STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

MARK ANTHONY HAILEY, JR.,

APPELLANT.

APPELLATE CASE NO. 2020-001276

Appeal from Greenwood County

Honorable Donald B. Hocker, Circuit Court Judge

Opinion No. 2024-UP-074 (Filed March 13, 2024)

RETURN TO
PETITION FOR REHEARING

On March 13, 2024, this Court reversed Appellant's convictions for murder and possession of a weapon during the commission of a violent crime in an unpublished opinion. State v. Hailey, 2024-UP-074 (S.C. Ct. App. filed March 13, 2024). Pursuant to Rule 221(a), SCACR, the state filed a petition for rehearing on March 28, 2024. On April 2, 2024, this Court requested Appellant file a return to the petition for rehearing. This return follows.

Appellant argued on appeal that the trial court erred by failing to tailor the self-defense instruction to adequately reflect the facts and theories presented by Appellant, specifically that a person is not required to wait until his adversary is on equal terms or has aimed or fired a

weapon before he acts, when the charge was supported by the evidence and was crucial to the jury's understanding of the law on self-defense. This Court agreed.

While the trial court instructed the jury that an "individual has no duty to retreat if by doing so the danger of being killed or suffering serious body injury would increase," this Court correctly concluded this instruction "more fully explained the fourth element" of self-defense and "did not adequately convey the full scope of the law as to the third element . . . because Hailey [Appellant] testified he shot the victim prior to the victim shooting him after the victim drove him two miles down a dark, wooded road, refused his pleas to turn around, and then parked the car and waved a gun in his face."

In State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984), our Supreme Court suggested a standard self-defense instruction. However, in State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989), the Court made clear that it did not intend Davis to be the exclusive self-defense charge. State v. Burkhart, 350 S.C. 252, 262, 565 S.E.2d 298, 303 (2002). Instead, "a trial judge should specifically tailor the self-defense instruction to adequately reflect the facts and theories presented by the defendant." State v. Day, 341 S.C. 410, 418, 535 S.E.2d 431, 435 (2000) (citing Fuller, 297 S.C. 440, 377 S.E.2d 328). "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. (citing Fuller, 297 S.C. 440, 377 S.E.2d 328).

In State v. Nichols, 325 S.C. 111, 116-117, 481 S.E.2d 118, 121 (1997), the defendant argued the trial court's instructions on the law of self-defense were inadequate under State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989), where the court instructed the jury solely on the common law elements of self-defense. Nichols objected to the charge and requested additional instructions on: (1) the right to act on appearances; (2) relevance of prior difficulties; and (3) that

a person does not have to wait before acting in self-defense. Id. at 117, 481 S.E.2d at 121. Nichols contended the trial judge's refusal to give further instructions was reversible error. Our Supreme Court agreed. Id.

The Court emphasized that the charge suggested in Davis was not intended to be the exclusive charge for self-defense and that trial courts have been instructed to consider the facts and circumstances of the case at hand to fashion a proper charge. Id. (citing Fuller, 297 S.C. at 443, 377 S.E.2d at 330). The Court held Nichols was entitled to a charge on the right to act on appearances because Nichols testified he thought he had seen a shiny object in the deceased's hand. Id. (citing State v. Jackson, 227 S.C. 271, 87 S.E.2d 681 (1955)). The Court also found the evidence showed there had been prior difficulties between Nichols and the deceased including an instance where the deceased pointed a rifle at Nichols. Consequently, the Court concluded Nichols was entitled to a charge on the relevance of prior difficulties. Id. (citing State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978) (prior bad blood, intoxication, and prior threats by deceased were relevant to defendant's reasonable apprehension of bodily harm)). Further, the Court held Nichols was entitled to a charge that he did not have to wait before acting in self-defense since Nichols testified he thought he saw a gun in the deceased's hand and did not wait for the deceased to fire or aim at him. Id. (citing State v. Rash, 182 S.C. 42, 188 S.E. 435 (1936)). Accordingly, the Supreme Court reversed Nichols conviction and remanded for a new trial. Id. at 118, 481 S.E.2d at 122.

In State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978), our Supreme Court held Hendrix was entitled to a directed verdict since he was acting in self-defense as a matter of law when he shot the decedent. Id. at 661-662, 244 S.E.2d at 507. Hendrix was celebrating Labor Day with his family at his property on the shore of Lake Murray. Id. at 655, 244 S.E.2d at 504.

Evidence established that "ill feelings characterized the relationship" between Hendrix and the decedent. Id. The decedent had confronted Hendrix earlier in the day and warned "they were going to have to fight to settle" the matter. Id. Hendrix was standing next to his truck, which was parked on his land, when the decedent arrived at the property, stopped his vehicle in the road, jumped out, and advanced toward Hendrix. Id. at 656, 244 S.E.2d at 505. Hendrix reached into the cab of his truck, pulled out a shotgun, leveled it at the decedent, and told him three times to back off. Id. The decedent immediately turned around, walked back to his truck, reached into the cab, drew out his own shotgun, and walked straight back to where Hendrix was standing. Id. A neighbor of the decedent observed the commotion and approached the scene. Id. at 657, 244 S.E.2d at 505. When she saw the two men facing each other with shotguns, she screamed the decedent's name. Id. The decedent turned his head in the direction of the scream. Id. As the decedent turned, Hendrix began firing. Id. He fired four times in rapid succession, killing the decedent. Id.

