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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Honorable Benjamin H. Culbertson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

PHILIP DAVID GUDERYON,

PETITIONER

APPELLATE CASE NO. 2023-000633

BRIEF OF PETITIONER

WANDA H. CARTER
Deputy Chief 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

[1] State v. Day, 341 SC 410, 535 S.E.2d 431 (2000).

TABLE OF AUTHORITIES

Cases

Other Authorities

ISSUE PRESENTED

The Court of Appeals erred in upholding the trial judge's denial of petitioner's requested self-defense charge, which was specialized and tailor-made to reflect petitioner's right to act in self-defense under lesser circumstances that involved an assault or threat to assault in response to less than deadly force, as opposed to the self-defense instruction given charging that the responding action would have been applicable if serious bodily injury or death resulted, because "a self-defense charge is erroneous where the trial judge fails to charge on the elements of [self] defense which are applicable to the issues raised by the defendant."[2]

[2] State v. Day, 341 SC 410, 535 S.E.2d 431 (2000).

STATEMENT

Petitioner was convicted of assault and battery of a high and aggravated nature during the October 2017 term of the Horry County General Sessions Court before Judge Benjamin H. Culbertson. Assistant Solicitors Joshua D. Holford and Cara J. Walker prosecuted the case and J. Eric Fox represented petitioner at trial. Judge Culbertson sentenced petitioner to imprisonment for a period of ten years.

Petitioner appealed, but on December 7, 2022, his conviction and sentence were affirmed by the South Carolina Court of Appeals. App. 1. A Petition for rehearing was filed on December 22, 2022. App. 16. On March 22, 2023, the Petition for Rehearing was denied by the South Carolina Court of Appeals. App. 30.

On April 28, 2023, a Petition for Writ of Certiorari was filed with the South Carolina Supreme Court, and on February 7, 2024, an Order was issued granting the Petition on Question II raised therein. This Brief of Petitioner follows.

STANDARD OF REVIEW

If there is any evidence in the record to support self-defense, then the issue should be submitted to the jury. State v. Hill, 315 S.C. 260, 433 S.E.2d 848 (1993).

To warrant a renewal, a trial, judge's refusal to give a requested charge must be erroneous and prejudicial. Ellison v. Parts Distributors, Inc. 302 S.C. 299, 395 S.E.2d 740 (Ct. App. 1990).

ARGUMENT

The Court of Appeals erred in upholding the trial judge's denial of petitioner's requested self-defense charge, which was specialized and tailor-made to reflect petitioner's right to act in self-defense under lesser circumstances that involved an assault or threat to assault in response to less than deadly force, as opposed to the self-defense instruction given charging that the responding action would have been applicable if serious bodily injury or death resulted, because "a self-defense charge is erroneous where the trial judge fails to charge on the elements of [self] defense which are applicable to the issues raised by the defendant."[3]

While at the place of business in question, the deceased fell backward and struck his head on the floor. A witness stated that there was an altercation type stand-off between petitioner and the deceased, which was followed by a swing. R. 199, l. 5 – p. 202, l. 23. The evidence indicated that petitioner hit the deceased, who then fell.

During the charge conference, defense counsel objected to the portions of the self-defense instruction requiring the evidence show petitioner was in imminent danger of death or serious bodily injury in order for self-defense to apply. R. 248, ll. 9-17. Defense counsel explained he could not imagine "that a person that is assaulted with something less than deadly force, a fist, does not have the right to defend himself." R. 248, ll. 21-24. He further explained that "from the Defense point of view," the incident involved "a punch for a punch." R. 249, ll. 7-9. According to defense counsel, the law must permit a person to "resist a punch with a punch." R. 249, ll. 12-16. Self-defense must include the ability of a person punched in the face, or threatened with a punch in the face, to be able to respond in self-defense. R. 249, ll. 18-21. Thus, defense counsel objected to the

[3] State v. Day, 341 SC 410, 535 S.E.2d 431 (2000).

self-defense jury instruction including language that petitioner must have been in fear of death or great bodily injury in order to exercise his right to self-defense. R. 249, ll. 21-22.

