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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Georgetown County

Honorable Benjamin H. Culbertson, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

ERYK J. SMITH,

APPELLANT

APPELLATE CASE NO. 2022-000723

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# INITIAL BRIEF OF APPELLANT

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## STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred where it refused to charge the jury on defense of others, where Appellant testified he fired because he thought Complainant would "shoot everybody in this car," since the court must give the charge where there is evidence adduced at trial that the defendant was acting in defense of another?

## STATEMENT OF THE CASE

During the September term of 2019, a Georgetown County Grand Jury indicted Eryk Smith, Appellant, for attempted murder. Appellant was also indicted for armed robbery and criminal conspiracy. Appellant was tried before the Honorable Benjamin Culbertson and a jury, from May 17 – 20, 2022. Appellant was represented by Ralph Wilson, Jr., and Lauren Anderson. Alicia Richardson and Elizabeth Smith prosecuted the case.[1]

The jury convicted Appellant of the lesser-included offense of assault and battery of a high and aggravated nature (ABHAN), and it acquitted him of armed robbery and criminal conspiracy. Appellant was sentenced to twenty years' imprisonment.[2]

This appeal follows.

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[1] R. *(indictment); Tr. 13, ll. 11-13; Tr. 1.

[2] Tr. 476, l. 25 – 477, l. 7; Tr. 481, ll. 12-16; R. *(sentence sheet).

## STANDARD OF REVIEW

"In criminal cases an appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000).

## ARGUMENT

The trial court erred where it refused to charge the jury on defense of others, where Appellant testified he fired because he thought Complainant would "shoot everybody in this car," since the court must give the charge where there is evidence adduced at trial that the defendant was acting in defense of another.

The jury could have found Appellant was not guilty because he acted in defense of another person, one who could have successfully availed himself of the self-defense doctrine. The evidence supported such a finding. It was prejudicial error not to charge defense of others.

***Relevant facts***

On October 9, 2018, a shooting occurred at the Francis Marion Store, a gas station in Georgetown County. Joshua Miller (Complainant) had gone to the gas station with Corey Hayes so that Hayes could sell Janena Gamble and Jed Coleman Xanax pills. Gamble and Coleman were parked behind the store in a black Audi. Gamble was the driver and Coleman was a back passenger. Coleman's younger brother Jayqwane Coleman (Brother), and Eryk Smith (Appellant) were also in the Audi. Appellant was in the front passenger seat and Brother was a back passenger.[3]

Hayes was "sketched out" about the Audi being parked behind the store, and after phone contact, both cars pulled up front to the pump. Coleman and Gamble got out of the Audi and into the back seat of Hayes's white Chrysler to do the drug deal. Appellant and Brother remained in the Audi. Inside the Chrysler, Hayes gave Coleman the drugs. But, instead of paying for the drugs, Coleman and Gamble took the drugs and tried to jump back into the Audi. Gamble threw the drugs through the open window of the Audi. As Coleman and Gamble were getting back into

[3] Tr. 103, l. 14 – 105, l. 11; Tr. 159, l. 20 – 160, l. 12; Tr. 106, l. 19 - 111, l. 8.

the Audi, Complainant got out of the Chrysler and reached into the Audi to try and grab the bag of drugs. It was undisputed that while Complainant was reaching into the Audi, Appellant fired one shot at Complainant. The shot struck Complainant in the wrist and traveled through his neck and jaw.[4]

The shot also struck Gamble in the hand. However, Gamble told law enforcement she did not know who shot her and she claimed she was shot while coming out of the convenience store.[5]

Complainant claimed all he did was reach into the Audi for the drugs. Complainant also claimed that after he was shot, Coleman told Appellant to "finish him off," but Complainant ran away. The shooting was not captured on video. Complainant was generally uncooperative with the police. Complainant told law enforcement at the hospital that the shooting was over money instead of drugs. Just prior to trial, Complainant told an investigator from the solicitor's office the shooting was over "weed." At trial, Complainant admitted the drug deal involved Xanax.[6]

In contrast, Appellant testified that he was unaware of any drug deal. Appellant said he was "laid back" in his seat when he saw Gamble jump into the Audi. Appellant explained he saw Complainant jump through the window of the Audi while attacking Gamble. Appellant stated Complainant reached for Gamble's throat and for her gun. Appellant said he shot Complainant while Gamble and Complainant tussled for Gamble's gun. Appellant explained events unfolded

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[4] Tr. 106, l. 19 - 109, l. 5; Tr. 110, l. 3 – 112, l. 12; Tr. 136, l. 10 – 137, l. 4; Tr. 288, ll. 3-8.

[5] Tr. 163, ll. 4-18; Tr. 213, ll. 8-14.

