

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

R. Markley Dennis, Jr., Circuit Court Judge

ORIGINAL

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

BRANDON RASHAD MARSHALL,

APPELLANT

APPELLATE CASE NO 2016-000870

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in failing to charge the jury that Appellant had the right to judge the deceased's conduct more harshly than otherwise because of the deceased's intoxication where the undisputed evidence in the record showed the deceased had consumed alcohol and marijuana, a reality distorting intoxicant and the request to charge was a sound principle of law?

STATEMENT OF THE CASE

On September 2, 2014, a Charleston County grand jury indicted Appellant for murder (2014-GS-10-5261) and possession of a weapon during a crime of violence (2014-GS-10-5262). R. 778-789; R. 781-782. The state, represented by David L. Osborne and Mark J. Bourdon, called the case to trial on April 4, 2016, before the Honorable R. Markley Dennis Jr., and a jury. R. 1. Melisa W. Gay and Robert Blanchard represented Appellant. R. 1.

Prior to trial, the judge presided over a hearing on Appellant's motion that he was entitled to immunity pursuant to the Protection of Persons and Property Act. R. 88, l. 21 – R. 208, l. 16; See S.C. Code Ann. § 16-11-410, et al. Appellant made clear his request for immunity was under section 16-11-410(C), which covers conduct in a “place where [the actor] has a right to be.” R. 200, ll. 8-13. At the conclusion of the evidentiary presentation, Judge Dennis denied the request for immunity. R. 203, l. 14; R. 205, ll. 11-12. Regarding the elements of self-defense, save the duty to retreat, Judge Dennis stated he could not find by a preponderance of the evidence the elements existed. R. 203, ll. 23-24. He based his ruling on the “suspect” “credibility” of Appellant “due to the inconsistent statements throughout even today.” R. 202, l. 24 – R. 203, l. 1; R. 203, ll. 7-9; R. 206, ll. 12-13; R. 207, ll. 3-5. The judge also considered “the scientific evidence,” which he found did not support Appellant's factual recitation. R. 203, ll. 1-3.

After the parties addressed several other preliminary matters, the state moved into the presentation of its case-in-chief. At the conclusion of the case, the jury found Appellant guilty as charged. R. 761, ll. 17-25. Judge Dennis sentenced Appellant to forty years' imprisonment for murder and five years' imprisonment for the weapon. R. 771, l. 24 – R. 772, l. 1; R. 772, ll. 8-9; R. 780; 783. He ordered the sentences to be served concurrently. R. 772, l. 9; R. 780; R. 783.

On April 14, 2016, Appellant filed and served his notice of appeal. This brief follows.

ARGUMENT

The judge erred in failing to charge the jury that Appellant had the right to judge the deceased's conduct more harshly than otherwise because of the deceased's intoxication where the undisputed evidence in the record showed the deceased had consumed alcohol and marijuana, a reality distorting intoxicant and the request to charge was a sound principle of law.

Relevant facts

Appellant met Anthony Williams in February of 2014. R. 554, ll. 3-7. The two hit it off and became romantically involved, but their relationship was a secret. R. 554, l. 20 – R. 555, l. 5. Williams was also romantically involved with Ashley Butler, with whom he lived and had a child. R. 244, ll. 2-5; R. 555, ll. 9-10. Appellant and Williams spent a romantic weekend in Myrtle Beach in mid-May. R. 556, ll. 8-13. On May 22, 2014, Williams invited Appellant to his home where Williams and Butler were winding down after a “date night.” R. 245, ll. 9-14; R. 561, l. 24 – R. 562, l. 1; R. 245, l. 24 – R. 246, l. 7. Appellant arrived with two bottles of tequila. R. 564, ll. 4-17; R. 246, ll. 13-18. Appellant wanted orange juice as a mixer, but Williams and Butler did not have any. R. 565, ll. 10-15; R. 246, ll. 19-21. Butler walked to a nearby store to get the orange juice, but the store was closed. R. 565, ll. 15-18; R. 246, ll. 22-25. Appellant drove to another store, bought the orange juice, and returned to the home. R. 566, l. 18 – R. 567, l. 9; R. 248, ll. 1-7.