The state agreed that the "the law could not be that a person must be in fear of losing his life in every situation," but relied upon the portion of the charge regarding fear of serious bodily injury as sufficient to cover situations in which a deadly threat was not posed. R. 250, ll. 19-23. According to the state, in order to exercise one's right to self-defense, one "must be in fear of death or serious bodily injury." R. 251, ll. 19-25. Anything less than fear of death or serious bodily injury precluded the use of self-defense. R. 251, ll. 19-25.

Judge Culbertson agreed with defense counsel, but explained his hands were "tied" by the lack of authority from the appellate courts to provide a different instruction. R. 249, ll. 23-24; R. 250, ll. 1-7. Judge Culbertson succinctly explained defense counsel's argument that based upon the proposed jury instruction for self-defense, a person "just in fear of injury" would not be able to defend himself. R. 250, l. 24 – R. 251, l. 7. Put simply, "[t]he question is here if somebody puts you in fear, not of your life, not of serious bodily injury, but just in fear of injuring you, can you not defend yourself?" R. 251, ll. 13-18. Judge Culbertson spoke frankly when he admitted he did not "know the answer because the Appellate Court hasn't addressed it, but at least that gives you your grounds for appeal is whether or not self-defense is available to any defendant who is not in fear of death, not in fear of serious bodily injury, but is in fear of injury or moderate injury." R. 252, l. 1-6; R. 252, ll. 12-19. According to the judge, it was for the appellate courts to decide "if it's serious bodily injury or it's death, then that means self-defense is not available" when the conduct "involves less than serious bodily injury or death." R. 253, ll. 1-5. Although he "tend[ed] to agree with [the defense's] argument," Judge Culbertson refused to alter the standard self-defense instruction. R. 253, ll. 6-8.

The Court of Appeals held as follows:

> [Petitioner] next argues the circuit court erred in instructing the jury that in order for self-defense to apply, Appellant must have been in fear of great bodily injury or death when he struck Victim. We find no abuse of discretion here, as the circuit court charged the current and correct law of self-defense in South Carolina. *See State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010) ("The trial court is required to charge only the current and correct law of South Carolina."). "In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." *Id.* at 478, 697 S.E.2d at 583. "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." *Id.*

Petitioner, who did not use deadly force, must have been in fear of serious bodily injury or death. First, the Court of Appeals noted that the question presented on appeal was one "our appellate courts may need to address," but the Court of Appeals declined to do so because the circumstances warranting an appellate decision on the matter did not exist here. The circumstances included the Court of Appeals questioning whether petitioner 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.

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 petitioner was entitled to a jury instruction on self-defense. The state merely objected to changing the language to make clear that Petitioner 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 petitioner walked to the dance floor area to where his friend was engaged in a heated verbal altercation with the deceased, petitioner was without fault in bringing on the difficulty. By all accounts, petitioner 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.

Regarding the matter of bringing on the difficulty, note the Supreme Court's holding in State v. Slater, 373 S.C. 66, 644 S.E.2d 50, 52 (2007), where the Court held that 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. Slater also acted in violation of the law by carrying a weapon, which the Court held was the proximate cause of the homicide.[4] Id. at 71, 644 S.E.2d at 53. Unlike Slater, petitioner was not in unlawful possession of a weapon. In fact, petitioner 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. Williams, 427 S.C. 246, 250-251, 830 S.E.2d 904, 906 (2019).

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

[4] 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).

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.

"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).[5]

The Supreme Court of Appeals of West Virginia analyzed a similar issue in the civil context. Shires v. Bogges, 77 S.E. 542, 545 (W. Va. 1913). The trial judge instructed the jury that the defendant could exercise his right to self-defense only if he believed the plaintiff intended to do him some great bodily harm. Id. The court was asked whether the law limited self-defense in this manner. Id. According to the court, the law did not. Id.

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[5] See also 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.).

