

ORIGINAL

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

v.

ROBERT MONDRIQUES JONES,

APPELLANT

Appeal from Greenville County

Edward W. Millèr, Circuit Court Judge

Opinion No. NO. 2013-UP-393

APPELLATE CASE NO. 2011-186367

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, counsel for Robert Mondriques Jones petitions the Court for rehearing. Counsel respectfully submits that the Court overlooked the fact, in finding there was no evidence that Appellant was acting in the sudden heat of passion, that ““To warrant the court in eliminating the offense of manslaughter it should very clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter.’ Burriss, 334 S.C. at 264, 513 S.E.2d at 109. In determining whether the evidence requires a charge of voluntary manslaughter, the Court views the facts in a light most favorable to the defendant. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001).” State v. Pittman, 373 S.C. 527, 572-

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573, 647 S.E.2d 144, 168 (2007). Viewing the evidence in the light most favorable to the Appellant, the evidence required a charge on voluntary manslaughter.

Additionally, counsel respectfully submits that the Court overlooked the fact that while the jury was charged with self defense in this case, the charge was inadequate, under the facts of this case, because it did not inform the jury that unlawful possession of a weapon does not necessarily preclude a finding that appellant acted in self-defense. Finally, counsel respectfully submits that the Court overlooked the fact that , if relevant, the probative value, for impeachment purposes, of the testimony by the Investigator, qualified as a gang expert, was limited to impeachment rendering the additional extensive testimony about criminal gang activity, unrelated to impeachment, inadmissible as far more prejudicial than probative.

In regard to the trial judge's refusal to charge voluntary manslaughter, this Court wrote, "No evidence was presented that Jones was acting in a sudden heat of passion when he shot Vincent. Rather, Jones' testimony makes clear that he shot Vincent solely in self-defense or in defense of his girlfriend. Thus, the evidence shows Jones intentionally shot Vincent, and he did so either with malice aforethought, or in defense of himself or others."

In State v. Smith, 391 S.C. 408, 413, 706 S.E.2d 12, 15 (2011) the South Carolina Supreme Court wrote, "For a defendant to be entitled to a voluntary manslaughter charge, there must be evidence of both sufficient legal provocation and heat of passion at the time of the killing. See State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000) ('Both heat of passion and sufficient legal provocation must be present at the time of the killing.')." This Court found that "Jones arguably presented evidence of sufficient legal provocation." This Court, however, found that Appellant was not acting in the sudden heat of passion. Appellant submits there was evidence of both sufficient legal provocation and heat of passion.

In regard to what constitutes heat of passion , the South Carolina Supreme Court has held, “The sudden heat of passion, upon sufficient legal provocation, which mitigates a felonious killing to manslaughter, while it need not dethrone reason entirely, or shut out knowledge and volition, must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence.” Knoten, 347 S.C. at 303, 555 S.E.2d at 395.

In Smith, 391 S.C. at 413, 706 S.E.2d at 15 (2011) the Court wrote, “In determining whether the act which caused death was impelled by heat of passion or by malice, all the surrounding circumstances and conditions are to be taken into consideration, including previous relations and conditions connected with the tragedy, as well as those existing at the time of the killing. State v. Norris, 253 S.C. 31, 35 168 S.E.2d 564, 566 (1969); State v. Gardner, 219 S.C. 97, 105, 64 S.E.2d 130, 134 (1951).”

The Appellant shot the Campbell brothers during the course of a heated argument in which Vincent refused to allow Crystal to take their daughter to Belton where she lived with the Appellant. (R. p. 159, lines 1-23) Vincent had inflicted violence on Crystal in the past, had threatened to “beat Appellant’s ass” and threatened gun play. These are precisely the types of circumstances that produce the uncontrollable impulse to do violence required for voluntary manslaughter. There is evidence in the record that the shooting was done in the heat of passion and not with malice and the jury should have been given the option to decide.

Viewing the evidence in the light most favorable to appellant, there is evidence of both sufficient legal provocation and heat of passion. The trial judge erred in refusing to charge voluntary manslaughter. The error is not harmless. In State v. Lowry, 315 S.C. 396, 400, 434,

S.E.2d 272, 274 (1993), the Court wrote, “Even though the jury was not convinced that Lowry acted in self-defense, the jury could have discerned, consistent with the evidence, that there was sufficient legal provocation and heat of passion to find Lowry guilty of voluntary manslaughter. See State v. Gilliam, 296 S.C. 395, 397, 373 S.E.2d 596, 597 (1988).” Just as in Lowry, even if the jury was not convinced that appellant acted in self-defense,¹ the jury could have discerned, consistent with the evidence, that there was sufficient legal provocation and heat of passion to find appellant guilty of voluntary manslaughter rather than murder.

In Gilliam, Court, in regard to charging voluntary manslaughter wrote:

To warrant refusal of such a charge, there must be no evidence tending to reduce the crime from murder to manslaughter. Id.; State v. Norris, 253 S.C. 31, 168 S.E.2d 564 (1969). Appellant's testimony that the victim threatened him and then fired at him would support a finding of sufficient legal provocation and heat of passion. See State v. Linder, supra; see also State v. Gardner, 219 S.C. 97, 64 S.E.2d 130 (1951) (heat of passion renders mind of ordinary person incapable of cool reflection and produces an uncontrollable impulse to do violence). The trial judge erred in refusing to charge voluntary manslaughter.

Id. 296 S.C. at 397, 373 S.E.2d at 597 (1988). As in Gilliam the trial judge erred in refusing to charge voluntary manslaughter.

