STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions

Steven H. John, Circuit Court Judge

Appellate Case No. 2012-212800
Circuit Court Case No. 2006-GS-26-2998

STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

LARRY CHESNUT,

APPELLANT.

FINAL REPLY BRIEF OF APPELLANT

JEREMY A. THOMPSON
Attorney and Counselor at Law

Law Office of Jeremy A. Thompson, LLC
P.O. Box 12891
Columbia, SC 29211
803-779-2555
803-779-2556 FAX
jeremyatlaw@yahoo.com

ATTORNEY FOR APPELLANT.

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions

Steven H. John, Circuit Court Judge

Appellate Case No. 2012-212800
Circuit Court Case No. 2006-GS-26-2998

STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

LARRY CHESNUT,

APPELLANT.

FINAL REPLY BRIEF OF APPELLANT

JEREMY A. THOMPSON
Attorney and Counselor at Law

Law Office of Jeremy A. Thompson, LLC
P.O. Box 12891
Columbia, SC 29211
803-779-2555
803-779-2556 FAX
jeremyatlaw@yahoo.com

ATTORNEY FOR APPELLANT.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL AMENDMENTS

OTHER AUTHORITIES

ARGUMENT IN REPLY

I. Subsequent developments in the law have undermined the basis for the rule, first set forth in State v. Huckie, 22 S.C. 298 (1885), that prohibits all defendants from making the final closing argument if one defendant introduces evidence in a joint trial such that Huckie should be modified to permit co-defendants in a joint trial to retain the right to the last argument even if another co-defendant introduces evidence at trial.

In its Brief, the Respondent makes a number of arguments in opposition to the Appellant's assertion that the closing argument rule set forth in State v. Huckie, 22 S.C. 298 (1885), should be modified. The Appellant contends that these arguments are baseless.

The Respondent opens its argument by stating that "[w]hile the right to make a closing argument cannot be circumvented, the order of argument is vastly different, particularly since argument is **not** evidence." Brief of Respondent at 10 (emphases in original). While it is certainly true that a closing argument is not evidence, "a closing argument is a basic element of the adversary factfinding process in a criminal trial." Herring v. New York, 422 U.S. 853, 858 (1975). "[C]losing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt." Id. at 862. The importance of a closing argument cannot be understated, and the Respondent's attempts to devalue the significance of closing arguments should be rejected by this Court.

The Respondent further argues that the "Appellant conveniently glosses over the fact the joint trial/closing argument practice was upheld by our appellate courts as recently as 2010." Brief of Respondent at 12; see also Brief of Respondent at 10 ("As support for his contention, Appellant engages in an exceptionally convoluted and tortured analysis of the practice's origins, while glossing over more recent cases affirming it"). This argument is simply untrue. In the Brief of Appellant, the Appellant traced the development of the practice through State v. Gellis,

158 S.C. 471, 155 S.E. 849 (1930). See Brief of Appellant at 13-15. The Appellant then specifically noted that decisions in 1972, 1997, and 2005 had applied the rule. See Brief of Appellant at 15 (citing State v. Crowe, 258 S.C. 258, 188 S.E.2d 379 (1972), State v. Mouzon, 326 S.C. 199, 485 S.E.2d 918 (1997), and State v. Pinkard, 365 S.C. 541, 617 S.E.2d 397 (Ct. App. 2005)). While the Appellant did not specifically mention State v. Smith, 387 S.C. 619, 693 S.E.2d 415 (Ct. App. 2010), at that point, the Appellant did cite Smith later in the Brief. See Brief of Appellant at 22. The Respondent's claim that the Appellant ignored these decisions is simply disingenuous, and should not serve as a basis for discounting the merit of the Appellant's position.[1]

The Respondent also contends that "[t]he practical result of Appellant's proposal would be a nightmare for the orderly administration of a trial, particularly in cases with many defendants." Brief of Respondent at 13. The Respondent then engages in a drawn-out hypothetical involving a trial with five co-defendants in an effort to show how unworkable the Appellant's proposed order of closing arguments would be:

> By way of example, Defendants 1 & 3 introduce evidence in a case with five defendants. As to those defendants, the State has the right to open and close final arguments – State, Defendant 1, State & State, Defendant 3, State. Defendants 2, 4 & 5 did not present evidence, and they have the right to the final argument – State, Defendant 2, Defendant 4, Defendant 5. Even if the State's open argument as to Defendant 1 and Defendant 3 is combined, the end result is still multiple layers of closing arguments.

