ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
Honorable R. Markley Dennis, Jr., Circuit Court Judge
Appellate Case Tracking No. 2012-213518

The State, Respondent,

vs.

Akeem O. Smith, Appellant.

FINAL BRIEF OF RESPONDENT

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

I. The trial court properly denied Appellant's request to charge self-defense. There was no evidence presented at trial indicating the charge was proper.

II. The trial court did not err in relying on a conviction of Appellant for a crime which occurred when Appellant was sixteen as Appellant's first strike for purposes of the recidivist statute. The use of the juvenile conviction did not violate the Eighth and Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

ARGUMENT

I. The trial court properly denied Appellant's request to charge self-defense. There was no evidence presented at trial indicating the charge was proper.

Appellant contends the trial court erred in failing to give a self-defense charge to the jury. He claims the jury could believe part of the State's evidence and disbelieve part and it would support a claim for self-defense. There is absolutely no evidence presented demonstrating Appellant acted in self-defense. Accordingly, the trial court properly denied the request to charge self-defense.

A trial court is required to charge the current and correct law of South Carolina. See State v. Rayfield, 369 S.C. 106, 119, 631 S.E.2d 244, 251 (2006). "The law to be charged must be determined from the evidence presented at trial." State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). "An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) (citing State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007)). "To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." Mattison, 388 S.C. at 479, 697 S.E.2d at 58.

A self-defense charge is not required unless it is supported by the evidence. State v. Light, 378 S.C. 641, 649, 664 S.E.2d 465, 469 (2008) (citing State v. Goodson, 312 S.C. 278, 440 S.E.2d 370 (1994)). "If there is any evidence in the record from which it could reasonably be inferred that the defendant acted in self-defense, the defendant is entitled to instructions on the defense, and the trial judge's refusal to do so is reversible error." Light, 378 S.C. at 650, 664 S.E.2d at 469 (citing State v. Slater, 373 S.C. 66, 644

S.E.2d 50 (2007)); State v. Frazier, 401 S.C. 224, 233, 736 S.E.2d 301, 306 (Ct. App. 2013). To prove entitlement to a self-defense charge, the record must contain evidence of four elements:

> (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, the defendant must show that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that he was actually in imminent danger and that the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or the loss of his life; and (4) the defendant had no other probable means of avoiding the danger.

Light, 378 S.C. at 649, 664 S.E.2d at 469.

At trial, Octavia Ancrum and Tyrone Ancrum both testified regarding the events of October 2010. Octavia testified she left Tyrone at home while she went over to a family member's house for a girls' night. She stated she purchased some diapers and other items on her way. (T.107-108; R. 46-47). During the evening, Tyrone called and indicated he was taking the children to his mother's house. (T.109; R. 48). She said she returned home around 4:00 am. (T.111-112; R. 50-51).

When Octavia got out of the car and gathered the items she purchased earlier in the evening, she headed to the door of the trailer. She testified she saw a shadowy figure running towards her, so she tried to turn and run. A second figure appeared and the two ambushed her. (T.113; R. 52). She stated one person hit her with something hard and she fell to the ground. (T.113; R. 52). Octavia dropped the items she had purchased as the

two individuals forced her into the house. (T.114; R.53). The individuals then demanded money and asked where her husband was at the time. (T.114-115; R. 53-54). Octavia got money she kept hidden in a dresser and gave it to the men. (T.116-117; R. 55-56). One man remained in the bedroom area with Octavia, while the other went to another area of the house. (T.120-121; R. 59-60).

Octavia testified she heard the men saying "That's him" and realized her husband Tyrone had returned home. She said when Tyrone opened the door, she heard him call her name and she told him not to come in the house. At that point, she stated "gunshots erupted." (T.121; R. 60).

Tyrone testified he stayed home for a while after his wife left. (T.182-183; R. 121-122). He runs a music promotion business with a partner and they had a show that night. He received a call from his partner about how busy the show was that night, so he took the children to his mother's home and headed to the show to assist. (T.182-183; R. 121-122). His promotions business deals with lots of cash, and he usually brings the cash home with him at night after a show. (T.185; R. 124). At the end of the show he returned home around 4:00 in the morning. (T.184; R. 123).

