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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Greenwood County
Honorable Donald B. Hocker, Circuit Court Judge

Opinion No. 2024-UP-074 (S.C. Ct. App. Filed March 13, 2024)

THE STATE,

PETITIONER,

V.

MARK ANTHONY HAILEY, JR.,

RESPONDENT.

APPELLATE CASE NO. 2024-001039

RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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QUESTION PRESENTED

Did the Court of Appeals correctly hold the trial judge erred by failing to tailor the self-defense instruction to adequately reflect the facts and theories presented by Respondent, specifically that Respondent was not required to wait until his adversary was on equal terms or until he fired or aimed his weapon, when the charge was supported by the evidence and was crucial to the jury's understanding of the law on self-defense?

STATEMENT OF THE CASE

The state alleged Respondent shot and killed Marty George as the pair drove down Warner Road, a dark secluded area in Ninety Six. Respondent admitted to shooting George, but maintained he acted in self-defense after George ignored Respondent's repeated pleas to turn the car around, suddenly stopped the vehicle in the middle of the road, pulled a gun, waived it in Respondent's face, and demanded Respondent return whatever he had allegedly stolen from George's bathroom earlier that night. Respondent, in fear for his life, shot George once in the head after George became distracted by a noise or light coming from his phone. App. 796, l. 14 – 813, l. 9.

A Greenwood County grand jury indicted Respondent on September 27, 2019 for murder, carjacking, and possession of a weapon during the commission of a violent crime. App. 962-965. On March 4, 2020, a pretrial hearing was held on Respondent's motion for immunity pursuant to the Protection of Persons and Property Act. App. 1. Yates Brown represented the state, and Tristan Shaffer represented Respondent. App. 1. In the middle of the hearing, Respondent invoked his Fifth Amendment right to remain silent and withdrew his motion. App. 109, l. 12 – 110, l. 13.

Respondent's case was called to trial on September 11, 2020 before the Honorable Donald B. Hocker, and a jury. App. 111. Yates Brown and Anna Sumner represented the state. App. 111. Tristan Shaffer and Chelsea McNeill represented Respondent. App. 111.

On September 23, 2019, the jury found Respondent guilty of murder and possession of a weapon during the commission of a violent crime. App. 932, l. 18 – 933, l. 8. It could not reach a unanimous verdict on carjacking and the judge declared a mistrial as to that offense. App. 931,

l. 24 – 932, l. 5; App. 938, ll. 1-2. Respondent was sentenced to thirty-five years for murder and five years concurrent for the weapons offense. App. 951, l. 23 – 952, l. 1.

Respondent filed a timely notice of appeal. Respondent argued on appeal that the trial judge erred by failing to instruct the jury 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 since the charge was supported by the evidence and was crucial to the jury's understanding of the law on self-defense.[1]

On March 13, 2024, the Court of Appeals reversed Respondent'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. Based on a request from the Court of Appeals, Respondent filed a return to the petition for rehearing on April 12, 2024. The Court of Appeals denied the petition for rehearing by order filed May 21, 2024. On June 26, 2024, the state filed a petition for writ of certiorari with this Court.

This return to the petition for writ of certiorari follows.

[1] Respondent raised two additional issues on appeal. The Court of Appeals did not address Respondent's other two issues since it reversed the trial judge as to the first issue.

ARGUMENT

The Court of Appeals correctly held the trial judge erred by failing to tailor the self-defense instruction to adequately reflect the facts and theories presented by Respondent, specifically that Respondent was not required to wait until his adversary was on equal terms or until he fired or aimed his weapon, when the charge was supported by the evidence and was crucial to the jury's understanding of the law on self-defense.

Relevant Facts

Respondent requested the trial judge tailor the self-defense instruction to reflect the evidence presented. Specifically, Respondent requested a charge on the concept that a person does not have to wait before acting in self-defense. Initially, defense counsel discussed the language from State v. Rash, 182 S.C. 42, 188 S.E. 435 (1936): "He [the defendant] doesn't have to wait until his assailant gets the drop on him, he has a right to act under the law of self-preservation and prevent his assailant getting the drop on him; if it is apparent, or reasonably apparent his assailant is taking steps to get the drop on him, he must take steps first to prevent such assailant from getting the drop on him." Id. at 42, 188 S.E. at 438; See App. 877, ll. 9-17. When the trial judge asked for clarification as to what Respondent wanted charged, defense counsel stated, "[O]nce a Defendant has a right to act in self-defense he is not required to wait until the adversary and him are on equal terms in order to fire a weapon." App. 877, l. 22 – 878, l. 3.