The South Carolina Supreme Court has long held that a trial judge has the responsibility to craft a self-defense charge tailored to the facts of a case. 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). As recognized in Fuller, there is a "body of common law self-defense" and trial judges must "consider the facts and circumstances of the case at bar in order to fashion an appropriate charge." Fuller, 297 S.C. at 443, 377 S.E.2d at 330.

In Fuller, the defendant solicited a prostitute. Id. at 441, 377 S.E.2d at 329. However, when the pair arrived at the prostitute's trailer, they discovered it was occupied. The defendant then left. Id. When the defendant later returned to the prostitute's trailer, he found a car driven by a white woman was blocking the road. Id. The defendant asked her to move her car. Id. Two men approached the defendant's car and asked him "what he was 'trying to do to that white lady.'" Id. One of the men used a racial slur and grabbed the defendant by the throat. Id. at 441, 377 S.E.2d at 329-30.

The defendant fired a warning shot allowing him to drive away. Unbeknownst to the defendant, the street was a dead end. Id. at 442, 377 S.E.2d at 330. Due to the men blocking his escape, the defendant ultimately crashed his car against a rail. Id. The two men yelled, "'we're going to take care of you.'" Id. The defendant thought he saw something shiny in one of the men's hands and fired four shots at them, killing both. Id. No gun was found on the men. Id.

The trial judge only instructed the jury on the basic elements of self-defense. Id. The Court held it was error to only give the general charge when the defendant "repeatedly requested additional charges." Id. at 443, 377 S.E.2d at 330. The Court found the trial judge erred by not giving three specific charges on self-defense that further explained the principles in the general charge. First, the trial judge failed to charge the jury that the defendant had the right to act on

appearances. Id. at 443-44, 377 S.E.2d at 330-31 (citing State v. Jackson, 277 S.C. 271, 87 S.E.2d 681 (1955)). Second, the trial judge failed to charge the jury that "words accompanied by hostile acts, may, depending on the circumstances, establish a plea of self-defense." Id. (citing State v. Harvey, 220 S.C. 506, 68 S.E.2d 409 (1951)). Third, the trial judge failed to charge that an individual has no duty to retreat "if by doing so he would increase his danger of being killed or suffering serious bodily injury." Id. (citing State v. Hardin, 114 S.C. 280, 103 S.E. 557 (1920)).

The South Carolina Supreme Court held a trial judge erred in failing to charge on the specific elements of self-defense that were applicable to the defendant's theory in State v. Day, 341 S.C. 410, 418, 535 S.E.2d 431, 435 (2000). As stated by the Court, "[a] self-defense charge is erroneous where the trial court fails to charge on elements of the defense which were applicable to the issues raised by the defendant." Id. The Court found the instruction given in Day incomplete because the trial judge failed to instruct the jury that the defendant had the right to judge the conduct of the deceased more harshly than otherwise because of the deceased's drug consumption. Id.; 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).

Regarding the duty to retreat, the Court of Appeals held that petitioner could have simply walked off the dance floor. The case law is that an individual has no duty to retreat if by doing so the danger of being injured would increase. See State v. Jackson, 277 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.

The issue is 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 petitioner'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).

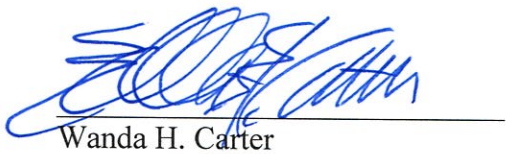
Despite the South Carolina Supreme Court's long line of cases directing a trial court to craft a self-defense charge tailored to the facts of the case presented, the trial judge failed to do so here. State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011); State v. Fuller, 297 S.C. 440, 444-45, 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.

The Court of Appeals erred in denying petitioner's specialized self-defense charge to reflect petitioner's right to act in self-defense in the case.

CONCLUSION

Based on the foregoing argument, counsel for petitioner would request that this Court reverse petitioner's conviction and sentence and remand for a new trial.

Respectfully Submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of March, 2024.