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Robert M. Dudek, Chief Attorney
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November 4, 2013

The Honorable Jenny Abbott Kitchings
Clerk, S.C. Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Morris Antonio Sullivan v. State, **Appellate Case No. 2010-151951**

Dear Ms. Kitchings:

The above referenced case is set for oral argument on November 5, 2013. Pursuant to Rule 227(f), SCACR, counsel for petitioner has enclosed both exhibits from the PCR hearing (plaintiff's exhibits #1 and #2) held in the case for review by the members of the Court inasmuch as these exhibits were part of the lower court record.

Please contact me if any questions arise regarding this matter.

Sincerely,

Wanda. H. Carter
Chief Deputy Appellate Defender

WHC/smf

Enclosures: Plaintiff's Exhibit # 1 and # 2

cc: Karen Ratigan

Published Opinions and Orders

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State,
Respondent,
v.

Morris A.
Sullivan,
Appellant.

Appeal From Greenville County
Lee S. Alford, Circuit Court Judge

Opinion No. 25294
Heard April 5, 2001 - Filed May 21, 2001

REVERSED AND REMANDED

Deputy Chief Attorney Joseph L. Savitz, III, and Assistant Appellate Defender Eleanor Duffy Cleary, both of

the South Carolina Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon; Chief Deputy Attorney General John W. McIntosh; Assistant Deputy Attorney General Donald J. Zelenka; Assistant Attorney General Tracey Colton Green, all of Columbia; and Solicitor Robert M. Ariail, of Greenville, for respondent.

JUSTICE PLEICONES: Appellant was convicted of murder, possession of a weapon during the commission of a violent crime, possession of marijuana with intent to distribute, and unlawful possession of a pistol by a person under the age of twenty-one. He was sentenced to one thirty

year term of imprisonment, a consecutive five year term, and two concurrent one year terms, respectively. On appeal, he challenges only the trial court's refusal to charge certain defenses in connection with the unlawful pistol charge. We reverse.

Facts

The evidence was undisputed that the teenage victim and several of his friends went to appellant's home, and that appellant invited them inside. It soon became apparent, however, that the victim was angry because he believed appellant had been involved in a recent drive-by shooting at the victim's house. There was testimony that the victim removed his jacket and acted as if he intended to fight appellant, who retreated to a back room. The victim followed, and they struggled over a handgun, with appellant gaining control. Appellant then walked backwards into the living room holding the gun, while the victim advanced towards him, daring appellant to shoot him. Appellant fired a warning shot towards the floor, but the victim continued to advance. Appellant then shot him in the leg and chest, killing him.

Law/Analysis

Where there is evidence in the record to support a defense, it is reversible error to refuse a request to charge the jury that defense. E.g., State v. Burris, 334 S.C. 256, 513 S.E.2d 104 (1999). The State concedes that a minor charged with the unlawful possession of a pistol under S.C. Code Ann. §16-23-30(c) and (e) (1985)[(1)] may be entitled to a charge on the defense of self-

defense, defense of habitation, and/or the defense of necessity when the facts adduced at trial support such a charge. It argues, however, that the evidence here did not require these charges. We disagree.

A defendant is entitled to a self-defense charge where the evidence shows that:

> (1) he was without fault in bringing on the difficulty;
>
> (2) he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; and
>
> (3) a reasonably prudent person of ordinary firmness and courage would have entertained the same belief. (2)

State v. Long, 325 S.C. 59, 480 S.E.2d 62 (1997).

The evidence here showed that appellant was threatened by the victim after inviting him into his home. There is no evidence that appellant was responsible for the victim's aggressive conduct, and in fact appellant retreated even though he was under no duty to do so. Id. Further, the jury could have found a reasonable person in appellant's position would have believed that he was in imminent danger of suffering serious bodily injury at the hands of the victim, and therefore appellant was entitled to arm himself in self-defense. Cf. State v. Burris, supra (a person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting). The trial judge erred in denying appellant's request that the jury be instructed on

self-defense.

The defense of habitation is analogous to self-defense and should be charged when the defendant presents evidence that he was "defending himself from imminent attack on his own premises." State v. Lee, 293 S.C. 536, 362 S.E.2d 24 (1987). As explained above, there was evidence to support this requested charge, and the refusal to give it constitutes reversible error. State v. Burris, supra.

