

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County
Benjamin H. Culbertson, Circuit Court Judge

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APR - 9 2014

S.C. Supreme Court

THE STATE,

PETITIONER,

V.

RICHARD BILL NILES, JR.,

RESPONDENT.

APPELLATE CASE NO. 2012-213592

BRIEF OF RESPONDENT

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

REID T. SHERARD
Attorney at Law

NELSON MULLINS RILEY &
SCARBOROUGH, LLP
Poinsett Plaza, Suite 900
104 South Main Street
Greenville, SC 29601-2122
(864) 250-2219

ATTORNEYS FOR RESPONDENT.

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QUESTION PRESENTED

Whether the Court of Appeals erred in determining Niles was entitled to a jury instruction on voluntary manslaughter where the evidence at trial failed to establish Niles was acting in a sudden heat of passion.

COUNTER QUESTION PRESENTED

Whether the Court of Appeals correctly held respondent was entitled to a jury instruction on voluntary manslaughter where there was evidence respondent was shot at and returned fire and since the trial court incorrectly reasoned that respondent was either acting in self-defense or shot the decedent during the commission of an armed robbery since voluntary manslaughter and self-defense are not mutually exclusive?

STATEMENT OF THE CASE

Respondent was indicted at the August 23, 2007 term of the Horry County Grand Jury for the offenses of murder, armed robbery, and possession of a weapon during the commission of a violent crime. R. 766 -777. His case came on for trial on March 9, 2009, before the Honorable Benjamin H. Culbertson and a jury. R. 1.

Respondent was tried together with co-defendant Mokeia Hammond. Verdell Barr represented respondent. Ron Hazzard represented co-defendant Hammond. Donna Elder and Brad Richardson were the assistant solicitors. R. 1.

On March 13, 2009, the jury found respondent guilty on all three counts. The jury found co-defendant Hammond not guilty on the charge of murder, guilty of armed robbery and not guilty on the charge of possession of a weapon during a violent crime. R. 741, ll. 1-19.

Judge Culbertson sentenced respondent to thirty years imprisonment for murder, thirty years imprisonment for armed robbery and five years imprisonment for possession of a weapon during the commission of a violent crime. The judge sentenced co-defendant Hammond to fifteen years imprisonment for armed robbery. R. 763, l. 24 – 764, l. 14.

The Court of Appeals reversed respondent's conviction and sentencing in Opinion 5034 September 12, 2012. The state filed a petition for rehearing on September 26, 2012, and on November 14, 2012 the Court of Appeals denied the petition for rehearing but substituted and refiled the opinion. See State v. Niles, 400 S.C. 527, 735 S.E.2d 240 (2012). On December 14, 2012, the state filed its petition for writ of certiorari with this Court, and respondent filed his return on February 13, 2013. This Court granted the state's petition for writ of certiorari on February 6, 2014, and the brief of petitioner was filed on March 10, 2014.

This brief of respondent follows.

ARGUMENT

The Court of Appeals correctly held respondent was entitled to a jury instruction on voluntary manslaughter where there was evidence respondent was shot at and returned fire -- he acted in a sudden heat of passion upon a sufficient legal provocation -- and particularly where the trial court incorrectly reasoned that respondent was either acting in self-defense or shot the decedent during the commission of an armed robbery since voluntary manslaughter and self-defense are not mutually exclusive.

Relevant Facts

Myrtle Beach Police Officer Ryan Wood responded to a “shots fired call” on April 9, 2007, in the “Coastal Grand Mall area.” R. 152, l. 1 – 153, l. 10. The shooting occurred in the parking lot near the Best Buy. R. 153, l. 11 – 154, l. 5.

Wood found the decedent “slumped over the driver’s seat.” R. 156, l. 22 – 157, l. 4. The decedent was able to tell Wood his name, and “he was kind of going in and out of consciousness.” The decedent told Wood he had been shot by “a couple of black dudes.” R. 157, ll. 8-19.

On cross-examination, Wood acknowledged that the decedent never said “Rich Boy,” respondent’s nick name, shot him. Neither did he say: “Mokeia Hammond shot me.” R. 168, ll. 10-13.

The obvious import of this, as defense counsel later argued, was that this case involved a drug deal where respondent knew the decedent, and that respondent would not have planned an armed robbery in broad daylight near the Best Buy. Further, the decedent would have named respondent as the shooter to Officer Wood if he thought respondent had shot him. The defense evidence, as will be seen infra was that alleged accomplice Ervin Moore decided to turn a “normal drug deal” into a robbery attempt without the knowledge of respondent. R. 652, l. 2 – 653, l. 21.