Tyrone indicated as he passed the gate to his trailer, he saw a guy standing up from his house. He stated he did not recognize the man and he knows all the people in the area because most are related. When Tyrone confronted the man about what he was doing near his house, the man ran. (T.186; R. 125). As Tyrone pulled up to his house, he saw the diapers on the ground and believed something was wrong. (T.186; R. 125).

After getting a gun out of the glove compartment of his vehicle, Tyrone went to the trailer and found the back door unlocked, confirming his suspicions something was

wrong. He testified he opened the door and called to his wife. She responded and he could hear something was wrong in her voice. (T.186-187; R. 125-126). Tyrone testified he looked into the house and saw a shadow of a person moving in a different area of the house from where his wife's voice originated. He testified he shot through the wall knowing someone was in his house and that something was wrong. (T.188; R. 127). A gun fight ensues between Appellant and his co-perpetrator and Tyrone. (T.188-189; R. 127-128). The men in the house ultimately broke out a window and ran from the house. (T.190; 192; R.129; 131). Tyrone went in pursuit of the individuals until his leg gave out and he realized he had been shot. (T.192; R.131).

While Appellant's counsel did a thorough job of cross-examining Tyrone and Octavia regarding the inconsistencies in their statements, their failure to be completely honest regarding the weapons located in the home, and their questionable backgrounds, nothing presented changed the facts of the events from those presented by Octavia and Tyrone. No evidence in the Record indicates Appellant responded in self-defense. There is no evidence in the record to indicate he was in the Ancrum's home for any reason other than an illegal reason. The only evidence placed him in the home as part of a burglary and armed robbery.

Appellant contends the mere fact Tyrone testified he shot first entitles him to a jury charge on self-defense. However, Tyrone was in his own home and firing at an intruder. He knew someone was present that was not entitled to be there and there is no evidence indicating otherwise. The Record must reflect some basis to demonstrate all four elements of self-defense prior to the charge being proper and there is no evidence of any kind indicating Appellant was not at fault in brining on the difficulty.

Additionally, he contends the jury could believe the argument of Appellant's counsel that the second co-perpetrator did not exist and Tyrone came home to find Appellant with his wife. No evidence in the record supports this theory. No evidence is presented indicating Appellant and Octavia were involved in an illicit affair. Appellant asserts the jury could accept the version of events proffered by counsel during closing argument. Closing argument, however, is not evidence in the record. See State v. Charping, 333 S.C. 124, 133, 508 S.E.2d 851, 856 (1998); Sosebee v. Leeke, 293 S.C. 531, 362 S.E.2d 22 (1987); McManus v. Bank of Greenwood, 171 S.C. 84, 171 S.E. 473 (1933). Even though counsel for Appellant may have hypothesized about alternate theories, no evidence exists in the record to support the theory and, as a result, no evidence supports Appellant's claim for a self-defense charge.[1]

Further, Appellant contends the jury could disregard part of Octavia and Tyrone's testimony but believe Tyrone's testimony he fired first and it would support a self-defense charge being given. First, as discussed above, there is absolutely no evidence supporting a self-defense charge in the record. So even if part of the testimony was disregarded by the jury, there is still no evidence supporting the claim of self-defense. Second, a charge of self-defense cannot be based on the possibility the jury may believe some of the evidence and disbelieve other evidence. See e.g., Barber v. State, 393 S.C. 232, 712 S.E.2d 436 (2011) (finding alternate theory of liability such as accomplice liability must be based on evidence presented and cannot rely on possibility jury will

[1] Further, it should be noted even if there is evidence Tyrone came home and found Appellant engaged in an illicit affair with Octavia, thereby causing Tyrone to fire the first shot, Appellant would still not be without fault in brining on the difficulty. See State v. Floyd, 160 S.C. 420, 158 S.E. 809, 812 (1931) (appellant found by victim in the midst of an illicit affair with victim's wife was not without fault in bringing on the difficulty). As a result, even under Appellant's unsupported theory, he was not entitled to a self-defense charge.

believe or disbelieve portion of the testimony); State v. Funchess, 267 S.C. 427, 229 S.E.2d 331 (1976) (a lesser-included offense may not be charged merely on the theory the jury may believe some of the evidence and disbelieve other evidence).