The defense of necessity should be charged where the evidence shows:

> (1) there is a present and imminent emergency arising without fault on the defendant's part;
>
> (2) the emergency gives rise to well-grounded apprehension of death or serious bodily injury if the criminal act is not done; and
>
> (3) there is no other reasonable alternative to avoid the threat of harm except to commit the criminal act.

State v. Cole, 304 S.C. 47, 403 S.E.2d 117 (1991).

We find appellant was entitled to a jury charge on this defense as it relates to the pistol charge. As noted above, appellant was threatened in his own home by a guest, there was evidence that appellant was not at fault in bringing about the confrontation, and there was evidence of a struggle over control of the gun. From this, the jury could have found that appellant was justified

in taking possession of the pistol. The denial of appellant's request that the jury be charged on the defense of necessity on the pistol charge requires reversal. State v. Burris, supra.

Conclusion

The evidence entitled appellant to the three defense charges requested in connection with the pistol offense. The failure to honor these requests left the jury no choice other than to convict him of that offense. Whether the refusal to charge these defenses prejudiced the jury's consideration of self-defense and/or defense of habitation with regard to the murder charge is not an issue before us at this juncture.[3] Appellant's conviction for violating §16-23-30 is

REVERSED AND REMANDED.

TOAL, C.J., MOORE, WALLER and BURNETT, JJ., concur.

1. Section 16-23-30(e) makes it unlawful for a person under age twenty-one to possess a pistol except under certain circumstances not applicable here. §16-23-30(c).

2. Since appellant was threatened in his own home, he had no duty to retreat. State v. Long, 325 S.C. 59, 480 S.E.2d 62 (1997).

3. We disagree with the State's position that the murder conviction renders harmless the failure to charge self-defense and defense of habitation in connection with the pistol charge. The jury may well have concluded it was reasonable for appellant to arm himself in response to the threat posed by the victim, but unreasonable to shoot

him to death. The jury's rejection of these defenses as applied to the homicide charge does not vitiate them in connection with the pistol possession charge. Further, since the jury was not allowed to consider whether appellant was entitled to arm himself, it may have concluded that his action in wresting control of the pistol precluded a finding that he was "without fault" in shooting the victim.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	THIRTEENTH JUDICIAL CIRCUIT
The State of South Carolina	)	
	)	
vs.	)	PROPOSED JURY CHARGE
	)	
Morris Sullivan,	)	
	)	
Defendant	)	
	)	

Words alone, no matter how terrible, are not legal provocation if the killing is caused by a deadly weapon. State v. Plemmons, 286 S.C. 78, 332 S.E.2d 765 (1985).

Respectfully Submitted,

Joyce Monts

Joyce Monts
Assistant Solicitor
Thirteenth Judicial Circuit

Dated: 4-18, 2006
Greenville, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	THIRTEENTH JUDICIAL CIRCUIT
The State of South Carolina	)	
	)	
vs.	)	PROPOSED JURY CHARGE
	)	
Morris Sullivan,	)	
	)	
Defendant	)	
	)	

"Serious bodily injury " means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ. Model Penal Code, § 210.0 Black's Law Dictionary, 5th Ed. 1979.

Respectfully Submitted,

Joyce Monts
Assistant Solicitor
Thirteenth Judicial Circuit

Dated: 1-18, 2006
Greenville, South Carolina

COURT'S EXHIBIT 3 1-18-06 DR

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	THIRTEENTH JUDICIAL CIRCUIT
The State of South Carolina	)	
	)	
vs.	)	PROPOSED JURY CHARGE
	)	
Morris Sullivan,	)	
	)	
Defendant	)	
	)	

Malice cannot be presumed but may be inferred or implied if there is:

1. brutal conduct or excessive force. State v. McLemore, 310 S.C. 91, 425 S.E.2d 752 (App. 1992)
2. use of a deadly weapon, State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998) [this could include a fist. See State v. Bennett, 328 S.C. 251, 493 S.E.2d 851 (1997)]
3. attempt to mislead the police as to who killed the victim by destroying evidence, State v. Ballington, 346 S.C. 262, 551 S.E.2d 280 (App. 2001)