The Court determined Hendrix was not at fault in bringing on the difficulty since he armed himself on his own land in a legal manner after he was threatened. Id. at 659, 244 S.E.2d at 506. The Court further found the second and third elements of self-defense were established since the evidence showed Hendrix was actually in imminent danger of losing his life. Id. at 659-660, 244 S.E.2d at 506. Having no duty to retreat because he was on his own property and being without fault in bringing on the fatal confrontation, the Court held Hendrix was warranted in reacting to the situation with force. Id. at 660, 244 S.E.2d at 507. In so holding, and relevant to this case, the Court emphasized, "Once [Hendrix's] right to fire in self-defense arose, he was not required to wait until his adversary was on equal terms or until he fired or aimed his

weapon." Id. at 660-661, 244 S.E.2d at 507. This is significant since the evidence showed Hendrix shot the decedent when he was distracted by his neighbor's scream.

In this case, as in Day and Nichols, the trial court erred by refusing to instruct the jury on the specific element of self-defense requested by Appellant since it was applicable to Appellant's account of what occurred. Appellant testified that after driving two miles the wrong way down Warner Road and repeatedly ignoring Appellant's advice to turn around, the decedent pulled a gun, waived it in Appellant's face, and demanded Appellant return whatever he had allegedly stolen from the decedent's bathroom. R. 806, l. 19 – 808, l. 18. The decedent then became distracted by a noise or light from his phone and briefly placed the gun in his lap. R. 811, ll. 1-7; R. 831, ll. 2-11. As the decedent began to raise the gun up again, Appellant shot him. R. 831, ll. 12-13; R. 833, l. 25 – 834, l. 4. Based on this testimony, the instruction from Rash and Hendrix, that once the right to fire in self-defense arose, Appellant was not required to wait until his adversary was on equal terms or until he fired or aimed his weapon, should have been charged to the jury as it was applicable to Appellant's account of what occurred.

Before waiting for the decedent to aim the pistol at him again and perhaps fire, Appellant shot him in self-defense. Consequently, there was evidence to support the requested instruction. As our Supreme Court stated in Day, "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." Day, 341 S.C. 410, 418, 535 S.E.2d 431, 435 (2000) (citing Fuller, 297 S.C. 440, 377 S.E.2d 328). Since the trial court failed to charge an important element of self-defense relevant to Appellant's account of what occurred, this Court correctly held the trial court erred and reversed Appellant's convictions.

Unlike the state argued on rehearing, the instruction that a person has "no duty to retreat if by doing so the danger of being killed or suffering serious bodily injury would increase," which was charged to the jury, is not "substantially similar to the 'equal terms' charge" requested by Appellant. Reh. Pet. at 2. In State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989), our Supreme Court held the trial court erred by refusing to charge the jury that (1) the defendant has the right to act on appearances *and* (2) an individual has no duty to retreat if by doing so he would increase his danger of being killed or suffering serious bodily injury.

While Fuller was in his car, he was confronted by two men. As Fuller began to turn his car around in an attempt to leave, he saw the two men open the trunk of their car. Both men then got into their car and tried to block Fuller's car from leaving. Fuller maneuvered past the men's car and turned right onto the main road. However, Fuller's car crashed into a steel rail at the road's curb. After Fuller crashed his car, the men rammed their car into Fuller's car. The men then began to exit their car. Fuller thought he saw something shiny in one of the man's hands and thought it was a gun. Fuller fired four shots and killed both men. Id. at 442, 377 S.E.2d at 330.

The Supreme Court held Fuller was entitled to a charge that the jury could find Fuller had the right to act on appearances because he testified that he saw the two men open the trunk of their car and also thought he saw a shiny object in one of the man's hands. The Court also held the trial court erred in not charging 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 because the evidence presented at trial revealed that the men rammed Fuller's car door when he tried to leave his car and Fuller testified that he did not believe it was safe to leave his car and run from the scene. Id. at 444, 377 S.E.2d at 331.

The holding in Fuller demonstrates that the rationale behind the two instructions is different. The no duty to retreat language more fully explains the fourth element of self-defense, while the right to act on appearances, which is similar to the "equal terms" charge, more fully explains the third element of self-defense. See State v. Harris, 328 S.C. 107, 114-15, 674 S.E.2d 532, 536 (Ct. App. 2009) (holding the trial court's instruction on self-defense adequately covered the law because an instruction that the defendant had the "right to act on appearances" was substantially similar to the "gets the drop" language from Rash).

Based upon the above argument, Appellant respectfully requests this Court deny the state's petition for rehearing. This Court correctly held the trial court erred by refusing to charge the jury that a person does not have to wait for the decedent to "get the drop on him" before defending himself where the evidence supported the instruction, and the charge as a whole, did not adequately cover the law based on the evidence presented at trial.

Respectfully Submitted,

s/ Lara M. Caudy
LARA M. CAUDY
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ATTORNEY FOR APPELLANT

This 12th day of April, 2024.

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Apr 12 2024
SC Court of Appeals

STATE OF SOUTH CAROLINA

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Appeal from Greenwood County

Honorable Donald B. Hocker, Circuit Court Judge

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APPELLATE CASE NO. 2020-001276

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies that a true copy of the Return to Petition for Rehearing in the above referenced case has been served upon Joshua A. Edwards, Esquire, at his primary email address listed in the Attorney Information System (AIS), this 12th day of April, 2024.

s/ Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

From:	Mcinnis, Sara
To:	Josh Edwards; mbrown@scag.gov
Cc:	Anne Mueller; abennett@scag.gov; Caudy, Lara
Subject:	2020-001276 The State v. Mark Hailey Return to Petition for Rehearing
Date:	Friday, April 12, 2024 12:05:00 PM
Attachments:	2020-001276 - State v. Mark Hailey - Return to Petition for Rehearing.pdf

Good Afternoon,

Please find attached for service in the above-referenced case the Return to the Petition for Rehearing, which will be filed with the Court of Appeals today, April 12, 2024, via email filing.

Thank you!

Sara McInnis
Administrative Assistant
South Carolina Commission on Indigent Defense
Appellate Division
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