STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable R. Keith Kelly, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SHANNON LAMONT ZIQUAN JOHNSON,

APPELLANT

APPELLATE CASE NO. 2022-001757

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by refusing to instruct the jury on self-defense where the evidence showed the much larger decedent was beating the slightly built appellant before appellant, with the help of others, broke free, the decedent then threatened to shoot appellant immediately before appellant shot him since it was a jury issue whether appellant would have put himself in greater danger by retreating under these circumstances, and self-defense was a jury issue?

STATEMENT OF THE CASE

Appellant was indicted at the June 2020 term of the Charleston County grand jury for the offenses of murder and possession of a weapon during the commission of a violent crime. R. 593. His case was called to trial on December 5, 2022, before the Honorable R. Keith Kelly, and a jury. Laree Anne Hensley represented appellant. B. Chad Simpson and Kelly Barber were the assistant solicitors. R. 1.

On December 8, 2022, the jury found appellant guilty on both counts. R. 577, l. 23- 578, l. 7. Judge Kelly sentenced appellant to fifty years' imprisonment for murder, and he imposed a five-year concurrent term for the firearms conviction. R. 590, ll. 10-14.

This appeal follows.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court "is bound by the [circuit] court's factual findings unless they are clearly erroneous." Id. Appellate courts do not re-evaluate the facts based on their own view of the preponderance of the evidence but simply determine whether the [circuit court]'s ruling is supported by any evidence. State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001).

ARGUMENT

The court erred by refusing to instruct the jury on self-defense where the evidence showed the much larger decedent was beating the slightly built appellant before appellant, with the help of others, broke free, the decedent then threatened to shoot appellant immediately before appellant shot him since it was a jury issue whether appellant would have put himself in greater danger by retreating under these circumstances, and self-defense was a jury issue.

Relevant facts

Shannon Gagnon was thirty-two-years-old and she lived on Hanover Street in downtown Charleston. The decedent was her neighbor whom she had known for a few months. Gagnon had a ten-year-old daughter and the decedent had a five-year-old son "so, they'd be doing sidewalk chalk stuff outside." R 166, l.24- 169, l. 13.

On the day of the fateful shooting, August 8, 2019, the decedent had a U-Haul in front of his apartment. His girlfriend, Christina, was moving in with him that day. R. 170, l. 7-, 171, l. 20.

Gagnon talked to the decedent that day and he was excited Christina was moving in with him. The decedent also congratulated Gagnon on signing a lease that morning to move a different location. R. 175, ll. 9-16.

Gagnon remembered that a young black man rode by on a bicycle—it was later stipulated this young man was the eighteen-year-old appellant—and there would be other evidence the young man was singing and waiving his hands around at the time. The decedent apparently did not like something that appellant was saying or singing, and he yelled: "No more of that shit." Appellant then "loops back around" and "he's like what's up, bro, and Tim's [the decedent] is like I don't know, man, what's up. You rode back." R. 176, ll. 3-13.

Gagnon did not consider this encounter unusual since "it was downtown Charleston. Everybody's on bikes." R 177, ll. 5-6. However, the decedent and appellant came "face-to-face" and "Christina's shouting at Tim. Tim, no, he's not worth it. No, Tim, stop." R 178, ll. 8-16. Most of this altercation was captured on videotape from a nearby surveillance camera. It was State's exhibit #25, and it on file before this Court for viewing with audio.

Gagnon remembered that other men approached on their bicycles and "people started fighting. Two other people on bikes "dropped their bikes and jumped in and everybody's fighting up against this wall over here...this whole area right here is where a fight's taking place. I'm trying to get the dog back upstairs." R 179, ll. 13-22. Gagnon took her dog upstairs and "I came back downstairs because there's an entire fight happening out in front of my house." R 180, ll. 3-24.

Gagnon testified she believed one of these men had slapped Christina and "I heard Tim say get in the house." R 181, l. 13-183, l. 2. "After that point it was gunshots." R 183, ll. 16-23. "After the gunshots I ran back upstairs—and told my daughter to stay in the house." R 184, ll. 12-21. Gagnon "grabbed a towel and went back downstairs with my cellphone and my towel and called 9-1-1, tried to stop the bleeding as best I could. Some people were coming up the street to start doing CPR and just—it was chaos." R 184, ll. 16-25. The decedent was laying bleeding on the steps outside of his apartment door. R 185, ll. 3-13.