In support of his request, Respondent cited to State v. Rash, 182 S.C. 42, 188 S.E 435 (1936), as mentioned, and State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978). App. 878, l. 4 – 879, l. 2. Counsel quoted the language from Hendrix, which is more concise than the language found in Rash: "Once the appellant'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." App. 878, ll. 18-25; See Hendrix, 270 S.C. at 660-661, 244 S.E.2d at 506. Counsel emphasized that the judge may "like to go into that language [from Hendrix] instead [of the language from Rash] because it is a little bit more concise." App. 878, l. 18 – 879, l. 2.

The state's *only* objection to the charge was the timing of the request. Respondent made the request after the deputy solicitor had finished his closing argument. App. 879, ll. 11-15. The judge found Respondent had not "waived his right" to request additional instructions even if the timing of the request may have been "unfair" to the solicitor. App. 880, ll. 4-15.

After defense counsel completed his closing argument and the deputy solicitor argued in reply, the judge denied Respondent's request to charge. App. 908, ll. 7-11. The judge did not provide any reasoning for his refusal to charge the additional language.

The trial judge charged the jury on self-defense as follows:

> [T]he Defendant has raised the defense of self-defense. Self-defense is a complete defense and, if it is established, you must find the Defendant not guilty. The State has the burden of disproving self-defense by proof beyond a reasonable doubt. If you have a reasonable doubt of the Defendant's guilt after considering all the evidence, including the evidence of self-defense, then you must find the Defendant not guilty. On the other hand, if you have no reasonable doubt of the Defendant's guilt after considering all the evidence, including the evidence of self-defense then you must find the Defendant guilty. The elements of self-defense are as follows, and, again, the Defendant has no burden to prove self-defense, but the burden is on the State to disprove self-defense beyond a reasonable doubt.
>
> And there are four elements. The first is without fault. First, the Defendant must be without fault in bringing on the difficulty. If the Defendant's conduct was the type which was reasonably calculated to and did provoke a deadly assault, the Defendant would be at fault in bringing on the difficulty and would not be entitled to an acquittal based on self-defense. The second element is imminent danger. The second element of self-defense is that the Defendant was actually in imminent danger of death or serious bodily injury or that the Defendant actually believed he was in imminent danger of death or serious bodily injury. The third element is reasonableness. If the Defendant was actually in imminent danger it must be shown that the circumstances would have warranted a

> person of ordinary firmness and courage to strike the fatal blow to prevent death or serious bodily injury. If the Defendant believed he was in imminent danger of death or serious bodily injury it must be shown that a reasonably prudent person of ordinary firmness and courage would have had the same belief. In deciding whether the Defendant actually was, or believed he was, in imminent danger of death or serious body injury you should consider all the facts and circumstances surrounding the case and the crimes including the physical condition and characteristics of the Defendant and the deceased. And the last element of self-defense is no other way to avoid the danger. The final element of self-defense is that the Defendant had no other probable way to avoid the danger of death or serious bodily injury than to act as the Defendant did in this particular instance. An individual [h]as no duty to retreat if by doing so the danger of being killed or suffering serious bodily injury would increase.

App. 919, l. 11 – 921, l. 8.

Respondent renewed his request to charge after the judge finished instructing the jury. App. 925, ll. 6-7.

Court of Appeals Opinion

The Court of Appeals held the trial judge abused his discretion by refusing Respondent's request to charge the jury that he did not have to wait for the decedent to "get the drop of 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. While the trial judge 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," the Court of Appeals 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 [Respondent] 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."

Standard of Review

"A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." State v. Williams, 400 S.C. 308, 314, 733 S.E.2d 605, 608 (Ct. App. 2012) (quoting State v. Mattison, 388 S.C. 469, 478, 697 S.E.2d 578, 583 (2010)) (internal quotation marks omitted). "The law to be charged must be determined from the evidence presented at trial." Id. (quoting State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 512 (2000)) (internal quotation marks omitted); See Mattison, 388 S.C. at 478, 697 S.E.2d at 583 (stating appellate courts should "consider the court's jury charge as a whole in light of the evidence and issues presented at trial").