[6] Tr. 110, l. 3 – 113, l. 13; Tr. 140, ll. 4-10; Tr. 187, l. 19; Tr. 216, l. 16 – 217, l. 25; Tr. 160, l. 14 – 162, l. 4; Tr. 119, l. 22 – 120, l. 10.

so fast he did not have time to escape from the car. Appellant stated he fired the shot because he was scared for his life.[7]

Appellant also testified he shot because he thought Complainant would shoot everyone in the car with Gamble's gun. "[I]f he's aggressing and I don't know why he's attacking her, he's gonna get this gun and he's gonna shoot me. **He's gonna shoot everybody in this car, so I shot.**" Tr. 353, ll. 19-22 (emphasis added). Appellant also explained Brother was in the car with him. Appellant and Brother had been friends since the fifth or sixth grade.[8]

It was undisputed Brother was in the car with Appellant. Law enforcement did not talk with Brother about the incident, and he was not charged with any crimes in connection with this event. No allegations were made which would have prevented Brother from successfully availing himself of self-defense. Brother was not alleged to have been part of the drug deal. "[T]here was no indication that he even knew what was going on or that he was involved in any way."[9]

Both Appellant and Delsean Oliver explained they were part of a group of people headed to a party together that night in two different cars. Appellant explained Oliver gave him a gun because they were going to a party in "the projects" and it was "dangerous." Appellant lived in Arizona and was in South Carolina visiting his grandmother. Appellant explained he had been drinking alcohol prior to the shooting. Appellant testified there was no talk about a drug deal,

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[7] Tr. 350, l. 1 – 355, l. 9.

[8] Tr. 337, ll. 2-1; Tr. 357, ll. 23-24.

[9] Tr. 202, l. 15 -204, l. 4; Tr. 219, ll. 13-23.

and he was unaware of a drug deal. Appellant admitted that he did not have a concealed carry permit.[10]

Law enforcement found Xanax pills scattered around the gas pump. Xanax is a "Schedule 4" drug.[11]

Although there was no testimony that Appellant was involved in the robbery or drug deal, the State argued Appellant was the "armed lookout" and knew about the robbery since he was in the Audi when it "wait[ed] around" at the gas station.[12]

During the charge conference, in addition to self-defense, Appellant sought a charge on defense of others. Defense counsel argued Appellant was defending Brother, who was an "innocent" person and was "not at fault." Defense counsel pointed to Appellant's testimony that he believed Complainant would "shoot everyone in the car." Defense counsel also pointed to testimony that Appellant and Brother were friends.[13]

The trial court ruled, "since everybody in the car, he's including himself in that, I'm just going to charge self defense and not defense of others." Tr. 409, ll. 7-9. "I don't know that a jury could find him not guilty by self defense in the defense of others without also finding him not guilty of self defense of himself." Tr. 411, ll. 3-12.

The trial transcript did not reflect how long the jury deliberated in total, but it did reflect the jury deliberated for more than four hours. The jury asked several questions, including a

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[10] Tr. 237, l. 13 – 242, l. 24; Tr. 339, l. 16 – 344, l. 12; Tr. 334, l. 18 – 335, l. 3; Tr. 350, l. 1 – 355, l. 9; Tr. 377, ll. 7-12.

[11] Tr. 175, ll. 11-15; Tr. 270, ll. 8-18; Tr. 229, ll. 17-18.

[12] Tr. 424, l. 19 – 425, l. 14; Tr. 445, ll. 6-10.

[13] Tr. 396, l. 6 – 399, l. 23; Tr. 408, l. 23 – 409, l. 22.

request to be recharged on each offense. It also asked for "clarification or examples of how 'without fault' works." Finally, the jury indicated it was hung on the charge of attempted murder, and received a charge pursuant to *Allen v. United States*, 164 U.S. 492 (1896).[14]

The jury acquitted Appellant of attempted murder, armed robbery, and criminal conspiracy but convicted Appellant of the lesser-included offense of ABHAN. Appellant was sentenced to twenty years' imprisonment.[15]

***Discussion***

The jury could have found that Appellant was acting in defense of Brother since there was evidence presented that was what happened. The jury should have been permitted to make that decision.

"The law to be charged to the jury is determined by the evidence presented at trial." *State v. Hill*, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). "A request to charge a correct statement of the law on an issue raised by the indictment and the evidence presented at trial should not be refused." *State v. Austin*, 299 S.C. 456, 458, 385 S.E.2d 830, 831 (1989). "If there is any evidence to support a jury charge, the trial judge should grant the request." *State v. Brown*, 362 S.C 258, 262, 607 S.E.2d 93, 95 (Ct. App. 2004). When reviewing the trial court's refusal to deliver a requested jury instruction, appellate courts must consider the evidence in a light most favorable to the defendant. *State v. Williams*, 400 S.C. 308, 314, 733 S.E.2d 605, 608-09 (Ct. App. 2012) (citing *State v. Cole*, 338 S.C. 97, 101, 525 S.E.2d 511, 512-13 (2000)).