Further, any possible error in failing to give the charge is harmless beyond a reasonable doubt. The jury convicted Appellant of burglary, armed robbery, and kidnapping. Clearly they did not believe he had consent to be in the home, but instead believed the version of events told by Octavia and Tyrone. As a result of being convicted on the other charges, he would not have been without fault in bringing on the difficulty.[2]

A charge of self-defense is only appropriate in a situation when the jury has actually been presented with evidence upon which it could rely to find Appellant acted in self-defense. No such evidence exists in this case; therefore, the trial court appropriately denied the request to charge self-defense.

[2] The self-defense charge would have only been a defense to the attempted murder charge. It would not have acted as a defense to the burglary, armed robbery, or kidnapping charges. Accordingly, the only relief Appellant could be granted would be a new trial on the attempted murder charge. As a result, the life without parole sentence would still be applicable based on the convictions for burglary, armed robbery, and kidnapping all of which also qualify as most serious offenses.

II. The trial court did not err in relying on a conviction of Appellant for a crime which occurred when Appellant was sixteen as Appellant's first strike for purposes of the recidivist statute. The use of the juvenile conviction did not violate the Eighth and Fourteenth Amendment to the United States Constitution.

Appellant maintains the Eighth and Fourteenth Amendments forbid sentencing Appellant to life without parole when basing the enhancement on a prior conviction committed as a juvenile. The trial judge properly sentenced Appellant under section 17-25-45 of the South Carolina Code (Supp. 2012) because Appellant's prior juvenile conviction for a most serious offense constituted a qualifying prior conviction for enhancement purposes under the statute. Furthermore, the enhancement of Appellant's sentence with the prior juvenile conviction did not violate his right to be free from cruel and unusual punishment under the Eighth Amendment.

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). "[T]he trial court's ruling will not be disturbed absent a prejudicial abuse of discretion amounting to an error of law." State v. Sheldon, 344 S.C. 340, 342, 543 S.E.2d 585, 585-586 (Ct. App. 2001).

Pursuant to section 17-25-45:

> Notwithstanding any other provision of law, except in cases in which the death penalty is imposed, upon a conviction for a most serious offense as defined by this section, a person must be sentenced to a term of imprisonment for life without the possibility of parole if that person has either:
>
> (1) one or more prior convictions for:
> (a) a most serious offense.

S.C. Code Ann. § 17-25-45(A) (Supp. 2012). Appellant's current convictions for armed robbery, burglary, kidnapping, and attempted murder all qualify as a most serious

offense. See S.C. Code Ann. § 17-25-45(C)(1) (Supp. 2012). Furthermore, his prior conviction for assault and battery with intent to kill constitutes a most serious offense. Id. (Court's Exhibit 3; R. 371).

A juvenile adjudication in family court does not qualify as a conviction for purposes of sentencing enhancement under the statute. See State v. Ellis, 345 S.C. 175, 179, 547 S.E.2d 490, 492 (2001). However, when a juvenile is tried as an adult in general sessions court, a resulting conviction or guilty plea is a conviction for enhancement purposes. See State v. Standard, 351 S.C. 199, 203, 569 S.E.2d 325, 328 (2002).

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. XIII. As the South Carolina Supreme Court has recognized, what constitutes cruel and unusual punishment, and thus, what violates the Eighth Amendment, is determined by "evolving standards of decency that mark the progress of a maturing society." Standard, 351 S.C. at 204, 569 S.E.2d at 328 (quoting Thompson v. Oklahoma, 487 U.S. 815, 821 (1988)). "[U]nder State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007), . . ., the two principles to consider in determining whether a punishment is cruel and unusual are (1) the evolving standards of decency that mark the progress of a maturing society and (2) the proportionality between the punishment and the offense." State v. Williams, 380 S.C. 336, 346, 669 S.E.2d 640, 645 (Ct. App. 2008).