"When reviewing the circuit court's refusal to deliver a requested jury instruction, appellate courts must consider the evidence in a light most favorable to the defendant." Id. at 314, 733 S.E.2d at 608-609 (citing Cole, 338 S.C. at 101, 525 S.E.2d at 512-513). "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 [circuit court's] refusal to do so is reversible error." Id. at 314, 733 S.E.2d at 609 (quoting State v. Day, 341 S.C. 410, 416-417, 535 S.E.2d 431, 434 (2000)) (alteration in original).

Discussion

The Court of Appeals correctly held trial judge erred by refusing to tailor the self-defense instruction to adequately reflect the facts and theories presented by Respondent as required pursuant to State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989). Specifically, the judge erred by failing to instruct the jury that Respondent was not required to wait until his adversary was on equal terms or until he fired or aimed his weapon before he acted. This charge was supported by the evidence and was crucial to the jury's understanding of the law on self-defense.

In State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984), this 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. Day, this Court held the trial judge's failure to charge the specific elements of self-defense that were applicable to Day's theory constituted reversible error. Day, 341 S.C. at 418, 535 S.E.2d at 435. The Court found the trial judge's instruction was incomplete because it failed to include a charge indicating: (1) Day had a right to judge the conduct of the decedent more harshly than otherwise because of the decedent's drug consumption, and (2) the jury could consider prior instances of violence or unprovoked aggression by the decedent in determining whether Day had a reasonable belief of imminent danger. Id. Part of Day's defense was his argument that the decedent had previously pulled a gun on him and that the decedent was in a "drug induced paranoia" the day of the incident. Id. Consequently, the Court held the jury charge, which only included the standard self-defense instruction as outlined by this Court in Davis along with a charge on the right to act on appearances, was incomplete because the trial judge failed to charge on the decedent's substance abuse or his prior acts of violence. Id. Ultimately, the Court reversed Day's convictions and remanded for a new trial.

In State v. Nichols, 325 S.C. 111, 116-117, 481 S.E.2d 118, 121 (1997), the defendant argued the trial judge'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 judge 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. This 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, this 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), this 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 judge erred by refusing to instruct the jury on the specific element of self-defense requested by Respondent since it was applicable to Respondent's account of what occurred. Respondent testified that after driving two miles the wrong way down Warner Road and repeatedly ignoring Respondent's advice to turn around, the decedent pulled a gun, waived it in Respondent's face, and demanded Respondent return whatever he had allegedly stolen from the decedent's bathroom. App. 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. App. 811, ll. 1-7; R. 831, ll. 2-11. As the decedent began to raise the gun up again, Respondent shot him. App. 831, ll. 12-13; App. 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, Respondent 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 Respondent's account of what occurred.

Before waiting for the decedent to aim the pistol at him again and perhaps fire, Respondent shot him in self-defense. Consequently, there was evidence to support the requested instruction. As this 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 judge failed to charge an important element of self-defense relevant to Respondent's account of what occurred, the Court of Appeals correctly held the trial judge erred and reversed Respondent's convictions.

Unlike the state argued in its petition for rehearing and subsequent petition for writ of certiorari, 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 Respondent.

In State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989), this Court held the trial court erred by refusing to instruct 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.

This 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.

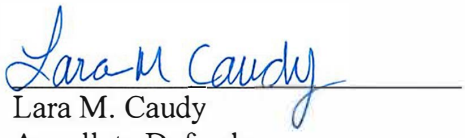
The holding in Fuller demonstrates that the rationale behind the two instructions is different. The no duty to retreat language more fully explains the fourth element of self-defense, while the right to act on appearances, which is similar to the "equal terms" charge, more fully explains the third element 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).

Respectfully, this Court should deny the state's petition for writ of certiorari.

CONCLUSION

Based on the foregoing argument, Respondent respectfully requests this Court deny the petition for writ of certiorari.

Respectfully Submitted,



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ATTORNEY FOR RESPONDENT

This 25th day of July, 2024.