011); State v. Fuller, 297 S.C. 440, 444-45, 377 S.E.2d 328, 331 (1989); State v. Day, 341 S.C. 410, 418, 535 S.E.2d 431, 435 (2000); see also State v. Hendrix, 270 S.C. 653, 660-661, 244 S.E.2d 503, 507 (1978) (including the intoxication of the deceased under its analysis of the imminent peril element of self-defense and stating intoxication would provide a basis for the defendant to judge the conduct of his adversary more harshly than otherwise). Important for this appeal, the trial judge voiced his frustration that his hands were tied because no appellate court had authorized such an instruction. Thus, this Court should rehear the matter to provide trial judges with concrete guidance.

Erroneous and confusing supplemental instruction on intent

The trial judge instructed the jury on ABHAN and the lesser-included offenses of assault and battery in the second and third degrees. During their deliberations, the jury asked, "[A]re we to consider intent as to which level of assault this is or is the resulting harm the deciding factor?" Over objection, the judge instructed the jury as follows: "To convict the Defendant of assault and battery of a high and aggravated nature, the State must prove beyond a reasonable doubt that the Defendant intended to unlawfully injure another person, and either great bodily injury to that person resulted or the act was accomplished by means likely to produce death or great bodily injury." His instructions on the lesser-included offenses followed the same pattern, including the

addition of the word "intended" as the verb and "unlawfully injure another person" as the object of the verb. Approximately ten minutes later, the jury returned with a guilty verdict of ABHAN.

Appellant challenged the trial judge's erroneous supplemental instruction on appeal. Appellant argued that the state was required to prove intent as to the resulting harm not simply the intent to injure. This Court rejected Appellant's argument and held the judge's response provided correct definitions and adequately addressed the law. Appellant respectfully requests rehearing on this novel question of law due to significant points overlooked and misapprehended by this Court.

The state charged Appellant with ABHAN, and the judge determined the evidence presented supported jury instructions on two lesser-included offenses. Thus, the state was required to show Appellant "unlawfully injure[ed] another person and (a) great bodily injury to another person result[ed]; or (b) the act [was] accomplished by means likely to produce death or great bodily injury." S.C. Code Ann. § 16-3-600 (B)(1). Similarly, for assault and battery in the second degree, the state was required to prove Appellant "unlawfully injure[d] another person," and "moderate bodily injury to another result[ed] or moderate bodily injury to another person could have resulted." S.C. Code Ann. § 16-3-600 (D)(1). And, finally, for assault and battery in the third degree, the state was required to prove Appellant "unlawfully injure[d] another person, or offer[ed] or attempt[ed] to injury another person with the present ability to do so." S.C. Code Ann. § 16-3-600 (E)(1). The statutory provisions omit any reference to the mental state required for any of the offenses.

The question presented on appeal is whether the different levels of assault and battery require merely an intent to injure allowing the potentially unintentional resulting injury to control the criminal charge or whether there must be an intent to cause the particular injury that results.

Appellant respectfully requests this Court rehear this matter to consider controlling case law overlooked by this Court.

In State v. Bryant, 316 S.C. 216, 447 S.E.2d 852 (1994), the South Carolina Supreme Court confronted a similar question. An officer attempted to arrest Bryant for failure to stop for a blue light. Id. at 218, 447 S.E.2d at 853. Bryant and the officer struggled. Id. at 218, 447 S.E.2d at 853-854. During the struggle, Bryant pushed the officer against the patrol car causing damage in excess of $200. Id. at 218, 447 S.E.2d at 854. At his trial for malicious injury to personal property – the police car, Bryant moved for a directed verdict because there was no evidence of intent to cause damage to the car. Id.