The United States Supreme Court (USSC) noted: "We have pinpointed that the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'" Atkins v. Virginia, 536 U.S. 304, 312, 122 S.Ct.

2242, 2247 (2002) (quoting Penry v. Lynaugh, 492 U.S. 302, 331(1989)). "The Legislature has the power, within constitutional limits, to define and punish crimes." State v. Washington, 338 S.C. 392, 400, 526 S.E.2d 709, 713 (2000) (quoting Guinyard v. State, 260 S.C. 220, 226, 195 S.E.2d 392, 395 (1973)). In this case, the legislature has determined a repeat offender of a most serious crime should be punished severely with life in prison without the possibility of parole.

The Eighth Amendment only prohibits sentences which are grossly out of proportion to the severity of the crime. See Curtis v. State, 345 S.C. 557, 575, 549 S.E.2d 591, 600 (2001); see also, State v. Jones, 344 S.C. 48, 56, 543 S.E.2d 541, 545 (2001) ("The cruel and unusual punishment clause requires the duration of a sentence not be grossly out of proportion with the severity of the crime."). Further, the USSC has found:

> All of these principles-the primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that proportionality review be guided by objective factors-inform the final one: The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are "grossly disproportionate" to the crime.

Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J. concurring in part and concurring in judgment).

In State v. Standard, the South Carolina Supreme Court determined the enhancement of a sentence under S.C. Code Ann. § 17-25-45 with a prior juvenile conviction did not constitute cruel and unusual punishment. Standard, 351 S.C. at 204, 569 S.E.2d at 328. "[The Court held] that an enhanced sentence based upon a prior most serious conviction for a crime which was committed as a juvenile does not offend evolving standards of decency so as to constitute cruel and unusual punishment." Id. at

206, 569 S.E.2d at 329 (emphasis in original). Subsequently, the Court of Appeals also found the imposition of a sentence of life without parole based on a prior juvenile conviction did not constitute cruel and unusual punishment. Williams, 380 S.C. at 348-349, 669 S.E.2d at 647.

In the present case, Appellant is categorically challenging the use of a juvenile conviction for enhancement purposes under South Carolina's recidivist offender statute. Appellant contends the recent holding of the USSC in Miller v. Alabama, 132 S.Ct. 2455 (2012) and Graham v. Florida, 560 U.S. 48 (2010), suggested a change in contemporary values and called into question our courts' holdings in both Standard and Williams.

Neither the holding of Miller, nor the holding of Graham, has impacted the underlying holdings of Standard and Williams. In Graham, the USSC found a sentence of life without parole to be unconstitutional for a juvenile offender who did not commit a homicide. Graham, 560 U.S. at 75. The Court in Graham discussed its holding in Roper v. Simmons, 543 U.S. 551 (2005), in which the USSC found the death penalty to be cruel and unusual punishment for a juvenile. The USSC explained juveniles have a "'lack of maturity and an underdeveloped sense of responsibility'"; they "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and their characters are "not as well formed." Graham, 560 U.S. at 68 (citing Roper, 543 U.S. at 569–570). The Court further explained: "Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults." Id.

The USSC in Miller found a sentencing scheme mandating life without parole for a juvenile offender violated the Eighth Amendment. Miller, 132 S.Ct. at 2469. The

Court again, relying on Roper and Graham, explained the differences between a juvenile and an adult. The Court then found those differences significant because the transition from juvenile to adult is one in which maturing occurs, in which changes occur in the parts of the brain that control behavior, and "as the years go by and neurological development occurs, [the juvenile's] 'deficiencies will be reformed.'" Id. at 2464-2465 (quoting Roper, 543 U.S., at 570).

The facts of this case are different from those of Roper, Graham, and Miller in one significant aspect—Appellant was not a juvenile when he committed the crime for which he was sentenced to life without parole. Appellant, at the time he committed the attempted murder, burglary, armed robbery and kidnapping for which he was sentenced to life without parole as a recidivist offender, was approximately 24 years of age. As a sixteen year old, Appellant committed an assault and battery with intent to kill. Under the rationale of Graham, Roper, and Miller, as he grew older, Appellant should have matured and his "deficiencies" seen as a juvenile should have been "reformed." Instead, his actions as a recidivist of most serious and egregious crimes have shown that Appellant is one of the individuals demonstrating "irretrievably depraved character."