Respectfully Submitted,

Joyce Monts
Assistant Solicitor
Thirteenth Judicial Circuit

Dated: 1-17, 2006
Greenville, South Carolina

DEFENDANT'S REQUEST TO CHARGE NUMBER 1

LADIES AND GENTLEMEN OF THE JURY, I CHARGE YOU THAT SELF-DEFENSE IS A COMPLETE DEFENSE. IF ESTABLISHED, YOU MUST FIND THE DEFENDANT NOT GUILTY. THERE ARE FOUR ELEMENTS REQUIRED BY LAW TO ESTABLISH SELF-DEFEENSE IN THIS CASE. FIRST, THE DEFENDANT MUST BE WITHOUT FAULT IN BRINGNG ON DIFFICULTY. SECOND, THE DEFEDANT MUST HAVE ACTUALLY BELIEVD HE WAS IN IMMINENT DANGER OF LOSING HIS LEFE OR SUSTAINNG SERIOUS BODILY, OR HE ACTUALLY WAS IN SUCH IMMINENT DANGER. THIRD, IF HIS DEFENSE IS BASED UPON HIS BELIEF OF IMMINENT DANGER, A REASONABLY PRUDENT MAN OR ORDINARY FIRMNESS AND COURAGE WOULD HAVE ENTERTAINED THE SAME BELIEF. IF THE DEFENDANT ACTUALLY WAS IN IMMINENT DANGER, 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. FOURTH, THE DEFENDANT HAD NO OTHER PROBABLY MEANS OF AVOIDING THE DANGER OF LOSING HIS OWN LIFE OR SUSTAINING SERIOUS BODILY INJURY THAN TO ACT AS HE DID IN THIS PARTICULAR INSTANCE. IF, HOWEVER, THE DEFENDANT WAS ON HIS OWN PREMISES HE HAD NO DUTY TO RETREAT BEFORE ACTING IN SELF-DEFENCE.

STATE V DAVIS, 282 S.C. 45, 317 S.E.2D 452 (1984).

COURT'S EXHIBIT 2

DEFENDANT'S REQUEST TO CHARGE NUMBER 2

LADIES AND GENTLEMAN OF THE JURY I CHARGE YOU THAT UNDER THE LAW OF SELF-DEFENSE, ONE WHO IS ATTACKED ON HIS OWN PREMISES IS IMMUNE FROM THE DUTY TO RETREAT.

STATE V BROWN, 321 S.C. 184, 467 S.E.2d 922 (1996)

DEFENDANT'S REQUEST TO CHARGE NUMBER 3

LADIES AND GENTLEMAN OF THE JURY I CHARGE YOU THAT "A PERSON IS ENTITLED TO DEFEND HIMSELF FROM IMMINENT ATTACK FROM ANOTHER ON HIS OWN PREMISES PROVIDED THAT THE PERSON HAS A REASONABLE BELIEF THAT HE IS IN IMMINENT DANGER OF AN ATTACK".

STATE V LEE, 293 S.C. 536, 362 S.E. 2d 24; STATE V SULLIVAN, 345 S.C. 169, 547 S.E. 2d 183.

DEFENDANT'S REQUEST TO CHARGE NUMBER 4

LADIES AND GENTLEMAN OF THE JURY I CHARGE YOU THAT THE ELEMENTS OF THE DEFENSE OF "NECESSITY" ARE AS FOLLOWS;

1. THERE IS A PRESENT AND IMMINENT EMERGENCY ARISING WITHOUT FAULT ON THE DEFENDANT'S PART;

2. THE EMERGENCY GIVES RISE TO WELL-GROUNDED APPREHENSION OF DEATH OR SERIOUS BODILY INJURY IF THE CRIMINAL ACT IS NOT DONE; AND

3. THERE IS NO OTHER REASONABLE ALTERNATIVE TO AVOID THE THREAT OF HARM EXCEPT TO COMMIT THE CRIMINAL ACT.

STATE V. SULLIVAN, 345 S.C. 169, 547 S.E.2d 183

DEFENDANT'S REQUEST TO CHARGE NUMBER 5

LADIES AND GENTLEMEN OF THE JURY I CHARGE YOU THAT WORDS ACCOMPANIED BY HOSTILE ACTS MAY, ACCORDING TO THE CIRCUMSTANCES ESTABLISH SELF DEFENSE.

BATTLE V STATE, 305 S.C. 460, 409 SE2d 400 (1991)