Ervin Moore pled guilty the week of respondent's trial to voluntary manslaughter "and robbery and gun possession" as an accomplice in this case, and he testified for the state. R. 391, l. 13 – 392, l. 1. Moore was originally charged with murder, armed robbery and possession of a weapon during a violent crime. R. 392, ll. 2-21. This Court can take judicial notice that Moore is serving a fifteen year sentence for voluntary manslaughter as a result of the incident in this case, and his testimony for the state.¹

Moore's testimony

Moore said on April 9, 2007, he was at a store in Trio, South Carolina "a little boring little town from where my family is from. So, I got in the car with them [respondent and Hammond] and came to the beach." Hammond apparently was driving. R. 394, ll. 13-20.

Moore said on the way to the beach respondent "made a couple of drug sales at a couple of motels." Moore claimed: "We were smoking blunts in the car and while we [were] riding on the beach we were smoking blunts. We ran out of weed and we said [decided] we wanted to get some more weed. R. 394, l. 21 – 395, l. 2. Moore maintained respondent "made a couple of phone calls" and we "ended up in the Best Buy parking lot." R. 395, l. 4-7.

Moore claimed he did not know who respondent was talking to on the phone. R. 395, ll. 3-21. Moore also maintained respondent said "he was going to do a lick." R. 395, ll. 23-24. Moore said he understood this meant a robbery. R. 396, ll. 1-18.

Moore said when they got to the Best Buy he "got out of the car and got in the other car, the white mustang [the decedent's car]" R. 397, ll. 3-6. Moore testified his job was "to identify the weed" for respondent. R. 397, ll. 3-16.

¹ South Carolina Department of Corrections inmate locator, <http://public.doc.state.sc.us/scdc-public/>

Moore said that the decedent pulled the marijuana out from under his seat so Moore could see it. R. 397, ll. 20-22. Moore stated the pound of marijuana was in a “big Ziploc bag.” R. 398, ll. 2-7.

Moore maintained that after he inspected the marijuana he got out of the decedent’s car and got back into the car with Hammond. Respondent was outside the car at this time. R. 398, ll. 8-23. Moore said he informed respondent he had seen the marijuana, and “the next thing I knew I just heard two shots and I seen Richard [respondent], he jumped back in the back seat behind Mokeia [Hammond]. He didn’t go in the front seat. He jumped in the back seat where I was at.” R. 399, l. 1 – 400, l. 2.

Moore maintained: “[A]fter he [respondent] jumped in, after them two shots then the other guy fired a shot and he fired a shot between, I mean, through the driver’s door on Mokeia’s car.” R. 400, ll. 3-6. Moore said “everybody was shook up . . . stunned. Then after that Richard shot some more and then he shot some more, I mean, by the, by the victim shooting he shot the back window out where I was sitting at and glass went, a piece of glass flew in my eye.” Moore stated that at this point Hammond drove out of the parking lot with much of the glass shot out of the car’s windows. R. 400, ll. 3-25.

Moore claimed on direct-examination that “the other guy didn’t shoot until after Richard shot.” R. 403, ll. 3-4. On cross-examination by defense counsel Barr Moore admitted that he lied to the police about the shooting. R. 423, ll.12-14. Moore acknowledged he told the police: “I didn’t see Richard shoot first.” Moore said he was testifying respondent shot first “because Richard told me he shot first when he jumped back in the car.” R. 429, l. 6 – 430, l. 5.

Moore also said respondent had a couple hundred dollars with him from drug sales that day. At the same time, Moore alleged respondent set up the drug robbery. R. 431, ll. 1-13.

Respondent's testimony

Respondent testified in his own defense. He said he had "no reason" to attempt to rob the decedent for marijuana. He denied he told either Hammond or Moore that "we're going to do a lick." R. 561, ll. 18-20.

Respondent testified that Moore asked him to attempt to purchase "a pound" of marijuana for him. R. 558, ll. 6-21. Respondent said he spoke to the decedent and planned to meet him at the Best Buy. R. 564, l. 25 – 567, l. 17.