[1] Indeed, there are only seven cases cited by the Respondent in its Brief which do not also appear in the Brief of Appellant: Herring, *supra*; Ex parte Morris, 367 S.C. 56, 624 S.E.2d 649 (2006); Department of Transportation v. Thompson, 357 S.C. 101, 590 S.E.2d 511 (Ct. App. 2003); Sosebee v. Leeke, 293 S.C. 531, 362 S.E.2d 22 (1987); State v. Furtick, 147 S.C. 82, 144 S.E. 839 (1928); State v. Porter, 389 S.C. 27, 698 S.E.2d 237 (Ct. App. 2010); and United States v. Scheffer, 523 U.S. 303 (1998). None of these decisions involve an issue regarding the order of the closing arguments to the jury. Since the Respondent cannot even cite to a decision on the order of the closing arguments that the Appellant failed to address, the Appellant is hard-pressed to see how he could have "gloss[ed] over" any relevant decision made on this issue by South Carolina's appellate courts.

Brief of Respondent at 14. The Appellant proposes that the solution to this "problem" is quite simple. In the scenario posed by the Respondent, the arguments would proceed in the following order: State, Defendant 1, Defendant 3, State, Defendant 2, Defendant 4, Defendant 5. Using the current practice, the closing arguments would proceed in the following order: State, Defendants 1, 2, 3, 4, and 5 (individually), State. Under either scenario, there are seven arguments. Thus, there are indeed "multiple layers of closing arguments" but the only difference between the two scenarios is the order of the arguments, not the number of arguments made. Brief of Respondent at 14. Consequently, it is difficult to see how the Appellant's proposed practice would result in "a nightmare for the orderly administration of a trial." Brief of Respondent at 13.

Additionally, the Respondent argues that

> The current practice requires each defendant to assess his own individual interests, and make trial decisions accordingly. Joint defendants can certainly agree on a joint strategy, but they must then bear the consequences of the agreed upon strategy, such as losing final closing argument.

Brief of Respondent at 15 (emphases in original). While the Respondent apparently sees this as a point in its favor, the Appellant contends that the Respondent has actually highlighted the problem with the current practice. A "joint strategy" is not the only strategy that can result in "losing final closing argument." Brief of Respondent at 15. Under the current practice, the decision by an individual defendant "to assess his own individual interests" by introducing any evidence adversely affects all other co-defendants, regardless of whether or not they have engaged in a joint strategy. Brief of Respondent at 15 (emphasis in original). If multiple defendants make individual decisions to introduce evidence, or if they make joint decisions to introduce evidence, then they should sustain the consequences of their decisions. If an individual

defendant makes an individual decision to introduce evidence, the hapless co-defendant who introduced nothing should not be penalized for a decision he had no input in.

As a final procedural assertion, the Respondent contends that the current practice, if it is changed, "should be modified to join the vast majority of jurisdictions that provide the prosecution has the first and last closing argument." Brief of Respondent at 17. While the Appellant obviously disagrees with the Respondent's proposed change, the Appellant asserts that if South Carolina joins the majority of jurisdictions in permitting the State the opening and closing arguments in all cases, then the Appellant should still receive a new trial. If the majority rule had been in place at the time of this trial, then the Appellant would have undoubtedly introduced evidence as he would have had no reason not to do so. Since it is the loss of the presentation of the evidence that the Appellant contends is prejudicial, see Brief of Appellant at 22-24, the Appellant asserts that the application of the majority rule in this case still requires that he receive a new trial.

Finally, the Respondent relegates its harmless error analysis to a footnote. See Brief of Respondent at 18 (footnote 5). The Appellant asserts that the Respondent's lack of harmless error analysis shows its acquiescence in a new trial if the Huckie rule is modified. However, even the Respondent's conclusory statement that "Appellant's self-defense claim was unsustainable in light of the undisputed evidence he was at fault in bringing on the difficult, or at a minimum, he and Victim were engaged in mutual combat" is meritless. Brief of Respondent at 18 (footnote 5). The Appellant and the decedent were *not* engaged in mutual combat. In order for two individuals to be engaged in mutual combat, there must be "pre-existing ill-will between the parties." State v. Taylor, 356 S.C. 227, 234, 589 S.E.2d 1, 5 (2003). In other words, there must be "an antecedent agreement to fight ... for the court to charge mutual combat." Id. at 233,

589 S.E.2d at 4 (internal quotation marks omitted). In this case, there was no evidence presented that the Appellant and the decedent had an antecedent agreement to fight; indeed, the evidence presented at the trial showed unmistakably that the Appellant and the decedent had gone out together with Kendrick and enjoyed each other's company prior to returning to the household. Under these circumstances, therefore, the Appellant was not engaged in mutual combat with the decedent.[2] Accordingly, the Respondent's contention that the Appellant was not prejudiced by the trial court's application of Huckie is manifestly without merit. The Appellant should receive a new trial.