Appellant took his handgun inside with him. R. 575, ll. 10-16; R. 248, ll. 8-13. Appellant had recently purchased the gun for protection. R. 576, ll. 7-15. Just months before, Appellant had been robbed in a rest stop in Kentucky. R. 576, l. 19 – R. 577, l. 9. Appellant was especially apprehensive when visiting Williams because he and Williams' neighbor had argued when the neighbor propositioned him for oral sex recently. R. 579, ll. 8-13. Additionally,

Appellant had witnessed the neighbor beat a guy “to a pulp,” fracturing his face. R. 579, ll. 14-17. So alarmed by the vicious attack, Appellant had called the police and provided a written statement. R. 579, ll. 18-22.

While Appellant, Williams, and Butler sat in the living room drinking, Appellant received messages via Facebook from Williams’ brother. R. 567, ll. 10-23; R. 249, ll. 16-18. Upon learning this, Butler called Williams’ brother “gay” in a derogatory sense. R. 568, ll. 2-9. Williams was upset with Butler for speaking of his brother disrespectfully. R. 568, ll. 16-18. Williams and Butler began arguing. R. 568, ll. 20-24; R. 252, ll. 15-22. In response, Appellant went into the kitchen and sat at the table. R. 569, ll. 1-2. Butler also referred to Appellant as Williams’ boyfriend, and this “kind of pissed him off.” R. 570, ll. 16-21; R. 253, ll. 13-15. Williams joined Appellant in the kitchen, but moments later, Williams “went charging into the living room” in response to something Butler said. R. 573, ll. 4-11. Appellant then heard Butler begging Williams to get off of her and that he was hurting her. R. 573, ll. 11-12. He even heard her say that Williams was always putting his hands on her. R. 573, l. 22.

According to Butler, Williams was angry when she spit in his face so he grabbed her by her arms and held her down on the couch. R. 253, l. 23 – R. 254, l. 4. In this position, Butler was choking and could not breathe well. R. 276, l. 19 – R. 277, l. 7.

Appellant picked up his gun and walked from the kitchen to the living room where he saw Butler on the floor with Williams choking her. R. 581, ll. 15-22. When Williams drew back to punch Butler, Appellant intervened. R. 582, ll. 1-4. He told Williams to leave. R. 582, ll. 4-5; R. 254, ll. 7-8. Williams got off of Butler and pushed passed Appellant to walk out the backdoor. R. 254, ll. 9-10; R. 582, ll. 14-20. Appellant followed him. R. 254, ll. 9-10; R. 583, ll. 2-6. Butler closed and locked the backdoor behind them. R. 255, ll. 6-7; R. 584, ll. 5-10.

Williams got in his car and started to leave. R. 585, ll. 1-3. Appellant knocked on the backdoor and asked Butler for the items he had left in the house. R. 255, ll. 8-9; R. 585, ll. 4-5. Butler placed Appellant's stuff on the front porch for him to retrieve. R. 255, ll. 9-11; R. 586, ll. 1-10. Appellant got his stuff and put the alcohol in his trunk, but kept possession of the gun for protection and to place it in the glove compartment, where he normally stored it. R. 586, ll. 11-17. Appellant then saw Williams return to the home and approach the backdoor. R. 587, ll. 12-17. Appellant followed Williams. R. 588, ll. 7-11. He heard Williams "kicking and hitting on the door." R. 256, ll. 10-24; R. 258, ll. 20-23; R. 588, l. 13. Williams was "trying to kick the door open." R. 589, ll. 2-8.

Appellant tried to distract Williams and calm him down. R. 589, ll. 9-10. Appellant feared Williams would be arrested because he was on trespass notice at the apartments. R. 589, ll. 10-13. Appellant even grabbed Williams' hand in an effort to calm him. R. 590, ll. 18-22. Williams snatched his hand back and shoved Appellant "really hard." R. 591, ll. 8-9. Williams then "charged" Appellant and shoved him again. R. 591, l. 11. Appellant fell down, slamming his back to the ground. R. 591, ll. 11-13. This was especially painful for Appellant because he recently suffered back injuries from two car accidents. R. 591, l. 14 – R. 592, l. 6. The shove was so violent Appellant's glasses were knocked off his face. R. 593, ll. 17-23.