Respondent recalled that Moore got out of his car and got into the car with the decedent. Respondent said as he was talking with Hammond about their upcoming wedding Hammond suddenly told him, "Baby, they are fighting." Respondent said he looked over and saw "they were tussling in the car." Respondent noticed Moore trying to get out of the car and he heard the decedent say, "You ain't getting out of this car with my weed without no money." R. 568, l. 11 – 569, l. 24.

Respondent remembered Moore then jumped back into his car, and "I seen him pull out a gun." *[That's when he [the decedent] started firing off as Ervin was jumping in the back seat and when he pulled the door that's when he was shooting in, he was shooting in the car.]* Hammond was screaming while these shot were fired at them, "So, while he was shooting in the car, yes, I did have a gun. So, I grabbed my, I grabbed my pistol and that's when I shot two times. My eyes was closed. I wasn't even looking. I shot two times. I went pow, pow. I wasn't trying to hit nobody." R. 568, l. 11 – 569, l. 24. Respondent testified the gunfire was "**constantly**" coming into his car when he shot back. R. 569, l. 25 – 570, l. 9.

Defense counsel Barr argued in closing that respondent and "Mr. Salter [the decedent] know each other. They're engaged in a business where they're making money. There's no logical reason

Niles would screw that up . . .” Counsel also argued, “[I] don’t think that Niles went to the Best Buy Parking lot with any intention to harm Salter [the decedent] or anyone else in any way and I don’t think the evidence has pointed to it.” R. 652, l. 2 – 653, l. 21.

Counsel for co-defendant Hammond complained about the jury verdict finding her guilty of armed robbery where the jury acquitted her of murder thereby finding the homicide was not the natural consequence of a planned robbery under the principle of the “hand of one is the hand of all.” He moved for a new trial on that basis. The judge refused to grant a new trial noting that **inconsistent verdicts** did not entitle Hammond to a new trial. R. 746, l. 15 – 748, l. 18.

Request to charge

The judge agreed to charge self-defense. Defense counsel Barr also requested that the judge charge the jury on voluntary manslaughter based on evidence the decedent shot at him and he shot back. R. 637, l. 10 – 638, l. 5. The judge ruled he was not going to charge voluntary manslaughter, and he reasoned that “either the victim started shooting and Mr. Niles was acting in self-defense or Mr. Niles started shooting or killed the victim during the commission of an armed robbery.” R. 638, ll. 6-13.

Opinion of the Court of Appeals

The Court of Appeals held:

[W]e find there is evidence, albeit conflicting, that Salter sufficiently provoked Niles. An unprovoked attack with a deadly weapon or an overt threatening act can constitute sufficient legal provocation to support a jury charge on voluntary manslaughter. State v. Starnes, 388 S.C. 590, 597–98, 698 S.E.2d 604, 608 (2010). In Gilliam,² our supreme court found adequate legal provocation to support a jury charge on voluntary manslaughter from the defendant's testimony that the victim made threatening statements to the defendant, drew a gun, and shot at the defendant. Gilliam, 296 S.C. at 396–97, 373 S.E.2d at 597. Further, in State v. Linder, 276 S.C. 304, 306–07, 278 S.E.2d 335, 337 (1981), our supreme court held the evidence supported a jury charge on voluntary manslaughter when, under the defendant's version of the facts, a patrolman began

² State v. Gilliam, 296 S.C. 395, 373 S.E.2d 596 (1998).

shooting at the defendant before the defendant reached for his weapon, returned fire, and killed the patrolman.

Here, Niles testified:

[W]hen [Moore] was getting out of the car and Salter was reaching underneath his seat I seen him pulling the gun and that's when he start[ed] firing off as [Moore] was jumping in the back seat and when he pulled the door to that's when ... [Salter] was shooting in the car. That's when my fiancé started screaming. [Hammond] ducked in my lap. She was screaming. So, while [Salter] was shooting in the car ... I grabbed my pistol and that's when I shot two times.

We find Niles' testimony provided evidence that he shot Salter after Salter pulled a gun and began shooting at Niles. Accordingly, viewing the evidence in a light most favorable to Niles, we find his version of the facts provided sufficient legal provocation to support a jury charge on voluntary manslaughter. See State v. Pittman, 373 S.C. 527, 573, 647 S.E.2d 144, 168 (2008) (“This court has previously held that an overt, threatening act or a physical encounter may constitute sufficient legal provocation.”); see also State v. Gadsden, 314 S.C. 229, 233, 442 S.E.2d 594, 597 (1994) (“In determining whether the evidence required a charge of voluntary manslaughter, we view the facts in a light most favorable to the defendant.”).