At the time Appellant executed his most recent egregious crimes, Appellant could no longer claim he had any diminished responsibility for his actions based on his age or maturity. Therefore, there is no rational basis to exclude his prior juvenile convictions from consideration for sentencing purposes; further, Roper, Graham, and Miller do not require the exclusion.

The punishment Appellant received as an adult is not further punishing him for his crime as a juvenile. Instead, it is punishing him as a repeat offender who did not

reform his behavior, and instead, demonstrated a continued disrespect for the law and for others. See Gryger v. Burke, 334 U.S. 728, 732 (1948) ("The sentence as a fourth offender or habitual criminal is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one."); see also, Solem v. Helm, 463 U.S. 277, 296 (1983) ("[A] State is justified in punishing a recidivist more severely than it punishes a first offender."). In addition, Appellant's enhanced sentence is entirely consistent with the rationale behind recidivist offender statutes, which is to more severely punish offenders who continue to break the law. See United States v. Rodriquez, 553 U.S. 377, 385 (2008) ("[A]n offense committed by a repeat offender is often thought to reflect greater culpability and thus to merit a greater punishment. Similarly, a second or subsequent offense is often regarded as more serious because it portends greater future danger and therefore warrants an increased sentence for purposes of deterrence and incapacitation.").

Additionally, other courts have considered the impact of Graham and Roper on recidivist life sentences and found the use of a juvenile conviction as a prior offense is not improper. See United States v. Graham, 622 F.3d 445, 463 (6th Cir. 2010) (finding the imposition of a sentence of life imprisonment under a recidivist statute based upon a prior juvenile conviction was not unconstitutional because the instant offense was committed by an adult offender and not a juvenile with lessened culpability as discussed in Graham v. Florida); United States v. Scott, 610 F.3d 1009, 1018 (8th Cir. 2010) ("The Court in Graham did not call into question the constitutionality of using prior convictions, juvenile or otherwise, to enhance the sentence of a convicted adult."); see, e.g., United

States v. Wilks, 464 F.3d 1240, 1243 (11th Cir. 2006) ("Our conclusion that youthful offender convictions can qualify as predicate offenses for sentencing enhancement purposes remain valid because Roper does not deal specifically – or even tangentially – with sentence enhancement. It is one thing to prohibit capital punishment for those under the age of eighteen, but an entirely different thing to prohibit consideration of prior youthful offenses when sentencing criminals who continue their illegal activity into adulthood. Roper does not mandate that we wipe clean the records of every criminal on his or her eighteenth birthday.").

Also, Appellant has failed to establish a clear or universal rejection of the use of prior juvenile convictions for enhancement purposes under recidivist offender statutes. Without a clear showing to the contrary, there is no basis to determine the statutory sentencing practice is unconstitutional. See State v. Jones, 344 S.C. 48, 58, 543 S.E.2d 541, 546 (2001) ("When the issue is the constitutionality of a statute, every presumption will be made in favor of its validity and no statute will be declared unconstitutional unless its invalidity appears so clearly as to leave no doubt that it conflicts with the constitution.").

Accordingly, the trial court properly found section 17-25-45 and its mandatory imposition of life without parole controlled in this case. Nothing in the USSC's opinions of Roper, Graham, or Miller has altered the analysis allowing for the use of a prior juvenile conviction as the qualifying conviction for the sentence enhancement. This Court should, therefore, affirm Appellant's sentence to life without parole.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), ACACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled, "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

David Alexander, Esquire
S.C. Commission on Indigent Defense
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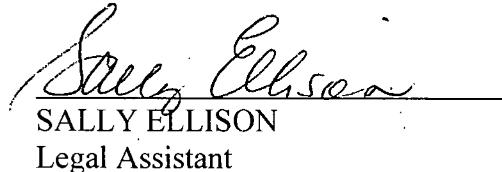
I further certify that all parties required by Rule to be served have been served.
This 24th day of June, 2014.



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