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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

CERTIORARI TO THE COURT OF APPEALS

Appeal from Horry County

The Honorable Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2023-000633

THE STATE,

Respondent,

v.

PHILIP DAVID GUDERYON,

Petitioner.

BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUE

Whether Guderyon was prejudiced by the trial court's instruction that self-defense must be premised on the threat of death or "serious" bodily injury, where Guderyon used force likely to cause serious bodily injury and the evidence conclusively showed he did not act in self-defense.

STATEMENT OF THE CASE

An Horry County grand jury indicted Petitioner Philip Guderyon for assault and battery of a high and aggravated nature. Guderyon proceeded to jury trial on that charge before the Honorable Benjamin H. Culbertson on October 9–12, 2017. Guderyon was convicted and sentenced to ten years' incarceration. The court of appeals affirmed his conviction in a published opinion. State v. Guderyon, 438 S.C. 476, 884 S.E.2d 202 (Ct. App. 2022), reh'g denied (Mar. 22, 2023). This Court granted certiorari on February 7, 2024.

STATEMENT OF FACTS

Justin Hodges (hereinafter referred to as the victim) went to a bar in Myrtle Beach called Carlos 'n Charlie's with his girlfriend, Mariah Stevens, on the night of October 16, 2015. Stevens ran into a friend, James Petrocine, referred to throughout trial as "Jimmer." Petrocine touched Stevens's breast, and Stevens told the victim. He and Petrocine had words, but Stevens, Petrocine, and another witness, David Hayes, testified the conversation was not heated and did not become physical. (R.p.106, 119, 110). Stevens testified that she, the victim, Petrocine and other friends were playing pool together. (R.p.105). She testified "everything was fine" when she went to the restroom. When she returned, the victim was gone. (R.p.103-108).

Hayes testified: "There wasn't a fight. From everything going on, all I know is apparently I was talking to my friend, I looked over and everybody is scattering, and someone said he got hit. . . . I didn't know anybody was upset with anybody" (R.p.110-11). Petrocine testified and admitted he touched Stevens's breast. He explained the victim "grabbed my arm and said that's my girlfriend. I said well you can have your girl, and we shook hands, and then he got hit." (R.p.118). There was no fight, altercation, or "big beef." (R.p.119). An "instant" after they shook hands, Petrocine "felt some wind come over [his] shoulder" and "heard like a hit, and then Justin was on the ground." (R.p.120). He learned his friend Philip Guderyon had punched the victim.

The victim was knocked out cold and lying face up on the barroom floor. Two bouncers dragged him outside and an ambulance came and took him to the hospital. The victim was in a coma when arrived at the hospital. Dr. Joseph Cheatle, the neurosurgeon who treated the victim, testified about his injuries and treatment. Hodges had a "very large subdural hematoma" which caused his brain to swell. The rear of the victim's head, near the base of his skull, was the site of impact for the force which caused his brain to collide with the front of his skull, causing the

hematoma near his frontal lobe. It appeared to be caused by a single blow. (R.p.59–74). Dr. Cheatle performed an emergency craniotomy to open up a “skull flap” and relieve pressure on the brain. However, after several days, the victim’s brain began swelling again and Dr. Cheatle removed his frontal lobe in a last-ditch effort to save his life. His efforts were unsuccessful and Hodges died from his injury.

Police arrested Guderyon and he gave a voluntary statement. (State’s Exhibit #8). He admitted to punching the victim. He claimed he was trying to “diffuse” an argument between the victim and Petrocine. He claimed the victim raised his hand as if to say “this don’t got nothing to do with you.” He admitted the victim was not even looking at him at the time. Guderyon claimed the victim “said something slick” and “went to put his hands on me.” Guderyon said he “slapped his hand away and hit him.” Guderyon admitted he punched the victim in the face and the victim’s “eyes rolled back.” He explained he had trained 13 years in kickboxing and “really didn’t even hit him with everything.” Guderyon at times claimed the victim touched him but admitted: “He didn’t punch me, he put his hand on me like this ain’t got nothing to do with you.” Guderyon explained: “I look for the first natural reaction . . . I’m always on point . . . right when he put his hand up I’m already swinging . . . and I know I’m quick.” He said he “kind of felt bad” afterward. He admitted he was drunk and vomited in the car on the way home.