State v. Niles, 400 S.C. 527, 534-36, 735 S.E.2d 240, 244 (2012)

The Court of Appeals also found there was evidence respondent Niles was acting in a heat of passion at the time he returned fire. The Court noted that after the decedent began shooting at his vehicle, Niles reached for his gun and returned fire:

So, while he was shooting in the car ... I grabbed my pistol and that's when I shot two times. My eyes were closed. I wasn't even looking. I shot two times. I went pow, pow. I wasn't trying to hit nobody ... I was just trying to get him to stop shooting. That's all I was trying to do. I didn't know if my fiancé got shot or nothing. That's the first thing that came to my head, you know.

From Niles' testimony, we find there is evidence Niles acted in a sudden heat of passion. Looking at the totality of the circumstances, there is no evidence Niles had a period of time to cool down or reflect before reaching for his gun and firing back at Salter. See State v. Knoten, 347 S.C. 296, 307–09, 555 S.E.2d 391, 397–98 (2001) (holding it is error to refuse a jury charge on voluntary manslaughter when in viewing the evidence in the light most favorable to the defendant, there is no evidence that a significant period of time elapsed between the attack of the defendant by the decedent and the defendant's fatal blows). Further, Niles' testimony that grabbing the gun and returning fire was the “the first thing that came to ... [his] mind” supports that he was acting on impulse upon being shot at by Salter. See Starnes, 388 S.C. at 598, 698 S.E.2d at 609 (holding to constitute sudden heat of passion to warrant a jury charge of voluntary manslaughter, a defendant's fear immediately following an attack or threatening act must cause the defendant to lose control and create an uncontrollable impulse to do violence).

State v. Niles, 400 S.C. 527, 536, 735 S.E.2d 240, 245 (2012).

The Court of Appeals wrote the trial judge's instructions on self-defense, murder, armed robbery and possession of a weapon during a violent crime **“do not cover the substance of voluntary manslaughter nor do they explain the elements of voluntary manslaughter.”**

State v. Niles, 400 S.C. 527, 537, 735 S.E.2d 240, 245-46 (2012). (emphasis added).

Discussion

The Court of Appeals correctly held that respondent's testimony provided evidence that the shooting was voluntary manslaughter rather than murder. First, “it is well settled that self-defense and voluntary manslaughter are not mutually exclusive, and both issues should be submitted to the jury if supported by the evidence.” State v. Wiggins, 330 S.C. 538, 549 500 S.E.2d 489, n. 18 (1998); State v. Nichols, 325 S.C. 111, 118, 481 S.E.2d 118, 122 (1997); State v. Gilliam, 296 S.C. 395, 396, 373 S.E.2d 596, 597 (1988). The rationale for this rule is that the jury may fail to find all of the elements for self-defense but still find a sufficient legal provocation and heat of passion to conclude the defendant was only guilty of voluntary manslaughter. See, Gilliam, 296 S.C. at 396-397, 373 S.E.2d at 597.

The trial judge here consequently erred by reasoning and only instructing the jury based upon his reasoning that the jury had to find respondent acted in self-defense or that he murdered the decedent.

As the Court of Appeals correctly noted there was evidence respondent was being shot at when he returned fire and that he acted on impulse. Respondent said they were under “constant fire,” and that he wanted to somehow make the decedent “stop shooting.” Returning fire in this situation was simply a natural human reaction. Wiggins, 330 S.C. at 549, 500 S.E.2d at 495.

Here, defense counsel correctly argued that respondent being shot at provided the heat of passion and sufficient legal provocation necessary for voluntary manslaughter. The judge erred by reasoning respondent either shot back at the decedent in self-defense, and that the jury could acquit him by reason of self-defense based on that evidence, or the jury could only find him guilty of murder based on the planned armed robbery. See State v Lowry, 315 S.C. 396, 434 S.E.2d 272 (1993). The Court of Appeals properly found that respondent was entitled to a voluntary manslaughter instruction, and reversed respondent's murder conviction since the jury was not given that verdict option.

The state in its brief in the Court of Appeals simply argued that there was no evidence of voluntary manslaughter, and that the trial judge correctly reasoned that while the jury could have found respondent not guilty by reason of self-defense that voluntary manslaughter was not a proper verdict option because there was no evidence to support that lesser-included offense. Respondent has shown above why that reasoning is incorrect and why the Court of Appeals correctly decided this issue.

