

 ORIGINAL

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

**RECEIVED**

MAR 04 2015

**SC Court of Appeals**

V.

AKEEM O. SMITH,

APPELLANT

APPELLATE CASE NO. 2012-213518

Appeal from Charleston County

R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 2015-UP-074

PETITION FOR REHEARING

Appellant asks this Court to re-examine its opinion in this case and grant rehearing on both issues. Respectfully, this Court's opinion overlooks points that necessitate reversal of appellant's conviction and sentence.

Issue 1

The Court cites State v. Slater, 373, S.C. 66, 644 S.E.2d 50 (2007) and State v. Bryant, 336 S.C. 340, 520 S.E.2d 319 (1999) for the proposition that appellant was not without fault in bringing on the difficulty. Respectfully, this conclusion arises from overlooking the correct standard of

review for failure to charge self-defense, which is that the evidence must be considered in the light most favorable to the defendant. State v. Williams, 400 S.C. 308, 314, 733 S.E.2d 605, 608-09 (Ct. App. 2012); see also State v. Larmand, 402 S.C. 184, 190, 739 S.E. 2d 898, 901 (Ct. App. 2013) (“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.”) (emphasis added). “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.” State v. Muller, 282 S.C. 10, 10, 316 S.E.2d 409, 409 (1984) (emphasis added).

The Court's ruling means there is an appellate finding that Octavia and Tyrone's version of events must be taken as true on appeal. “A jury is free to believe a portion of the testimony of a witness and disbelieve another portion.” State v. Smith, 304 S.C. 129, 131, 403 S.E.2d 162, 163 (Ct. App. 1991); see also State v. Register, 323 S.C. 471, 481, 476 S.E.2d 153, 159 (1996) (stating jury is free to believe or disbelieve expert witness testimony).

The jury could have believed that the defendant was alone at the house with Octavia with her consent (as was argued by defense counsel) and Tyrone came home and opened fire (as Tyrone testified). The trial court could not have reached a conclusion that the defendant was not entitled to a self-defense instruction without making a credibility determination in the State's favor. See State v. Rogers, 405 S.C. 554, 569 n.5, 748 S.E.2d 265, 273 n.5 (Ct. App. 2013) (stating that at the directed verdict stage—which uses the same “any evidence” standard as a jury charge—the court may not weigh the credibility of witnesses). Any such credibility determination was not allowed.

Octavia and Tyrone lied about the incident from the beginning. They tried to flee the scene without letting the police in their house. R. 221, l. 11 – 222, l. 2. Neither would identify any

suspects. R. 224, ll. 21-24. Octavia gave the police a false statement. R. 89, ll. 22-24. Octavia had a pending charge for assault with intent to kill with the same solicitor's office prosecuting the case. R. 23, l. 21- 24, l. 12. R. 110, 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. R. 127, l. 8 – 128, l. 10. Not only did he shoot down what must have been a limited angle, he blindly fired through a wall. R. 127, l. 8 – 128, 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. R. 309, 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").

To the extent the Court's opinion relies on the State's argument that a request to charge may not be based on believing some part of the State's evidence and disbelieving other parts of it, the State's 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 cases 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 undisputed 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 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. The Court misapprehended that it was bound to accept Octavia and Tyrone's testimony as true on appeal, and therefore should grant rehearing and reverse.

Issue 2

Respectfully, the Court erroneously held that State v. Standard, 351 S.C. 199, 569 S.E.2d 325 (2002) remains valid after Miller v. Alabama, 132 S.Ct. 2455 (2012) and Graham v. Florida, 560 U.S. 48, 75 (2010). The Court cited two federal circuit court decisions in support of its conclusion. United States v. Hunter, 735 F.3d 172 (4<sup>th</sup> Cir. 2013); United States v. Hoffman, 710 F.3d 1228 (11<sup>th</sup> Cir. 2013). Neither case applies. Hunter does not deal with a mandatory life sentence based on a juvenile conviction. Hunter, 735 F.3d at 173. Hunter only dealt with the imposition of a mandatory minimum sentence under the federal Armed Career Criminal Act. Id.

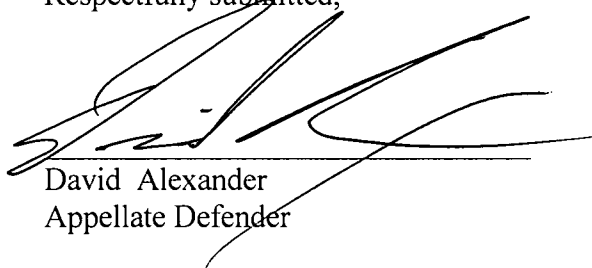
In Hoffman, the Eleventh Circuit was constrained to disregard the Miller argument because of its standard of review. Hoffman, 710 F.3d at 1231-32. The court analyzed the Miller claim under its plain error standard. Id. Under this standard, an "error is not plain unless it is contrary to explicit statutory provisions or on-point precedent in this Court or the Supreme Court." Id. The Eleventh Circuit then held that because Miller was not directly on-point, the defendant had "not met his burden of showing plain error." Id. at 1232.

South Carolina already holds that a juvenile adjudication may not be used as a "strike." State v. Ellis 345 S.C. 175, 179-80, 547 S.E.2d 490, 492 (2001). In 2002, the South Carolina Supreme Court considered the exact question presented by this case. State v. Standard, 351 S.C. 199, 204-07, 569 S.E.2d 325, 328-30 (2002). In Standard, the Court held that if a juvenile had been tried and adjudicated as an adult, that conviction could be used as a strike. Id. Standard relied on now-invalid reasoning in older United States Supreme Court and federal appellate cases to reach

that conclusion. Id. For example, Standard held that “lengthy sentences or sentences of life without parole imposed upon juveniles do not violate contemporary standards of decency so as to constitute cruel and unusual punishment.” Id. at 205, 569 S.E.2d at 329. This holding is no longer good law after Miller and Graham.

Since Miller and Graham have overruled the principles underlying Standard, it is time to correct this practice in South Carolina. While this Court cannot overrule state Supreme Court precedent, it can recognize when such precedent has been rendered invalid by decisions of the United States Supreme Court. The Court should do so in this case and overturn Smith’s LWOP sentence.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David Alexander', is written over a horizontal line. The signature is stylized and extends above and below the line.

David Alexander  
Appellate Defender

This 4th day of March, 2015.

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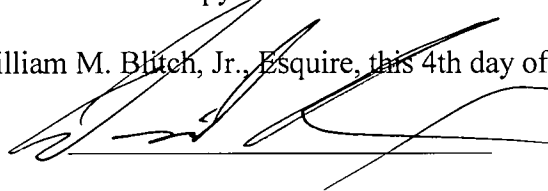
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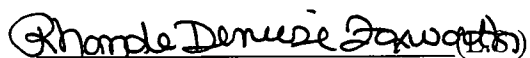
The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon William M. Bitch, Jr., Esquire, this 4th day of March, 2015.



David Alexander  
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 4th day  
of March, 2015.



Notary Public for South Carolina  
My Commission Expires: October 17, 2021