Guderyon called two witnesses who claimed to have seen the confrontation. Ambrose Heavener was Guderyon’s cell mate at the county jail. (R.p.212). He claimed he “realized” after speaking with Guderyon at the jail that he was a witness to this incident. (R.p.208). He testified Guderyon attempted to “get in between” two individuals who were arguing when one of them “turned real fast toward Philip like he was gonna hit him, and from what I could tell, it looked like he was about to hit him. And when that happened is when Philip swung and hit him and he

fell down.” (R.p.204). Heavener did not give a recorded statement to anyone prior to his trial testimony.

Steven Sumpter was also incarcerated with Guderyon at the county jail. (R.p.219–20). Incredibly, he claimed he also realized after speaking with Guderyon at jail that he was a witness to this incident. (R.p.222). Like Heavener, he testified he saw Guderyon attempting to separate two men who were arguing. But unlike Heavener, he claimed he saw the victim “swing” at Guderyon. (R.p.227). Guderyon then punched the victim, and “it looked like he was knocked out on his feet.” (R.p.229). He fell “straight back.” (R.p.230). Neither Petrocine nor Hayes made any mention of Guderyon trying to diffuse an argument.

STANDARD OF REVIEW

An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion. State v. Marin, 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016).

To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant. Id.

ARGUMENT

Guderyon was not prejudiced by the trial court's self-defense charge because the evidence conclusively showed he did not act in self-defense and the court's charge that self-defense must be justified by the danger of "serious bodily injury" gave the jury the proper test to determine the issues.

Guderyon alleges the trial court abused its discretion by instructing the jury that in order to act in self-defense one must have a reasonable apprehension of "serious" bodily injury.

Guderyon asserts he "did not use deadly force" in this case, and thus the instruction was not sufficiently tailored to the evidence. Brief of Petitioner at 6.

The State agrees that one may resist non-deadly force with non-deadly force, and one need not be in danger of death or "serious" bodily injury to act in self-defense in all cases. However, the instruction was not prejudicial to Guderyon in this case. Guderyon, an experienced kickboxer, used force likely to cause serious bodily injury and which actually resulted in the victim's death. To be justified in using this degree of force in self-defense, he must have been faced with the danger of serious bodily injury. The evidence conclusively showed that he was not. Rather, the evidence showed he did not act in self-defense at all. This Court should affirm.

The trial court gave the standard self-defense charge given in cases involving deadly force. In these cases, a defendant must ordinarily show:

- (1) That he was without fault in bringing on the difficulty;
- (2) That he actually believed he was in imminent danger of losing his life or of sustaining serious bodily injury, or he actually was in imminent danger of losing his life or of sustaining serious bodily injury;
- (3) If his defense is based on his actual belief of imminent danger, that a reasonable prudent man of ordinary firmness and courage would have entertained the same belief, or if his defense is based on his being in actual and imminent danger, that 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 harm, or losing his own life;

- (4) That he had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in the particular instance.

State v. Hendrix, 270 S.C. 653, 657–58, 244 S.E.2d 503, 505–06 (1978) (internal citations omitted and punctuation modified).

This Court has not previously announced the proper jury charge to be given in self-defense cases involving non-deadly force. However, the general principles explained in this Court’s self-defense jurisprudence apply to cases involving non-deadly force.

The two cornerstones of self-defense are necessity and proportionality. The requirement of necessity is manifested in the elements of self-defense requiring “imminent danger” and “no other probable means of avoiding the danger.” See State v. Wise, 33 S.C. 582, 12 S.E. 556, 559 (1891) (“The plea of self-defense rests upon the idea of necessity”); § 3.04. Use of Force in Self-Protection., Model Penal Code § 3.04 (providing “the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion”).

The requirement of proportionality was explained in State v. Wood, 1 S.C.L. 351 (1794). In holding that “there must be . . . some proportion” between the initial aggression and the response, the court explained:

[T]he degree of resistance, ought to be in proportion to the nature of the injury offered; that is, that it be sufficient to war [sic] off such injury, and no more. For the moment a man disarms or puts it out of the power of the aggressor from doing him further injury, he ought to desist from using further violence; and if he does commit any further outrage, he, in his turn, then becomes the aggressor. In Salk, 642, a question was, what assault was sufficient to maintain such plea? Lord Holt said, that Wyndham, J. would not allow such plea, if it was an unequal return. His lordship then says, that for every assault, he did not think it reasonable that a man

should be banged with a cudgel. That a small blow will not justify an enormous beating

Id. at 346–47 (emphasis added). See also State v. McGowan, 347 S.C. 618, 624, 557 S.E.2d 657, 660 (2001) (in context of resisting unlawful arrest, explaining one “may not use force disproportionate to the injury threatened”); State v. Jones, 133 S.C. 167, 130 S.E. 747, 750 (1925) (“If then the defendant . . . used more force than was necessary, it matters not how slight was that excess, he at once became the aggressor and must be judged by his conduct.”).

