THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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AUG 26 2015
SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions

Stephen H. John, Circuit Court Judge

Case No.: 2012-GS26-02679
Appellate Case No.: 2014-

The State, Respondent,

vs.

Vivian Schrader-Falls, Appellant.

INITIAL REPLY BRIEF OF APPELLANT

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ARGUMENT

I. The State's argument that the Defendant was not entitled to a jury charge on self-defense incorrect under South Carolina law and the facts of the instant action.

The State first argues that "Appellant cannot show an abuse of discretion because, even though the trial judge instructed the jury on both self-defense and how the evidence of battered spouse syndrome bore on Appellants' claim for self-defense, there was no evidence that Appellant acted in self-defense." **[Br. of Resp. at 16].** Based upon this position, the State argues that the circuit court erred providing the jury an instruction on self-defense. **[Br. of Resp. at 21].** The State then summarily concludes that this allegedly improper submission of jury charges related to self-defense is the "only error" in the instant action and that this error "did not prejudice the Appellant." **[Br. of Resp. at 28].** Ultimately, while never explicitly stating this argument, the State suggests that any error in requiring the defendant to testify before her expert witness would be rendered harmless due to this alleged error in jury instruction. However, this argument is meritless because the State's analysis regarding the circuit court's decision to charge the jury on the issues of self-defense and battered woman syndrome is incorrect under South Carolina law and the facts of this case.

Under South Carolina law, "[t]he law to be charged to the jury is determined by the evidence presented at trial." *State v. Brown*, 362 S.C. 258, 261-62, 607 S.E.2d 93, 95 (Ct. App. 2004) (quoting *State v. Hill,* 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993)). "If there is ***any evidence*** to support a jury charge, the trial judge should grant the request." *Id.* (emphasis added); *see also State v. Santiago*, 370 S.C. 153, 159, 634 S.E.2d 23, 26 (Ct. App. 2006).

In the instant action, there was ample evidence to support the circuit court's decision to charge the jury on both self-defense and battered spouse syndrome. At trial, Vickie Bourus was qualified, without challenge from the State, as an expert witness in "domestic violence and battered

spouse syndrome." **[Trial Transcript from May 5-8 Jury Trial (hereafter, "TT") at 409-10].** Bourus testified regarding the abusive and controlling nature of Tony Hughes' relationship with Schrader-Falls. **[TT at 413-23].** Based upon her observations of certain symptoms from Schrader-Falls and the plethora of evidence of physical, psychological, and sexual abuse, Bourus opined that Schrader-Falls suffered from battered spouse syndrome. **[TT at 413].** Following her expression of this diagnosis, Bourus testified extensively regarding how battered spouse syndrome affects the mental perceptions of the women who suffer from it. According to Bourus, Schrader-Falls exhibited a number symptoms related to battered spouse syndrome, including: "a great deal of self-blame;" the destruction of her "ability to believe in herself and make good decisions;" "a high level of loyalty to a person who has been very abusive towards you;" "the perception of [Hughes] as kind of all powerful;" and "hyper vigilance." **[TT at 419-20, 422].** In sum, Bourus' testimony established that Schrader-Falls' battered spouse syndrome completely altered her entire thought process concerning her interactions with her abuser, Tony Hughes.

Moreover, Bourus specifically testified as to how Schrader-Falls' diagnosis of battered spouse syndrome affected her mental state leading up to and at the time of the shooting. Specifically, Bourus stated that in her opinion, at the time of the shooting, Schrader-Falls "was very much needing to extricate from this relationship," but had failed to do so because "she felt very badly that if she were to leave [Hughes,] he would be alone." **[TT at 419-20].** Based upon these concerns, Borus testified that Schrader-Falls felt that "in her mind, if [Hughes] were involved with another woman, which she believed he was and wanted to show that, wanted to prove that, that she would be able to extricate from the relationship and he would have another partner, and that felt better to her than leaving him alone." **[TT at 420].** Bourus also testified that Schrader-Falls felt that it was "important that she confront" Hughes in order to avoid a situation where he

could "lie and he would somehow work his way out of" being caught with another woman. This testimony demonstrates that Schrader-Falls' thought-process in deciding to confront Hughes at Movsky's home was directly influenced by her battered spouse syndrome.