In regard to the judge's refusal to charge the jury that the unlawful possession of a weapon does not necessarily preclude a finding that Appellant acted in self-defense this Court wrote, “The fact that the jury was charged on self-defense is an indication in and of itself that the unlawful possession of a weapon does not necessarily preclude a finding of self defense.” In charging self defense, the judge correctly instructed the jury, “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.” (R. p.

¹ The inadequate charge on self defense is discussed below.

558, lines 20 – p. 559, line 1). The judge’s failure to instruct the jury that the unlawful possession of weapon does not necessarily preclude a finding that Appellant acted in self defense, precluded the jury from finding that appellant acted in self defense.

In State v. Slater, 373 S.C. 66, 644 S.E.2d 50 (2007), the Court held that the defendant was not entitled to a charge on self defense because the defendant was not without fault in bringing on the difficulty where he brought a loaded weapon to an altercation in progress. The Court wrote, “Although we agree that ‘the mere unlawful possession of a firearm, with nothing more, does not automatically bar a self-defense charge,’ we reject the position that the unlawful possession of a weapon could never constitute an unlawful activity which would preclude the assertion of self-defense.” Slater, 373 S.C. at 70-71, 644 S.E.2d at 52-53.

The Court in Slater then clarified State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999), writing:

Burriss, which deals with the defense of accident, is instructive in the instant case. In Burriss, this Court discussed the use of an accident defense where the defendant unlawfully possessed a gun. Burriss maintained that he was lawfully armed in self-defense when the gun accidentally fired. Id. at 259, 513 S.E.2d at 106. Because a defendant must be acting lawfully to use the defense of accident, we discussed whether a person in unlawful possession of a weapon may lawfully arm himself in self-defense. Id. at 262, 513 S.E.2d at 108. Clarifying an ambiguity in this Court's prior case law, we noted that where the defendant's unlawful possession of a weapon is merely incidental to the defendant's lawful act of arming himself in self-defense, the unlawful possession of the weapon will not prevent the use of an accident defense. Id. at 262 n. 5, 513 S.E.2d at 108 n. 5. We further explained, however, that the unlawful possession of a firearm can, under some circumstances, constitute an unlawful activity so as to preclude an accident defense if the weapon is the proximate cause of the killing. Id. Although Burriss takes the additional step of applying the rule in the context of accident, the analysis is equally applicable in determining if a defendant in unlawful possession of a weapon is entitled to a charge on self-defense.

Slater, 373 S.C. at 71, 644 S.E.2d at 53.

The trial judge correctly noted that the issue in Slater involved whether a self defense charge was warranted. In the present case the self defense charge given was warranted but under the facts of the case and in view of the ruling in Slater and Burris, the jury should have been instructed that the mere unlawful possession of a weapon does not preclude a finding of self defense.

Appellant's mere act of unlawfully possessing the weapon and bringing it with him to Greenville does not bar self defense. Unlike Slater, appellant was not bringing the weapon to an altercation in progress. The unlawful possession was not the proximate cause of the shooting. The shooting took place after appellant was entitled to arm himself in self defense. The error in refusing to charge that the mere unlawful possession of a weapon does not bar self defense was not harmless.

In closing the State argued:

Let me tell you why this theory of self-defense doesn't apply. There's five elements of self-defense and the State has to disprove. He has, he the defendant, has offered, he's attempted to offer some of these into evidence. I submit to you that he doesn't get past any of them. The Defendant is without fault. The Defendant came to Greenville with a loaded .38. The Defendant told you on the stand that he told Vincent if he had something to say, he was going to say it. He's not this innocent angel they try to paint him out to be. Doesn't work.

(R. p. 545- lines 20 – p. 546, lines 1-4). The incomplete charge and the State's closing argument precluded the jury from finding that appellant acted in self defense.

In regard to the testimony by the Investigator as a gang expert this Court wrote, "Investigator Brown's testimony served to impeach Jones' testimony that he was no longer affiliated with the gang. Because his testimony was relevant for impeachment purposes, and because extensive evidence of Jones' gang involvement had already been admitted without

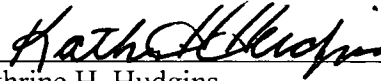
objection, we believe the probative value of Investigator Brown's testimony was not substantially outweighed by the danger of unfair prejudice."

The entire line of questioning in regard to gang activity and the reply testimony from the expert witness in regard to gang activity was irrelevant as to the guilt or innocence of the defendant and was highly prejudicial as it amounted to improper propensity evidence. See State v. Bailey, 279 S.C. 437, 308 S.E.2d 795 (1983).

Alternatively, as this Court found the evidence from the gang witness was proper reply testimony in response to the appellant stating that he was no longer involved with a gang, the testimony should have been limited to impeachment testimony. The prejudicial impact of the the additional extensive testimony about criminal gang activity, unrelated to impeachment far outweighs any purported probative value. "The admission of evidence is within the circuit court's discretion and will not be reversed on appeal absent an abuse of that discretion." State v. Dickerson, 395 S.C. 101, 116, 716 S.E.2d 895, 903 (2011). Rule 403, SCRE provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." The admission of the extensive gang expert testimony constitutes an abuse of discretion requiring reversal.

Based on the above three arguments, counsel seeks rehearing.

Respectfully submitted,



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This 31st day of October, 2013.

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Edward W. Miller, Circuit Court Judge

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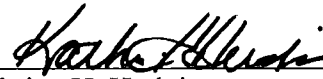
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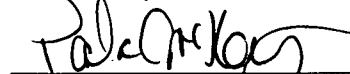
The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Brendan J. McDonald, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 31st day of October, 2013.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 31st day
of October, 2013.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.