Williams shoved Appellant for a third time, knocking him into a tree. R. 595, ll. 16-21. The force knocked the breath out of him. R. 596, ll. 2-6. Appellant crumbled to the ground. R. 596, ll. 5-6. Then, Williams, who was in an uncontrollable rage, was "on" him. R. 596, l. 7; R. 597, ll. 20-25; R. 604, ll. 7-9. Although Williams had been drinking tequila earlier in the evening, Appellant did not believe he was intoxicated. R. 633, ll. 10-22. Instead, Appellant explained Williams' behavior as "rage, emotional rage." R. 633, ll. 10-15. Appellant conceded,

however, that Williams' conduct "could have been because he was intoxicated." R. 633, ll. 15-16. Appellant struggled to get out of Williams' grasp to no avail. R. 597, l. 25 – R. 598, l. 3; R. 599, ll. 8-18. Fearing for his life, Appellant then fired his gun at Williams. R. 600, ll. 13-18; R. 604, ll. 5-11; R. 605, ll. 13-16; R. 606, ll. 10-22. Appellant continued to fire, unaware of whether any of the bullets struck Williams. R. 601, ll. 14-23. When the gun stopped firing, Appellant, frightened, ran to his car. R. 601, ll. 20-25; R. 602, ll. 12-14.

Appellant weighed a "very fat" 286 pounds. R. 592, ll. 7-12. He was weak and not physically fit. R. 592, ll. 20-24. Williams, on the other hand, was "lean," "pretty strong," and quick. R. 592, l. 25 – R. 593, l. 6; see also R. 433, ll. 1-4 (pathologist testifying that Williams was 6'3" and weighed 200 pounds).

Butler heard the gunshots inside her apartment. R. 259, ll. 6-7. She looked out the backdoor and saw Williams lying on the ground. R. 259, ll. 19-21. She called 911 and went out to check on Williams. R. 259, l. 22 – R. 260, l. 6.

Adrenaline pumping, Appellant started driving away from the apartment. R. 607, ll. 1-4; R. 609, ll. 2-6; R. 609, ll. 13-18. While driving, Appellant realized he needed to check on Williams, so he put the car in reverse and backed up the very short distance to the apartment. R. 609, ll. 7-12. A police officer had arrived at the scene and ordered Appellant to the ground as soon as Appellant got out of his car. R. 609, ll. 19-21; R. 308, l. 22 – R. 309, l. 1. Appellant fully complied with the officer's instructions and admitted he had shot Williams. R. 308, l. 22 – R. 309, l. 1; R. 609, ll. 19-22; R. 610, ll. 8-11.

The pathologist explained that Williams died as a result of "gunshot wounds of the trunk." R. 432, ll. 19-24. Additionally, the toxicology results indicated Williams had a blood alcohol concentration of 0.131 percent. R. 433, ll. 15-16; R. 450, ll. 2-4. The toxicology

analysis also detected “Delta 9 THC, which is essentially the parent drug in marijuana. And a breakdown product of marijuana.” R. 433, ll. 16-18. The pathologist was unable to testify as to what effect the blood alcohol concentration would have had on Williams, however. R. 433, ll. 19-24; R. 450, ll. 5-10. Nevertheless, he made clear that it was “not an insubstantial concentration.” R. 433, l. 24. Regarding the THC, the pathologist explained that finding the parent drug of marijuana in Williams’ system indicated Williams had “ingested or used the drug within a couple of hours before his death.” R. 434, ll. 3-14; R. 450, ll. 15-18. Again, though, the pathologist was unable to say how the drug would have affected Williams. R. 434, ll. 15-21. He allowed that Williams “could have been under the influence.” R. 434, l. 25. According to the pathologist’s report, the intoxicants in Williams’ body were “a depressant” and had “reality distorting effects.” R. 450, l. 19 – R. 451, l. 2.

Charge conference

During the charge conference, Appellant, citing supporting case law, requested the jury be charged as follows:

In assessing whether the state has proven the defendant did not act in self-defense, I now charge you that the defendant had the right to judge the conduct of the deceased more harshly than otherwise because of the deceased’s alcohol consumption or drug use on the day of the incident.