Describing the fight further, Gagnon testified that two other black males rode up on their bikes when the argument between appellant and the decedent became physical. Gagnon claimed the fight "started one-on-one and it turned into three-on-one." R 188, l. 24 - 189, l. 24. There would be other evidence the men who rode up on their bikes were trying to stop the fight between appellant and the decedent. Gagnon maintained that the fight started because the

decedent yelled at appellant: "No more of that shit." Gagnon said the appellant then shouted something at the decedent in return. Gagnon maintained this behavior was unusual for the decedent, while admitting the decedent "could be a little a fiery to be a line cook of some, some sense. But he was from Denver, just kind of a hippie, stoner dude." R 189, ll. 21-25. Gagnon reasoned "the only time we'd ever been yelling at people to get off the porch is when they're smoking blunts on your porch and you're trying to get to work." R 190, ll. 2-11.

Travis Scott testified that he was forty-one-years-old and living in North Charleston on August 8, 2019. He was one of the men who came upon the altercation between the decedent and appellant. Scott said he was trying to break "it up," and not trying to fight with the decedent. He remembered the fight was between "a white guy [the decedent] and a black guy [appellant]" and that during the fight, he tried to help out a young lady with her children. R. 208, l. 18-210, l. 19.

Scott said that appellant was "significantly smaller...than the heavy white fellow [the decedent]." Scott said the decedent was being very aggressive towards the significantly smaller young, black man. The decedent had appellant in a headlock, and he was punching him in the face when Scott tried to intervene to help appellant from being beaten further. R 213, ll. 4-24.

The pathologist testified that the decedent was six-foot-one and he weighed two-hundred-and-sixteen pounds. Conversely, DMV records showed appellant was only five-foot-five and he only weighed one hundred and thirty pounds. R 475. The decedent was forty-one-years-old, and he was killed by the gunshot wound to his back that went through his heart, and his lungs.. R 304, l. 18 - 310, l. 25.

Charleston Police Officer Matthew Lawcock was also working with the United States Marshals Service Fugitive Task Force on August 12, 2019, which was several days after the

August 8, 2019 shooting. Appellant was apparently traced by his Facebook account to Bridgeview Apartments, which are also formerly known as the Bayside Apartments, on August 12, 2019. He was wearing the same clothes as he did on the surveillance tape, State's Exhibit 25, of the shooting a few days earlier. See, also, State's Exhibit #5 and State's Exhibit #13, which are Facebook postings which are on file with this Court for viewing.

Lawcock testified that appellant was arrested on a probation warrant in addition to a murder warrant. Lawcock repeated that he told appellant he had a probation warrant for his arrest when he was arrested at the Bridgeview Apartments on August 12, 2019. R 371, l. 15-372, l. 21.

Defense counsel moved for a mistrial based on Lawcock's gratuitous mention of the probation arrest warrant. The judge agreed Lawcock should not have mentioned the probation arrest warrant, and the solicitor said he was surprised by this testimony as well. Defense counsel ultimately agreed with the trial judge's offer to give a curative instruction. R 388, R 390, R 395; R 513; R 519.

Self-defense instruction

Defense counsel Hensley requested an instruction on self-defense at the close of the case. Hensley argued that appellant was not at fault in bringing on the difficulties and that the evidence showed that the decedent threw the first punch, and he was beating appellant badly during the altercation. R 526, ll. 13-19.

The decedent was a much larger man, and appellant felt he was in imminent danger of great bodily harm or death at the time. Further, the decedent told appellant "homie, don't make me fire" immediately before appellant shot him. Appellant had no other probable means of avoiding the danger of losing his life or sustaining serious bodily injury than to act as he did. R

526, ll. 13-19. The solicitor disputed that the decedent squared up to appellant and said "Damn right homie...I'm right here, don't make me fire."

However, it does appear that the decedent did say "homie, don't make me fire" to appellant at 2:56 on the surveillance tape, state's exhibit #25, which is on file for this Court to view with audio. The solicitor urged the judge not to charge self-defense, arguing that since appellant circled back on his bicycle, he was not totally without fault in bringing on the fatal difficulty. The solicitor also asserted appellant could not get a charge on self-defense because of the doctrine of mutual combat.[1] R 527, l. 21- 529, l. 11.

The trial judge ruled that he would not charge self-defense. The judge reasoned that by circling back on his bicycle, appellant was not without fault in bringing on the difficulty, and that "the video speaks for itself." The judge also stated that that "the scuffle was over. The parties were separated by several people over a minute. The defendant had his bike and was free to ride away." The judge also noted that "the victim was shirtless. He was in shorts. He had no weapon." The judge further stated that while the decedent was not armed "the defendant then brandished a handgun and...the defendant fired five .40 caliber rounds in the general direction of the victim, striking him one time in the back, in his back." R 529, l. 24-531, l. 13.