With respect to any additional arguments advanced by the Respondent as to why the Appellant's conviction should not be overturned with regard to this issue, the Appellant would rely upon the arguments presented in the Brief of Appellant.

[2] The Appellant recognizes that the trial court charged the jury on mutual combat during its charge to the jury on self-defense. See ROA p. 613, lines 11-24 (Tr. p. 884, lines 11-24). The Appellant contends that the trial court's instruction on mutual combat was patently erroneous and would warrant the grant of a new trial for the same reasons as set forth in Taylor. However, no objection was made to the charge, either during the colloquy on the charge, see ROA pp. 580-592 (Tr. pp. 774-785), or following the trial court's charge to the jury. See ROA p. 620, lines 14-19 (Tr. p. 896, lines 14-19). Since "'South Carolina appellate courts do not recognize the plain error rule,'" this issue is not preserved for appeal. Kennedy v. S.C. Retirement System, 349 S.C. 531, 533, 564 S.E.2d 322, 323 (2001) (quoting Jean H. Toal, Shahin Vafai, & Robert Muckenfuss, Appellate Practice in South Carolina 65).

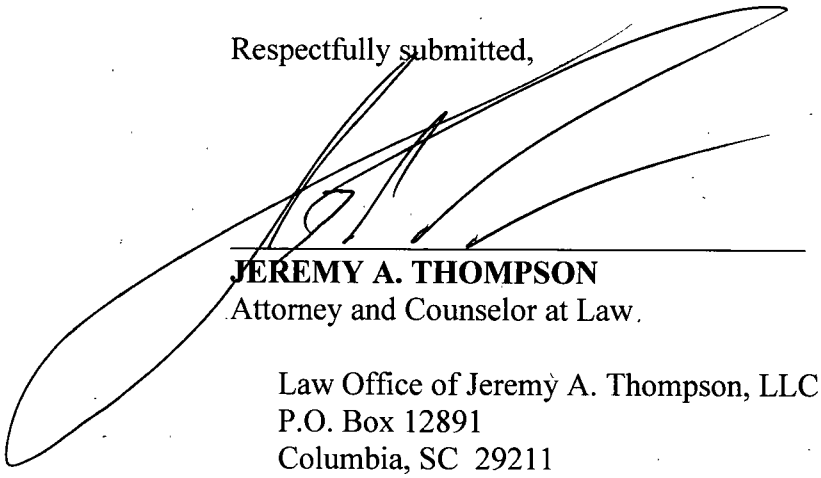
II. The trial court's ruling to prohibit the Appellant's co-defendant from making the final closing argument to the jury if the Appellant introduced evidence at trial violated the Appellant's constitutional right to testify at trial and the Appellant's Sixth Amendment right to present a defense at trial.

With respect to the arguments advanced by the Respondent as to why the Appellant's conviction should not be overturned with regard to this issue, the Appellant would rely upon the arguments presented in the Brief of Appellant.

CONCLUSION

The Appellant's conviction for voluntary manslaughter should be reversed, and this matter should be remanded for a new trial.

Respectfully submitted,



JEREMY A. THOMPSON
Attorney and Counselor at Law.

Law Office of Jeremy A. Thompson, LLC
P.O. Box 12891
Columbia, SC 29211
803-779-2555
803-779-2556 FAX
jeremyatlaw@yahoo.com

ATTORNEY FOR APPELLANT.

This 28th day of January, 2014.

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions

Steven H. John, Circuit Court Judge

Appellate Case No. 2012-212800
Circuit Court Case No. 2006-GS-26-2998

STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

LARRY CHESNUT,

APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned attorney hereby certifies that this Final Reply Brief of Appellant complies with Rule 211(b), SCACR. The undersigned also certifies that this Final Reply Brief is in compliance with the August 13, 2007, Order of the Supreme Court of South Carolina pertaining to the inclusion of personal data identifiers and other sensitive information in documents.

JEREMY A. THOMPSON
Attorney and Counselor at Law
Law Office of Jeremy A. Thompson, LLC
P.O. Box 12891
Columbia, SC 29211
803-779-2555
803-779-2556 FAX
jeremyatlaw@yahoo.com
ATTORNEY FOR APPELLANT.

This 28th day of January, 2014.