After explaining that the state was required to show "willful, unlawful and malicious damage" to the police car, the Court explained that willful was synonymous with intentional. Id. at 219, 447 S.E.2d at 854. Based on the evidence presented, the state failed to provide any evidence that Bryant intended to cause damage to the patrol car when he pushed the officer against it. Id. "The only reasonable inference form the evidence [was] that the damage to the patrol car was an unintended harm." Id. Bryant's "intent to assault and batter the police officer [could not] be transferred to the property damage since the harm caused was different from the type of harm intended." Id. There was no evidence that Bryant willfully caused harm to the car. Id.

South Carolina is not alone in requiring the resulting harm be the intended harm. See People v. Williams, 254 N.Y.S.2d 193, 194-195 (N.Y. App. Div. 1964) (explaining that "[j]ust as in simple assault, New Jersey requires an intent, not merely to injure, but to 'inflict *the* injury' so in atrocious assault there must necessarily be an intent to 'inflict the atrocious injury.'"); People v. Katz, 49 N.E.2d 482, 484 (N.Y. 1943) (holding that where the statute forbade conduct that willfully and wrongfully wounded another or inflicted grievous bodily harm upon another, the state was

required to prove intent co-extensive with the act prohibited and explaining that under the common law, for an assault to be considered a felony, then felonious intent must be proven); Knott v. State, 573 So.2d 179, 180 (Fla. Dist. Ct. App. 1991) (holding that a defendant who did not intend injuries received by victim did not commit aggravated battery); People v. Lattimore, 955 N.E.2d 1244, 1254 (Ill. App. Ct. 2011) (explaining that for purposes of the state's aggravated battery statute, the person must act to accomplish the result).

South Carolina's new assault and battery statutes are divided based upon the degree of harm caused by the conduct of the defendant's conduct. It is the degree of harm that distinguishes the various levels. The punishment meted out to the offender depends upon the degree of harm. Thus, the criminal intent of the offender must apply to the intent to injury and the resulting injury. When the judge instructed the jury that it was only necessary for Appellant to have intended to injure, the judge alleviated the state's burden of proving the resulting injury was also intended. The nature of the injury suffered was quite serious by any measure. Thus, when the judge explained that the resulting injury, whether great bodily injury, moderate bodily injury, or just bodily injury, controlled the offense, the jury found Appellant guilty of ABHAN in less than ten minutes.

Despite Appellant's contention that the trial judge's supplemental instruction was erroneous and supporting case law, this Court held the trial court did not err because the instructions accurately communicated the law applicable to the trial evidence. In other words, this Court held that all that is necessary for a conviction for ABHAN is that a defendant intended to injure someone and the resulting injury qualified as great bodily injury. According to this Court, there was no question the injury qualified as great bodily injury because "he had to have part of his brain removed before he ultimately died." Succinctly, this Court concluded that Appellant's deliberate blow to the deceased's head was evidence of intent to injure and the severity of the resulting harm provided the

jury with evidence of the statutory degree. Appellant respectfully requests this Court rehear this matter based upon case law that may have been overlooked concerning intent.

Susan B. Hackett
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ATTORNEY FOR APPELLANT

This 22nd day of December, 2022.

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Dec 22 2022
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Benjamin H. Culbertson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

PHILIP DAVID GUDERYON,

APPELLANT

APPELLATE CASE NO. 2017-002168

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the petition for rehearing in the above-referenced case has been served upon William M. Blitch, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), which is wblitch@scag.gov; and on Philip David Guderyon, #374208, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 22nd day of December, 2022.

Susan B. Hackett

Susan B. Hackett
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ATTORNEY FOR APPELLANT

From: Stock, Chris
To: SC - BLITCH WILLIAM; SC - COLLINS CAROLINE
Cc: Hackett, Susan
Subject: Guderyon - Petition for Rehearing - 2017-002168
Date: Thursday, December 22, 2022 4:15:00 PM
Attachments: Guderyon - Petition for Rehearing - 2017-002168.pdf
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Mr. Blitch,

Please find attached for service the Petition for Rehearing for Philip Guderyon's appeal which will be filed today with the Court of Appeals.

Thank you.

Chris

Chris Stock
Administrative Assistant
Commission on Indigent Defense
Appellate Division
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