R. 668, l. 16 – R. 669, l. 3; R. *(Court’s Exhibit #6). The judge refused to issue the charge. The judge agreed the requested instruction was a sound principle of law, but stated it was “not part of this case. He said he wasn’t drunk.” R. 668, l. 24 – R. 669, l. 1. When defense counsel noted the toxicology results for the deceased also revealed he was “under the influence of marijuana,” the judge responded yet again with “[h]e said he wasn’t drunk.” R. 669, ll. 2-4. The judge emphasized that Appellant stated “[h]e wasn’t any different than he was. And he said he wasn’t drunk.” R. 669, ll. 4-7. As a result, the judge declined to issue the instruction. R. 669, ll. 8-9.

Defense counsel re-iterated that the undisputed evidence showed the deceased “was under the influence of marijuana.” R. 669, ll. 10-11. The judge again rebuffed defense counsel’s request based on Appellant’s testimony that the deceased was not intoxicated. R. 669, ll. 12-19. The judge also stated that he relied upon the pathologist’s testimony that “[i]t affects people differently, I can’t tell you how it affected him, it may not have affected him at all.” R. 669, ll. 17-19. The judge was not “shock[ed]” by the deceased’s blood alcohol level of 0.13. R. 669, ll. 20-24. The judge ruled:

Okay. I mean you are going to be arguing something that your client said was not true. So I’m not going to include - - for the reason - - he is the person - - and more importantly, whether the doctor said he was, he is acting on his perception, his understanding; and he doesn’t think he is intoxicated.

So because of that, there is another reason he is not; because it is all based on his perception of why he is acting. Because there is certainly nothing in the record to suggest that he was in any danger other than he has testified that, yes, there is no question he could have hurt him with his fist. I don’t quarrel with that part of it. I mean he has raised that part.

But from the standpoint of intoxication, that doesn’t have anything to do with it. So for that reason I decline to add it.

R. 670, ll. 2-17.

Jury instructions

After instructing the jury regarding murder, the judge gave the following charge concerning self-defense:

Now the defendant in this case has raised the defense of self-defense, which is a complete defense and it is established - - if it is established. And you must find the defendant not guilty if such is the case, if you are satisfied beyond a reasonable doubt that it is established.

And I would instruct you that the burden of disproving self-defense by proof beyond a reasonable doubt rests upon the State.

If you have a reasonable doubt of the defendant's guilt after considering all of the evidence including the evidence of self-defense, then you must find the defendant not guilty.

On the other hand if you have no reasonable doubt of the defendant's guilt after considering all of the evidence including the evidence of self-defense then you must return a verdict of guilty.

The following elements are required to establish self-defense. First, the defendant must be without fault in bringing on the difficulty.

If the defendant's conduct was the type which was reasonably calculated and did provoke a deadly assault, the defendant would be at fault in bringing on the difficulty and would not be entitled to an acquittal based on self-defense.

The second element of the self-defense is that the defendant was actually in imminent danger of death or serious bodily injury or that the defendant actually believed he was in imminent danger of death or serious bodily injury.

If the defendant was actually in imminent danger it must be shown that the circumstances would have warranted a person of ordinary firmness and courage to strike the fatal blow to prevent the death or serious bodily injury.

If the defendant believed - - if the defendant believed he was in imminent danger of death or serious bodily injury it must be shown that a reasonably prudent person of ordinary firmness and courage would have had the same belief.

In deciding whether the defendant was or believed he was in imminent danger or serious bodily injury you should consider all the facts and circumstances surrounding the crime including the physical condition and characteristics of the defendant and the victim.

The defendant does not have to show that he was actually in danger. It is enough if the defendant believed he was in imminent danger and a reasonably prudent person of ordinary firmness and courage would have had the same belief. The defendant has the right to act on appearances, even though the defendant's belief may have been mistaken.

It [is] for you to decide whether the defendant's fear of imminent danger [of] death or serious bodily injury was reasonable and would have been felt by an order [sic] person in the same situation.

The final element of self-defense is that the defendant had no other probable way to avoid the danger or death or serious bodily injury - - the danger of death or serious bodily injury than to act as they did at the particular instance.

A person cannot be required to make an exact calculation as to the degree or amount of force which may be needed to avoid death or serious bodily harm. Therefore, in self-defense the defendant has the right to use the force needed to avoid death or serious bodily harm.