McAninch writes that this Court’s jurisprudence supports the rule that “one need not anticipate serious bodily harm before responding with non-deadly force” McAninch and Fairey, The Criminal Law of South Carolina, 674 (4th Ed. 2002). This is in accord with the “traditional rule.” United States v. Black, 692 F.2d 314, 318 (4th Cir. 1982) (explaining “the amount of force . . . must be reasonably related to the threatened harm which he seeks to avoid. One may justifiably use nondeadly force against another in self-defense if he reasonably believes that the other is about to inflict unlawful bodily harm (it need not be death or serious bodily harm) upon him (and also believes that it is necessary to use such force to prevent it)”) (quoting W. LaFave & A. Scott, Handbook on Criminal Law 392–93 (1972)); see also State v. Anderson, 51 S.E.2d 895, 897 (N.C. 1949) (“The law does not compel any man to submit in meekness to indignities or violence to his person merely because such indignities or violence stop short of threatening him with death or great bodily harm. If one is without fault in provoking, or engaging in, or continuing a difficulty with another, he is privileged by the law of self-defense to use such force against the other as is actually or reasonably necessary under the circumstances to protect himself from bodily injury or offensive physical contact at the hands of the other, even though he is not thereby put in actual or apparent danger of death or great bodily harm.”). The trial court

erred by instructing the jury that apprehension of “serious” bodily injury is an element of self-defense without considering the degree of force used by the defendant.

However, Guderyon was not prejudiced by the trial court’s instruction. The evidence conclusively showed Guderyon did not act in self-defense.¹ Further, the charge gave the jury the proper test for determining the issues presented by this case because Guderyon used force likely to cause serious bodily injury. For this response to be justified, he must have been faced with the imminent danger of serious bodily injury, which he wasn’t. Even going by Guderyon’s own version of events, his response was unnecessary and disproportionate.

No amount of force was justified in this case. Guderyon fails all the elements of self-defense. First, inserted himself into a confrontation in which he was not involved, and thus was at fault in bringing on the difficulty. The victim and Petrocine were not engaged in a physical fight. Their disagreement had nothing to do with Guderyon and had already ended with the two of them shaking hands. (R.p.121). Witness David Hayes succinctly testified: “There wasn’t a fight.” (R.p.110). Guderyon was the only cause of this violence. See State v. Slater, 373 S.C. 66, 70, 644 S.E.2d 50, 52 (2007) (explaining self-defense charge was not warranted where “Slater approached an altercation that was already underway with a loaded weapon by his side”).

Second, Guderyon was not in imminent danger of bodily harm. The State’s evidence conclusively showed Guderyon was not being attacked. The still image from the surveillance video shows Guyderon approaching the victim from the side and punching the victim with full force. (State’s Exhibits #6–7, 9). The victim was blindsided and unable to defend himself. This

¹ Contrary to Guderyon’s assertion in his brief (p.6), the State did object to a self-defense charge on the ground that Guderyon was at fault in bringing on the difficulty and could have avoided the danger. (R.p.241).

evidence and the testimony from Petrocine and Hayes was inconsistent with Guderyon's self-defense claim. The two jailhouse witnesses were completely non-credible.

Even by Guderyon's own version of events, he did not act in self-defense. (State's Exhibit #8). He claimed he was trying to "diffuse" an argument between the victim and Petrocine. He claimed the victim raised his hand as if to say "this don't got nothing to do with you." He admitted the victim was not looking at him at the time. Guderyon claimed the victim "said something slick" and "went to put his hands on me." Guderyon said he "slapped his hand away and hit him." Guderyon admitted he punched the victim in the face and the victim's "eyes rolled back." He explained he had trained 13 years in kickboxing and "really didn't even hit him with everything." Guderyon at times claimed the victim touched him but admitted: "He didn't punch me, he put his hand on me like this ain't got nothing to do with you." Guderyon explained: "I look for the first natural reaction . . . I'm always on point . . . right when he put his hand up I'm already swinging . . . and I know I'm quick."