As pointed out in the State's brief, the South Carolina Supreme Court has specifically contemplated the relationship between battered spouse syndrome and the elements of self-defense. *See Robinson v. State*, 308 S.C. 74, 77-80, 417 S.E.2d 88, 90-92 (1992). With regard to the first element concerning the requirement that the defendant must be without fault in bringing on the difficulty, the *Robinson* court stated:

> The first element of self-defense requires evidence that a defendant not be at fault in bringing about the difficulty. Often a battered woman will kill an abuser during a confrontation when the man clearly is the aggressor, so that this element is satisfied. **However, it may be possible to characterize a battered woman as the victim of a continuing assault at the hands of her batterer. When this is the case, the first element of self-defense may be satisfied even though the battered woman acts at a time when the batterer is not physically abusing her.**

Id. at 79, 417 S.E.2d at 91.

The State's argument that Schrader-Falls was at fault for bringing on the difficulty upon herself completely ignores Bourus' testimony concerning how battered spouse syndrome affected Schrader-Falls' mental state leading up to the time of the shooting. Schrader-Falls decision to seek out Hughes for the purpose of terminating their relationship was inextricably linked to the abusive nature of their relationship and her symptoms from battered spouse syndrome. Bourus specifically testified that her abusive relationship with Hughes and battered spouse syndrome influenced Schrader-Falls thought process and actions on the day of the shooting. **[TT at 419-22].** Accordingly, Schrader-Falls is no more to blame for bringing about the difficulty under the facts of this case than a wife who seeks out and shoots her husband in his sleep. While Schrader-Falls did not arrive at the Movsky's home with the intention of killing Hughes, the evidence presented

at trial suggests she would not have been there but for the abusive nature of the relationship and the fact that she suffered from battered spouse syndrome. In addition, Bourus' testimony regarding the controlling nature of Hughes' relationship with Schrader-Falls and Schrader-Falls' state of "hyper vigilance" and constant fear of "perceived threat[s] of danger" could easily serve as evidence that Schrader-Falls was in a "continuing assault at the hands of her batterer" as to satisfy the first element of self-defense. *Robinson*, 308 S.C. at 79, 417 S.E.2d at 91.

Accordingly, under the "any evidence" standard for charging a jury, the circuit court properly instructed the jury on both self-defense and battered spouse syndrome.[1] *See Santiago*, 370 S.C. at 159, 634 S.E.2d at 26 ("If there is ***any evidence*** to support a jury charge, the trial judge should grant the request."(emphasis added)).

II. The State has failed to demonstrate that the circuit court exercised sound discretion in requiring the defendant to testify before her expert.

In its second argument in response to the Appellant, the State argues that the circuit court's decision to require Schrader-Falls to testify at trial before her expert witness "was a sound exercise of discretion" because "the trial judge's ruling was predicated on his desire to avoid the potential necessity for a mistrial that may have occurred if either the Appellant had exercised her right not to testify, or if she failed to testify that the victim had battered her." **[Br. of Resp. at 28-29].**

In this argument, the State piggybacks on the circuit court's concern for a potential mistrial if the defendant's testimony were inconsistent in any way with the defense's expert on battered

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[1] In addition, as the Respondent in this case, the State is not in a position to argue that the circuit court erred in instructing the jury on self-defense. The State did not appeal any of the circuit court's rulings. Therefore, the State's arguments on appeal should be limited to those bearing on the issues raised by the Appellant. *See, e.g., S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007) ("There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." (quoting Jean Hoefer Toal et al., Appellate Practice in South Carolina 57 (2d ed. 2002)(emphasis added)).

spouse syndrome. While the State cites to numerous cases describing policy reasons for wanting to avoid mistrials, it, like the circuit court, has failed to point to any controlling law that supports the theory that a mistrial was possible under the facts of this case. In reality, under a worst-case scenario where Schrader-Falls' testimony completely refuted Bourus' opinion that she was suffering from battered-spouse syndrome, this contradiction would simply diminish the credibility of the defense's witnesses, not create a potential mistrial. Without advancing a valid reason for requiring the defendant to testify before her expert, the circuit court's ruling in this case represents an unfounded and arbitrary decision that amounts to an abuse of discretion. *See Douglas*, 367 S.C. at 508, 626 S.E.2d at 64 (noting a circuit court's ruling "constitutes an abuse of discretion when the ruling is manifestly arbitrary, unreasonable, or unfair").