"To establish self-defense, the defendant must establish (1) he was without fault in bringing on the difficulty; (2) he actually believed he was in imminent danger of losing his life or

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[14] Tr. 467, l. 7 – 476, l. 14.

[15] Tr. 476, l. 25 – 477, l. 7; Tr. 481, ll. 12-16.

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. Long*, 325 S.C. 59, 62, 480 S.E.2d 62, 63 (1997) (citing *State v. Bruno*, 322 S.C. 534, 473 S.E.2d 450 (1996)). The "burden [is] on the defendant to produce some evidence to support the existence of each element." *State v. Williams*, 427 S.C. 246, 249, 830 S.E.2d 904, 906 (2019).

"Under the theory of defense of others, one is not guilty of taking the life of an assailant who assaults a friend, relative, or bystander if that friend, relative, or bystander would likewise have the right to take the life of the assailant in self-defense." *State v. Starnes*, 340 S.C. 312, 322-23, 531 S.E.2d 907, 913 (2000) (citing *Long*, 325 S.C. 59, 480 S.E.2d 62). "[I]n order for the trial court to give a defense of others charge, there must be some evidence adduced at trial that the defendant was indeed lawfully defending others." *Douglas v. State*, 332 S.C. 67, 73, 504 S.E.2d 307 (1998). *See also State v. Sales*, 285 S.C. 113, 114, 328 S.E.2d 619, 620 (1985) (right to defend a relative); *State v. Norris*, 253 S.C. 31, 38, 168 S.E.2d 564, 567 (1969) (father's right to defend daughter coextensive with daughter's right to defend self).

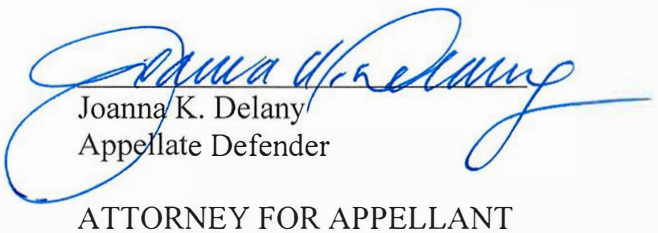
But, where a defendant "[a]t no point" suggests he shot to protect another, he is not entitled to a defense of others charge. *Starnes*, 340 S.C. at 323, 531 S.E.2d at 913. A defendant is not entitled to a defense of others charge "where defendant did not testify he was shooting for a purpose other than to protect himself . . ." *Id.* (*citing State v. Alford*, 264 S.C. 26, 212 S.E.2d 252 (1975) (*overruled on other grounds by State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009)). Although Appellant stated he shot to protect himself, unlike *Starnes*, Appellant also testified that he shot to protect another person.

Viewing the evidence in the light most favorable to Appellant, there was evidence to support a finding Appellant shot in defense of his friend Brother, who met the elements of self-defense. Because Brother was an innocent party in the car with Appellant, it was a jury question whether Appellant was not guilty by virtue of defending Brother. The jury could have found this as a separate justification for shooting, apart from self-defense. *See generally State v. Knoten*, 347 S.C. 296, 306, 555 S.E.2d 391, 396 (2001) (defendant who testified at trial he did not kill decedent was entitled to jury instruction on voluntary manslaughter since the court admitted his confession that he killed decedent after she cut his leg with a knife). The trial court's ruling that Appellant was not entitled to an instruction on defense of others because, "I don't know that a jury could find him not guilty by self defense in the defense of others without also finding him not guilty of self defense of himself," was error. Tr. 411, ll. 3-12. Appellant said he shot to protect another. It was up to the jury, not the judge, to find the facts. The court should have charged the jury on defense of others. *Starnes*, 340 S.C. 3 at 322-23, 531 S.E.2d at 913.

"[T]o warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." *State v. Burkhart*, 350 S.C. 252, 263, 565 S.E.2d 298, 304 (2002). "Failure to give requested jury instructions is not prejudicial error where the instructions given afford the proper test for determining the issues." *Id.* at 263, 565 S.E.2d at 304; *accord State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010). This error was prejudicial, since the jury was not able to consider a defense supported by the evidence—the jury was not given the proper law to determine whether Appellant was not guilty because he was defending another. *Mattison*, 388 S.C. at 479, 697 S.E.2d at 583.

## CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his conviction and sentence and remand for a new trial.



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This 30th day of January, 2023.