STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

R. Markley Dennis, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

AKEEM O. SMITH,

APPELLANT

APPELLATE CASE NO. 2012-213518

INITIAL REPLY BRIEF OF APPELLANT

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The State ignores the evidence in the record supporting Smith's self-defense theory. It also ignores the principle that Smith is entitled to the inferences flowing from the evidence in the light most favorable to him. The standard of review for analyzing whether a jury charge should have been given is the same as whether a directed verdict should have been granted: the "any evidence" standard. State v. Muller, 282 S.C. 10, 10, 316 S.E. 2d 409, 409 (1984) (self-defense); State v. Larmand, 402 S.C. 184, 190, 739 S.E. 2d 898, 901 (Ct. App. 2013) (directed verdict). "When reviewing the denial of a directed verdict, an appellate court views the evidence and all reasonable inferences in the light most favorable to the State." Larmand at 190, 739 S.E. 2d at 901.

Just like when reviewing a directed verdict, a defendant whose request for a self-defense charge has been denied is entitled to have the appellate court view inferences arising from the evidence in the light most favorable to him. "To determine whether self-defense is fairly raised by the proof and must be instructed to the jury, a court must, in effect, consider the evidence in the light most favorable to the defendant, including drawing all reasonable inferences flowing from that evidence." State v. Thacker, 164 S.W. 3d 208, 245 (Tenn. 2005).

Octavia and Tyrone lied about the incident from the beginning. They tried to flee the scene without letting the police in their house. Tr. 282, l. 11 – 283, l. 2. Neither would identify any suspects. Tr. 285, ll. 21-24. Octavia gave the police a false statement. Tr. 150, ll. 2224. Octavia had a pending charge for assault with intent to kill with the same solicitor's office prosecuting the case. Tr. 75, l. 21 76, l. 12. Tr. 171, ll. 11-20.

Tyrone was the first to open fire into a dark single-wide trailer even though he knew his wife was in the field of fire. Tr. 188, l. 8 – 189, l. 10. Not only did he shoot down what must have been a limited angle, he blindly fired through a wall. Tr. 188, l. 8 – 189, l. 10. An inference that can be drawn – and was made by the defense attorney in closing – was that Tyrone did not care if he hit Octavia when he fired through a wall because he believed he was catching her with another man. Tr. 370, ll. 6-17.

This inference is supported by the evidence that Tyrone and Octavia lied about the incident, that Tyrone admitted he fired first, and that Tyrone fired blindly through a wall without concern for his wife's safety. The Court should ignore the State's assertion that Smith would be at fault for bringing on the difficulty because he was committing adultery. Even if the 1931 case cited by the State stood for the proposition it claims, whether Smith knew Octavia was married would be a jury question. See State v. Floyd, 160 S.C. 420, 158 S.E. 809, 813 (1931) (holding that jury did not necessarily ignore trial court's instruction not to try an adulterous defendant for "immorality or adultery").

The State asserts that a request to charge may not be based on believing some part of the State's evidence and disbelieving other parts of it. This assertion significantly overstates the holding of several cases. The correct way to state this principle is that the request to charge may not be based on speculation which requires the belief of some portion of evidence and the disbelief of other evidence. In this case, the jury would not need to speculate that Octavia and Tyrone were liars. They both admitted they were liars. The police testified that they were uncooperative immediately after the incident. The evidence that Octavia and Tyrone lied about the incident combined with the admission of shooting

first provides a solid evidentiary and inferential basis for self-defense and does not invite unreasonable speculation.

A more in-depth look at the case cited by the State betrays its overreach. In State v. Barber, 393 S.C. 232, 712 S.E. 2d 436 (2011), the question was whether there was evidence to submit accomplice liability to the jury. Four men allegedly participated in a robbery and murder. Id. at 234-36, 712 S.E.2d at 437-38. Three of the alleged participants testified for the prosecution and other witnesses' testimony indicated that more than one man was armed. Id. at 237-39, 712 S.E.2d at 438-40. Despite the testimony of these witnesses, the defendant (at PCR) argued that the evidence was insufficient to present accomplice liability to the jury. Id. at 236, 712 S.E.2d at 438. Barber is an "any evidence" case and does not stand for the proposition contended by the State.

Respondent also overstates State v. Funchess, 267 S.C. 427, 229 S.E.2d 331 (1976). In Funchess, the court found "no conflict in the evidence" that the defendant assaulted the victim with the intent to ravish her. Id. at 429, 229 S.E.2d 332. The court addressed the defendant's contention that the jury could disbelieve the unconflicted evidence and rejected this as a "mere contention." Id. The defense theory in Funchess was alibi. Id. In the North Carolina case cited in Funchess, the defendant's theory was that he was did not enter the house where the assault occurred. State v. Hicks, 84 S.E.2d 545, 547 (N.C. 1954) ("As to this, his position is simply that he did not go into the house with Abernathy.") In Funchess and Hicks, the defendants requested an instruction based on speculation that contradicted their theory of the case.

As opposed to Funchess and Hicks, the appellant admitted he was in the house. His theory was that Tyrone fired first. The evidence was in conflict because the testimony of the

witnesses was itself in conflict and full of lies. Therefore, the Funchess rule barring speculative disbelief of the State's evidence does not apply to this case and the evidence supported a self-defense charge.

Finally, the State contends the failure to give the self-defense instruction only would require reversal of the attempted murder conviction, but not Smith's remaining convictions. This assertion is erroneous because the trial judge's refusal to charge self-defense foreclosed Smith's theory of the case. This amounted to a *de facto* comment on the evidence. See S.C. Const. art. V, § 21, ("Judges shall not charge juries in respect to matters of fact, but shall declare the law.") If error is found, all of Smith's convictions must be reversed.

Reply to Argument 2

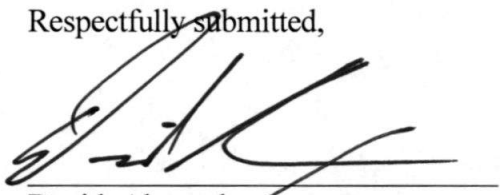
The State utterly failed to refute appellant's argument that after Miller v. Alabama, 132 S.Ct. 2455 (2012) and Graham v. Florida, 560 U.S. 48 (2010), the constitutional basis for our Supreme Court's decision in State v. Standard, 351 S.C. 199, 569 S.E. 2d 325 (2002) has evaporated. All of the cases cited by the State were decided before Miller. As such, they have no relevance to the current issue on appeal.

Individualized sentencing is required for juveniles. Miller, 132 S.Ct. at 2469. In this case, the trial judge had no ability to make any kind of determination about the prior conviction and Smith's culpability. The trial judge had no ability to assess Smith's ability to be reformed or any relevant sentencing factor for the current crime. The recidivist statute robbed the trial judge of all discretion. After Miller, judges must have the ability to use discretion when considering the impact of juvenile convictions and sentencing. If the appellant does not receive a new trial, this case should be remanded for resentencing.

CONCLUSION

For the reasons stated in Issue 1, appellant's convictions must be reversed and remanded for a new trial. Alternatively, for the reasons stated in Issue 2, appellant's sentences must be reversed and remanded for a new sentencing proceeding.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT.

This 15th day of May, 2014.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Reply Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and upon Mr. Akeem O. Smith at Lieber Correctional Institution, P.O. Box 205,Ridgeville, SC 29472, this 15th day of May, 2014.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 15th day of May, 2014.

Rhonda Denise Foxworth (L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021 .