Moreover, by forcing Schrader-Falls to testify without first having the opportunity to fully evaluate the strength of her case prior to her testimony, the circuit court's ruling evokes the exact due process concerns set forth in *Brooks v. Tennessee*, 406 U.S. 605 (1972). There is no reason that Schrader-Falls was required to testify in order to make her expert's testimony either relevant or admissible. In addition, under South Carolina law, a defendant can argue self-defense based upon circumstantial evidence and is not required to take the stand in order to present such a defense. *See State v. Hendrix*, 270 S.C. 653, 657, 244 S.E.2d 503, 505 (1978) (finding that defendant was entitled to a directed verdict on the issue of self-defense despite that defendant did not testify at trial and instead presented circumstantial evidence that his actions were in self-defense). Accordingly, the circuit court's ruling in this case effectively denied Schrader-Falls the choice of arguing self-defense via battered spouse syndrome without taking the stand to testify in her own defense.

The State's argument that this issue is not preserved for this Court's review is also without merit. At trial, defense counsel made it abundantly clear that he desired to call the defense's expert witness before putting his client on the stand. **[TT at 282-83].** Defense counsel further argued that Bourus' testimony was both relevant and admissible under South Carolina law and therefore there was no reason that would require Schrader-Falls to testify before Bourus. **[TT at 283].** Finally, the circuit court clearly understood the defense's position when it denied the request. **[TT at 284-85].** While defense counsel did not specifically argue the exact grounds presented in this appeal, the basic nature of his request—that he be allowed to call his expert witness prior to putting the defendant on the stand—was clearly raised to and ruled upon by the circuit court. *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. . . . A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground.").

Finally, the State's argument that this error did not prejudice the defendant is also unpersuasive. By forcing Schrader-Falls to testify before her expert, the circuit court impermissibly invaded the defense counsel's right to control the presentation of his client's case, and therefore committed unconstitutional deprivation "of the 'guiding hand of counsel' in the timing of this critical element of his defense." *Brooks*, 406 U.S. at 612-13. Moreover, the circuit court's ruling forced Schrader-Falls to decide whether to testify before having the opportunity to evaluate her case after hearing the testimony of the defense's other witnesses. There is no way this Court could anticipate how the Defendant's testimony at trial would have differed had she

been able to first hear the testimony of her expert witness.[2] Because this error affected the framework within which the trial proceeded, it is arguably a structural error that is not subject to the harmless error analysis. *See State v. Rivera*, 402 S.C. 225, 246-47, 741 S.E.2d 694, 705 (2013), reh'g denied (Apr. 3, 2013) (noting that certain constitutional rights "are so basic to a fair trial that their infraction can never be treated as harmless error" and that "[t]hese are structural defects in the constitution of the trial mechanism, which defy analysis by harmless-error' standards and which affect the framework within which the trial proceeds, rather than simply an error in the trial process itself." (internal quotation marks, alterations, and citations omitted)).

[2] For example, the portion of the transcript containing Schrader-Falls' testimony takes up over 100 pages of the 560 page transcript. **[TT at 295-402].** Schrader-Falls, who was of limited education (only attending school until the age of fourteen) **[TT at 304-05]**, spent a large portion of her testimony recounting her long history of abusive relationships. It is easily conceivable that her testimony could have been greatly shortened by allowing Bourus to recount this history based upon her interview of Schrader-Falls.

CONCLUSION

Based on the foregoing and those arguments advanced in the Appellant's Initial Brief, the Appellant's conviction should be reversed and the case remanded for a new trial.

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PROOF OF SERVICE

I certify that I have caused to be served the Appellant's Initial Reply Brief by U.S. Mail on August 26, 2015 on the Respondent, addressed to its attorney of record, W. Edgar Salter, III, SC Attorney Generals' Office, Post Office Box 11549, Columbia, South Carolina 29211.

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