The force used in self-defense does not have to be limited to the degree or the amount of force used by the victim. The defendant has the right to use so much force as appeared to be necessary for complete self protection in which a person of ordinary reason and firmness would have believed to be needed to prevent death or serious bodily harm.

The relative size, ages and weights of the defendant and the victim may be considered in deciding the apparent or actual need for force in self-defense and the amount of force needed.

If the defendant is justified in defending himself and in firing the first shot, the defendant is also justified in continuing to shoot until it is apparent that the danger of death or serious bodily injury has completely ended.

R. 742, l. 2 - R. 745, l. 4.

Jury deliberations

Shortly after the jury began deliberating, the jury requested “definition of the elements of malice,” a “list of elements of crime of murder that must be proved,” and the “elements of self-defense that must be disproved.” R. 754, ll. 20-25; R. 774-776. In re-charging the jury, the judge decided to amend his previous charge on self-defense pursuant to a request from the state. He decided to inform the jurors that the state needs only to disprove one element of self-defense in order for the defense to fail. R. 755, l. 21 – R. 756, l. 12. Appellant objected, but the judge overruled the objection. R. 756, l. 22 – R. 757, l. 10. However, the judge explained that he was not going to send that portion of the charge back to the jury when he provided them with written instructions. R. 757, ll. 11-14. Thereafter, the judge instructed the jury that “for the murder charge,” “in order to obtain a conviction for murder [the state] must establish each of those elements beyond a reasonable doubt. If they fail on any one then you must return a verdict of not guilty.” R. 758, ll. 20-24. He continued,

On self-defense, which they have to disprove, you will note there are three elements. And unlike the murder where the state doesn't have to disprove all three, all three must be - - if they disprove one beyond a reasonable doubt then the self-defense would fail; just as the murder would fail if they proved all but one of the elements of that charge.

So you understand that part of it, that that is necessary for the self-defense to be a complete defense. If they disprove - - if they fail to disprove - - if they fail to disprove any of the - - any of the elements then you must return a verdict of not guilty because the self-defense would have been established beyond a reasonable doubt.

R. 758, l. 25 – R. 759, l. 11. He also provided written instructions. R. 774.

Shortly thereafter, the jury returned with its guilty verdicts. R. 760, ll. 9-12.

Discussion

The South Carolina Supreme Court has long held that a trial judge has the responsibility to craft a self-defense charge tailored to the facts of a case. State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011); State v. Fuller, 297 S.C. 440, 444-45, 377 S.E.2d 328, 331 (1989). As recognized in Fuller, there is a “body of common law self-defense” and trial judges must “consider the facts and circumstances of the case at bar in order to fashion an appropriate charge.” Fuller, 297 S.C. at 443, 377 S.E.2d at 330. “If there is any evidence to support a jury charge, the trial judge should grant the requested charge.” State v. Santiago, 370 S.C. 153, 159, 634 S.E.2d 23, 26 (Ct. App. 2006)(citing State v. Burriss, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999)). The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand is an error of law. Santiago, 370 S.C. at 159, 634 S.E.2d at 26.

In Fuller, the defendant solicited a prostitute. Fuller, 297 S.C. at 441, 377 S.E.2d at 329. However, when the pair arrived at the prostitute's trailer, they discovered it was occupied. The defendant then left. Id. When the defendant later returned to the prostitute's trailer, he found a car driven by a white woman was blocking the road. Id. The defendant asked her to move her car. Id.

Two men approached the defendant's car and asked him "what he was 'trying to do to that white lady.'" Id. One of the men used a racial slur and grabbed the defendant by the throat. Id. at 441, 377 S.E.2d at 329-30.

The defendant fired a warning shot allowing him to drive away. Unbeknownst to the defendant, the street was a dead end. Id. at 442, 377 S.E.2d at 330. Due to the men blocking his escape, the defendant ultimately crashed his car against a rail. Id. The two men yelled, "'we're going to take care of you.'" Id. The defendant thought he saw something shiny in one of the men's hands and fired four shots at them, killing both. Id. No gun was found on the men. Id.