The judge did charge the jury on voluntary manslaughter as well as murder. Defense counsel in her closing argument reminded the jurors that the decedent said "damn right, homie, don't make me fire" immediately before the shooting which was evidence of appellant's state of mind after the decedent threw the first punch, and had physically beaten appellant. R 558, l. 8-559, l. 2. Both the solicitor and defense counsel urged the jurors to watch and listen to the video

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[1] Mutual combat requires at a minimum a tacit prior agreement to meet in a location for an armed fight. See State v. Bowers, 436 S.C. 640, 875 S.E.2d 608 (2022) affirming the Court of Appeals opinion in State v. Bowers, 428 S.C. 21, 832 S.E.2d 623 (Ct. App. 2019). The record in this case is devoid of any such evidence.

of the altercation and the shooting as many times as they desired, and to come to their own conclusions.

Discussion

"If there is any evidence in the record from which it could reasonably be inferred that the defendant acted in self-defense, the defendant is entitled to instructions on the defense, and the trial judge's refusal to do so is reversible error." State v. Light, 378 S.C. 641, 650, 664 S.E.2d 465, 469 (2008). See, also, State v. Burkhart, 350 S.C. 252, 565 S.E.2d 298 (2002) (if there is any evidence in the record to support self-defense, the issue should be submitted to the jury).

There are four elements of self-defense which must be charged if there is any evidence of each element. First, the defendant must be without fault in bringing on the difficulty. State v. Fuller, 297 S.C. 440, 442-43, 377 S.E.2d 328, 330 (1989). Here, appellant should not have been deemed to have been at fault -- or not without fault -- merely for circling back on his bike after the decedent yelled something out to him. Such a legal standard would remove a citizen's right to act in self-defense if he did not flee any potentially unpleasant circumstance with another person.

Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or that he actually was in such imminent danger. See, State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984). Here, the surveillance tape, State's Exhibit #25, showed appellant, a much smaller, eighteen-year-old man was being beaten by the much larger decedent. The decedent had appellant in a headlock and he was punching him in the face when the other men intervened. Appellant was reasonably in fear of serious bodily injury in this situation.

Third, if his defense was based upon his belief of imminent danger, a reasonably prudent man of ordinary fitness and courage would have entertained the same belief. If the defendant actually was in such imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily injury or from losing his own life. See State v. Hendrix, 270 S.C. 653, 657-58, 244 S.E.2d 503, 505-06 (1978). Here, an ordinary man of common prudence, firmness, and courage would have entertained the belief he was about to suffer serious bodily injury unless he acted as appellant acted in this instance.

Fourth, the defendant had no other probable means of avoiding the danger of losing his life or sustaining serious bodily injury than to act as he did in this particular circumstance. Importantly, however, the defendant has no duty to retreat if by doing so, it apparently increases his danger of being injured. See State v. McGee, 185 S.C. 184, 193 S.E.2d 303, 306 (1937).

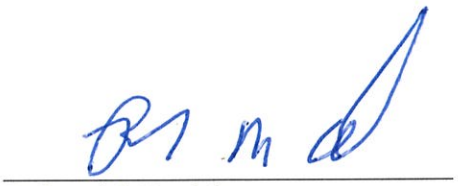
Here, as stated defense counsel and the solicitor repeatedly told the jury to watch the surveillance video, State's Exhibit #25, and to draw their own conclusions from the videotape. Defense counsel was apparently correct in her assertion that the decedent threatened to fire [shoot] at appellant at 2:56 of that video, which is on file with this Court for viewing with its audio. Appellant reasonably believed at that time if he turned his back on the decedent and attempted to leave that he may have been shot given the decedent's threat to shoot him. Appellant did not have a legal duty to retreat given that reasonable belief. See State v. McGee, 185 S.C. 184, 193 S.E.2d 303, 306 (1937).

The judge erred by interjecting his own interpretation of the videotape, and by reasoning appellant did not meet any of the elements of self-defense where there was in fact evidence of each element of self-defense. Self-defense was a jury question in this case. See State v. Day, 341

S.C. 410, 535 S.E.2d 431 (2000); State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489 (1998); State v. Dickey, 394 S.C. 491, 716 S.E.2d 97 (2011). Appellant should be granted a new trial.

CONCLUSION

By reason of the foregoing arguments, appellant's convictions should be reversed, and this case remanded to the Charleston County Court of General Sessions for a new trial.



Robert M. Dudek
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ATTORNEY FOR APPELLANT

This 7th day of August, 2023.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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This 7th day of August, 2023.

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CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Anders Brief of Appellant and Designation of Matter in the above-referenced case has been served upon Melody Brown, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Shannon Lamont Ziquan Johnson, #389708, at Tyger River Correctional Institution, 200 Prison Road, Upper Yard, Enoree, SC 29335-9308, this 7th day of August, 2023.

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