Guderyon, by his own admission, was not being attacked. As discussed above, neither was Petrocine. He testified there was no physical altercation and there was "nothing to protect." (R.p.121). Neither Petrocine nor Guderyon was in reasonable apprehension of danger.

The surveillance photographs and Petrocine's testimony show Guderyon's story—that he was trying to "diffuse" the situation—was a lie. But even if the victim "touched" Guderyon, Guderyon was not in danger of bodily harm and his response was not proportionate. Guderyon apparently believed that if the victim touched him at all—even in a non-aggressive way—he was entitled to use excessive force in return. Guderyon told police he punched the victim with such force that his "eyes rolled back." His own witness, Steven Sumpter, testified Guderyon "knocked him out with one punch" and the victim was unconscious before he hit the ground.

(R.p.229–30). Guderyon told police about his kickboxing experience and was adamant about how good he was at fighting. See State v. Bennett, 328 S.C. 251, 262, 493 S.E.2d 845, 851 (1997) (explaining “a hand or fist may be considered a deadly weapon depending on the factual circumstances”). The surveillance photograph shows him punching the victim with full force. The “touch” Guderyon described in his statement to police could not justify the deadly force he used. See Wood.

For these same reasons, Guderyon was not prejudiced by the charge because it gave the jury the proper test for determining the issues. Guderyon used force which was likely to cause serious bodily injury and did in fact cause great bodily injury which resulted in the victim’s death. To justify such force, Guderyon must have been faced with the danger of “serious bodily injury” himself. Thus the instruction fit the facts of the case. 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.”).

Finally, Guderyon fails the last element of self-defense. There was no reason for him to insert himself into this disagreement, which had already been resolved. Force was not necessary at all, and this senseless violence could have been avoided.²

² McAninch writes that “one need not retreat before responding with non-deadly force.” McAninch at 674. See also Wayne LaFave, *Substantive Criminal Law*, §10.4(f) (3d ed. 2023 Update) (“It seems everywhere agreed that one who can safely retreat need not do so before using nondeadly force.”); but see Com. v. King, 460 Mass. 80, 83, 949 N.E.2d 426, 429 (2011) (“Where nondeadly force is used, a defendant is entitled to a self-defense instruction if the evidence, viewed in the light most favorable to the defendant without regard to credibility, supports a reasonable doubt that (1) the defendant had reasonable concern for his personal safety; (2) he used all reasonable means to avoid physical combat; and (3) ‘the degree of force used was reasonable in the circumstances, with proportionality being the touchstone for assessing reasonableness.’”). Guderyon did not object to the portion of the charge regarding the fourth element of self-defense, the duty to “avoid the danger,” so that issue is not before the Court. (R.p.248–53). Preservation aside, the “duty to retreat” is not squarely presented by this case. The State’s argument was that Guderyon should not have inserted himself into this disagreement

No reasonable juror could have determined Guderyon acted in lawful self-defense. State v. Jenkins, 412 S.C. 643, 651, 773 S.E.2d 906, 910 (2015) (“An error is harmless if it did not reasonably affect the result of the trial.”). Further, the charge fit the facts of the case and gave the jury the proper test for determining the issues. This Court should affirm.

in the first place, not that he was required to retreat from an attack (which the State argued never occurred). (R.p.282). Further, the State believes there is a difference between a duty to retreat and a duty to avoid unnecessary violence, which is just another expression of necessity. Compare State v. Babb, 88 S.C. 395, 70 S.E. 309, 310 (1911) (“[I]f one expects to be assaulted and has two paths, one leading to the attack and the other leading from it, he must avail himself of the one leading from it if while so doing he can reasonably avoid the necessity of resorting to it.”), with State v. Jackson, 227 S.C. 271, 279, 87 S.E.2d 681, 685 (1955) (explaining “it is one’s duty to avoid taking human life where it is possible to prevent it even to the extent of retreating from his adversary unless by doing so the danger of being killed or suffering serious bodily harm is increased or it is reasonably apparent that such danger would be increased.”).

CONCLUSION


For all of the foregoing reasons, it is respectfully submitted that the judgment and sentence of the trial court be affirmed.

Respectfully submitted,

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