The trial judge only instructed the jury on the basic elements of self-defense. Id. The Court held it was error to only give the general charge when the defendant "repeatedly requested additional charges." Id. at 443, 377 S.E.2d at 330. The Court found the trial judge erred by not giving three specific charges on self-defense that further explained the principles in the general charge. First, the trial judge failed to charge the jury that the defendant had the right to act on appearances. Id. at 443-44, 377 S.E.2d at 330-31(citing State v. Jackson, 277 S.C. 271, 87 S.E.2d 681 (1955)). Second, the trial judge failed to charge the jury that "words accompanied by hostile acts, may, depending on the circumstances, establish a plea of self-defense." Id. (citing State v. Harvey, 220 S.C. 506, 68 S.E.2d 409 (1951)). Third, the trial judge failed to charge that an individual has no duty to retreat "if by doing so he would increase his danger of being killed or suffering serious bodily injury." Id. (citing State v. Hardin, 114 S.C. 280, 103 S.E. 557 (1920)).

The South Carolina Supreme Court held a trial judge erred in failing to charge on the specific elements of self-defense that were applicable to the defendant's theory in State v. Day, 341 S.C. 410, 418, 535 S.E.2d 431, 435 (2000). As stated by the Court, "[a] self-defense charge is erroneous where the trial court fails to charge on elements of the defense which were applicable to

the issues raised by the defendant.” Id. The Court found the instruction given in Day incomplete because the trial judge failed to instruct the jury that the defendant had the right to judge the conduct of the deceased more harshly than otherwise because of the deceased’s drug consumption. Id.; see also State v. Hendrix, 270 S.C. 653, 660-661, 244 S.E.2d 503, 507 (1978)(including the intoxication of the deceased under its analysis of the imminent peril element of self-defense and stating intoxication would provide a basis for the defendant to judge the conduct of his adversary more harshly than otherwise).

Day involved “a complicated love triangle, a murder conspiracy, and a stolen trailer.” Day, 341 S.C. at 414, 535 S.E.2d at 433. Renew hired Day to kill his ex-girlfriend, Bouchillon, because she had reported him to the police in connection with a stolen trailer. Id. Instead of killing Bouchillon as planned, Day told her of the Renew’s wishes and professed his love for her. Id. Day then called the police anonymously to report the plot. Id. According to the plan devised by Renew, Day was to meet him at a specific spot after killing Bouchillon. Id. To continue the ruse, Day and Bouchillon decided to meet Day at the spot with Bouchillon hiding under a blanket in the backseat of the car. Id. at 414-415, 535 S.E.2d at 433. Day and Renew met at the spot, and Day told Renew he had killed Bouchillon. Id. at 415, 535 S.E.2d at 433. The two then drove away separately with Day and Bouchillon following Renew. Id. Renew suddenly stopped and indicated he wanted to talk to Day. Id. Day feared Renew had figured out his deception. Id. Day saw the blanket move up and down and Renew reach for what he believed was a gun. Id. Day shot Renew. Id. Not only did Day hide evidence, including a crack pipe and extra bullets, he did not initially tell the police what happened. Id. at 415, 535 S.E.2d at 434.

At Day’s murder trial, the judge refused to charge the jury on self-defense, but did give a self-defense instruction in response to a jury question. Id. This instruction was “a standard self-

defense instruction” from State v. Davis, 282 S.C. 45, 317 S.E.2d 452 (1984). Day, 341 S.C. at 418, 535 S.E.2d at 435. Ultimately, the jury found Day guilty. Id. at 415, 535 S.E.2d at 434. On appeal, the South Carolina Supreme Court held the trial judge erred in failing to instruct the jury on self-defense where there was evidence in the record to support self-defense. Id. at 418, 535 S.E.2d at 435. As mentioned earlier, the Court also held the trial judge’s refusal to charge on the specific elements of self-defense that were applicable to Day’s theory was reversible error. Id. The Court re-iterated his ruling in Fuller, supra, that a judge “should specifically tailor the self-defense instruction to adequately reflect the facts and theories presented by the defendant.” Id. “A self-defense charge is erroneous where the trial court fails to charge on elements of the defense which were applicable to the issues raised by the defendant.” Id. Among other things, the judge’s instruction in Day’s case was incomplete because it “should have included a charge indicating ... Day had a right to judge the conduct of Renew more harshly than otherwise because of Renew’s drug consumption.” Id. “Central to Day’s defense was his argument that ... Renew was in a drug-induced paranoia the day of the incident.” Id.