In its brief of Petitioner the state now argues that the failure to instruct the jury on voluntary manslaughter was "harmless error." Interestingly though the state repeats that "[t]he evidence yielded one of two conclusions – either Niles shot Salter during the course of a robbery or Niles shot Salter after Salter shot at Niles' vehicle." Brief of Petitioner at 18. The state then maintains that the judge's charge "required the jury to answer whether it believed Moore's testimony" that "the trio" had agreed to rob the decedent. It then goes on to offer its opinion on the logic of the jury's verdict. *Id.*

There are several problems with this: First, South Carolina abolished the doctrine of "inconsistent verdicts" given the undoubtedly correct reasoning that juries compromise at times in a

lenient fashion, at times harshly -- in ways that logic cannot explain. See State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991). Further, juries are instructed that they can believe the entire testimony of a witness, part of it, or none of it. Consequently, the trial judge “requiring the jury to answer whether it believed Moore’s testimony” would be an impossible task even if that was the trial judge’s intent.

Moreover, the jury’s task is to judge whether the state has proved the defendant guilty beyond a reasonable doubt on each and every charge. Its function is not to “seek the truth” or find the truth. *“We again take this opportunity to strongly urge the trial courts to avoid using any “seek” language, or any of the other offending terms described above, when charging jurors on either reasonable doubt or circumstantial evidence. Such language is unnecessary and runs the risk of unconstitutionally shifting the burden of proof to a defendant.”* State v. Needs, 333 S.C. 134, 155, 508 S.E.2d 857, 867-68 (1998). (emphasis added).

Although respondent agrees that the failure to charge a lesser-included offense where it is supported by the evidence is an error of law requiring reversal, respondent would be remiss in not noting the very real differences between this case and State v. Middleton, Op. No. 27358, Shearouse’s Adv. Sh. #8, at pp. 45-52 (filed February 26, 2014) (Pleicones, J. dissenting) if a harmless error analysis is unfortunately conducted here. In Middleton, the evidence established that the defendant deliberately drove up to the passenger window of an automobile and shot into the vehicle at least five times.

Respectfully, the regrettable holding of that case found harmless error in the refusal to charge assault and battery in the first degree rather than a holding there was no evidence of that lesser included offense given the obvious Mouzon³ malice in firing five shots into an automobile.

Here, respondent's testimony plainly provides evidence of voluntary manslaughter. Respondent was being shot at and he shot back out of fear and to make "the shooter stop." See State v. Knoten, 347 S.C. 296, 307–09, 555 S.E.2d 391, 397–98 (2001); State v. Linder, 276 S.C. 304, 306–07, 278 S.E.2d 335, 337 (1981). Respondent's actions were impulsive when his life was in danger because he was being shot at by the decedent.

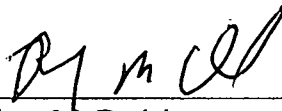
Finally, and again, the rationale for requiring charging both voluntary manslaughter and self-defense in this situation is that the jury may fail to find all of the elements for self-defense but still find a sufficient legal provocation and heat of passion to conclude the defendant was only guilty of voluntary manslaughter. See, Gilliam, 296 S.C. at 396-397, 373 S.E.2d at 597. There was evidence of voluntary manslaughter in this case, and the jury would have been fully justified in rejecting self-defense yet finding appellant guilty of voluntary manslaughter rather than murder.

³ State v. Mouzon, 231 S.C. 655, 99 S.E.2d 672 (1957).

CONCLUSION

The opinion of the Court of Appeals should be affirmed.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender
Appellate Division
S.C Commission on Indigent Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

Reid T. Sherard, SC Bar No. 72536
Nelson Mullins Riley & Scarborough, LLP
Poinsett Plaza, Suite 900
104 South Main Street
Greenville, South Carolina 29601-2122

ATTORNEYS FOR RESPONDENT.

This 9th day of April, 2014

STATE OF SOUTH CAROLINA

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THE STATE,

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CERTIFICATE OF SERVICE

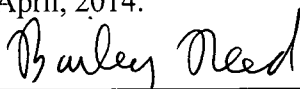
I certify that a true copy of the brief of respondent, in this case has been served on Brendan J. McDonald, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 9th day of April, 2014.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 9th day
of April, 2014.



(L.S.)

Notary Public for South Carolina
My Commission Expires: October 24, 2021