The trial judge erred in charging the jury that Williams had the right to judge the conduct of Williams more harshly than otherwise because of Williams’ alcohol consumption and drug use on the day of the shooting. See R. 777. The judge failed to consider the full import of the evidence presented. Although Appellant testified that he did not believe Williams was intoxicated, he also testified that Williams’ aggressive conduct “could have been because he was intoxicated.” See R. 633, ll. 15-16. Additionally, although the pathologist was unwilling to say how Williams’ alcohol consumption and drug use affected him specifically, the pathologist testified Williams’ blood alcohol concentration of 0.131 percent was “not an insubstantial concentration.” R. 433, l. 24. Concerning the level of THC found in Williams’s system, the

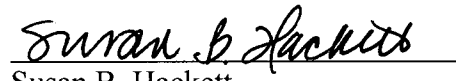
pathologist opined he “could have been under the influence.” R. 434, l. 25. According to the pathologist’s report, the intoxicants in Williams’ body were “a depressant” and had “reality distorting effects.” R. 450, l. 19 – R. 451, l. 2. Either the judge simply ignored this evidence in the record or discounted its import. While the judge was correct that the requested charge concerned Appellant’s perception and his ability to act on that perception, the evidence in the record supported the instruction that Appellant had the right to judge Williams’ conduct more harshly than otherwise because of his alcohol consumption and drug use.

The jury clearly pondered whether the state had disproved self-defense in this case as evidenced by its note requesting additional instructions. Rather than clarifying, the judge’s supplemental instruction confused. Not only did the judge instruct the jurors on a matter not previously instructed, but the judge confusingly tried to juxtapose proving all elements of murder with disproving only one element of self-defense. See R. 758, l. 25 – R. 759, l. 11.

The evidence in the record supported submitting the instruction to the jury. Although the judge recognized the request was based on a sound principle of law, the judge erred by determining the evidence did not support the charge. The judge focused too rigidly on Appellant’s testimony that he did not believe Williams was intoxicated and on the pathologist’s testimony that he could not say how the intoxicating substances affected Williams specifically. The judge should have expanded his consideration to include Appellant’s testimony that Williams could have been intoxicated and the pathologist’s testimony that Williams’ blood alcohol level was substantial coupled with the presence of a reality distorting drug in his system. The judge erred in failing to charge the jury regarding Appellant’s ability to judge Williams’ conduct more harshly based on Williams’ intoxication where the evidence presented supported the charge on a sound principle of law.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and remand for a new trial.


Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 24th day of January, 2017.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

RECEIVED

JAN 24 2017

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

BRANDON RASHAD MARSHALL,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Brandon R. Marshall states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent Appellant.
2. She has reviewed the record of Appellant's pre-trial hearings and trial before the Honorable R. Markley Dennis, Jr., which was held on April 4-7, 2016, and in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. Pursuant to Anders v. California, 386 U.S. 738 (1967), she has briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Brandon R. Marshall.

Respectfully Submitted,

Susan B. Hackett

Susan B. Hackett

Appellate Defender

ATTORNEY FOR APPELLANT

This 24th day of January, 2017.

STATE OF SOUTH CAROLINA
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**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) Entire trial transcript dated April 4-7, 2016;
- (2) State's Exhibit # 39 (DVD of interrogation);
- (3) Court's Exhibit #5 (jury note & attached instructions);
- (4) Court's Exhibit #6 (request to charge);
- (5) True-billed indictments (2014-GS-10-52621; -52622); and
- (6) Sentence sheets.

I certify that this designation contains no matter which is irrelevant to this appeal.

January 24, 2017

Susan B. Hackett

Susan B. Hackett
Appellate Defender
S.C. Commission on Indigent Defense
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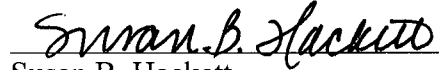
JAN 24 2017

CERTIFICATE OF COUNSEL

SC Court of Appeals

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

January 24, 2017.



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