STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from Charleston County

Honorable R. Lawton McIntosh, Circuit Court Judge

Opinion No. 2017-UP-015 (S.C. Ct. App. filed January 11, 2017)

2013-GS-10-02839 & 2013-GS-10-02840

THE STATE,

RESPONDENT,

V.

JALANN LEE WILLIAMS,

PETITIONER

APPELLATE CASE NO. 2015-000115

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Jalann Lee Williams, Appellant.

Appellate Case No. 2015-000115

Appeal From Charleston County
R. Lawton McIntosh, Circuit Court Judge

Unpublished Opinion No. 2017-UP-015
Submitted October 1, 2016 – Filed January 11, 2017

AFFIRMED

Chief Appellate Defender Robert Michael Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General Sherrie Ann Butterbaugh, all of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, for Respondent.

PER CURIAM: Affirmed pursuant to Rule 220(b), SCACR, and the following authorities: *State v. Stanko*, 402 S.C. 252, 264, 741 S.E.2d 708, 714 (2013) ("[An appellate court] will not reverse a trial court's decision regarding a jury instruction absent an abuse of discretion."); *State v. Lemire*, 406 S.C. 558, 565, 753 S.E.2d 247, 251 (Ct. App. 2013) ("An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." (quoting *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000))); *State v. Light*, 378 S.C. 641, 649, 664 S.E.2d 465, 469 (2008) ("A self-defense charge is not required unless it is supported by the evidence."); *Stone v. State*, 294 S.C. 286, 287, 363 S.E.2d 903, 904 (1988) ("Upon request, a defendant is entitled to a jury instruction on self-defense *if he has produced evidence tending to show the four elements of that defense*." (emphasis added)).

AFFIRMED.[1]

LOCKEMY, C.J., and KONDUROS and MCDONALD, JJ., concur.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

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JALANN LEE WILLIAMS,

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Appeal from Charleston County

Honorable R. Lawton McIntosh, Circuit Court Judge

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PETITION FOR REHEARING

Petitioner requests rehearing pursuant to Rule 221 (a), SCACR because this Court apparently overlooked the fact that the trial judge gave **several legally erroneous** reasons for refusing the instruct the jury on self-defense, and this Court should respectfully address them in a revised opinion. Defense counsel requested that the judge instruct the jury on self-defense, and involuntary manslaughter in addition to murder. The judge stated that he was not inclined to charge either self-defense or involuntary manslaughter, but he was thinking about charging voluntary manslaughter. The judge deferred ruling until the next day. R. 288, l. 14- 291, l. 25.

The following day, and the last day of trial, the judge stated he had "consulted with my fellow brethren up here and I'm not charging self-defense." The judge reasoned that appellant armed himself "early on in the situation. **He wasn't allowed to carry – there is no evidence he had a concealed weapons permit."** R. p. 295, ll. 3-25. (emphasis added). That is an erroneous reason to refuse to charge self-defense. A person who is not legally armed is not barred from defending himself if the aggressor is going to kill or serious hurt him. He is also not precluded from receiving a self-defense instruction because he was illegally armed. See State v. Crosby, 355 S.C. 47, 584 S.E.2d 110 (2003); State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999). This Court should most respectfully grant rehearing, address this legally spurious reason not the charge self-defense, revise its opinion, and reverse appellant's conviction.

The judge also reasoned: "He [appellant] voluntarily went to a drug transaction. While he's at the drug transaction he engaged in an argument with the victim in this case. There was no basis of the drug deal argument -- but he actually started the altercation with the victim. That's argued." R. p. 295, ll. 3-25. (emphasis added). That is legally and factually incorrect. The fact appellant was involved in a drug deal, and not legally armed, did not mean he was not entitled to a self-defense instruction or a lesser-included offense. See State v. Niles, 412 S.C. 515, 772 S.E.2d 877 (2015) (Pleicones, J. dissenting). State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999). This record also does not support the conclusion that appellant started the altercation. Again, and respectfully, this Court should address this spurious legal reasoning.

Finally, the judge also reasoned that appellant failed "on the last element [the duty to retreat]." The judge reasoned that: "there is no evidence that once the altercation started the defendant did anything whatsoever to extricate himself from the situation. The judge reasoned that appellant went "straight to his weapon and killed the victim." R. p. 295, ll. 3-25. (emphasis

added). It is totally unclear from this record how the judge thought appellant could have retreated given the evidence of the deadly encounter. Appellant was in a **moving vehicle** when the deadly altercation occurred. Appellant did not go "straight to his weapon" when the fight occurred in the moving vehicle. Further, a defendant *does not have a duty to "retreat" if attempting to retreat from the situation rather than act if attempting to retreat will put him in more danger*. See State v. Bodie, 33 S.C. 117, 11 S.E. 624, 625 (1890). Appellant was attacked in a moving vehicle. Once again, respectfully, this Court should address this incorrect reason to refuse to instruct on self-defense.

Self-defense was a **jury issue** in this case, and appellant respectfully submits our Supreme Court has looked with great disfavor on trial judges not allowing a jury to consider self-defense where there was "any evidence" of self-defense. See State v. Dickey, 394 S.C. 491, 716 S.E.2d 97 (2011). This is respectfully the most common reason for reversing a trial court. When the trial court substitutes its view of the evidence for the fact finding function of the trier of fact: The jury. As this Court will recall, defense counsel Murphy took exception to the judge's refusal to charge self-defense. R. p. 296, ll. 1-4.

In determining whether to charge self-defense or a lesser-included offense, our Supreme Court has said that it will view the evidence in the light most favorable to the defendant when determining if there is any evidence to justify the charge. State v. Byrd, 323 S.C. 319, 474 S.E.2d 430 (1996). Self-defense must be charged *if there is any evidence* in the record to support that charge. See, State v. Hill, 315 S.C. 260, 433 S.E.2d 848 (1993); State v. Muller, 282 S.C. 10, 316 S.E.2d 409 (1984).

Self-defense involves four elements. State v. Fuller, 297 S.C. 440, 442-43, 377 S.E.2d 328, 330 (1989). First, the defendant must be without fault in bringing on the difficulty. As

stated, the judge erred here **as a matter of law** by ruling appellant could not meet this element because he allegedly **did not have a concealed weapons permit**, or because he may not have been in "legal possession" of the gun. State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999).

Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, if his defense is based upon his behalf of imminent danger, a reasonable prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to dace himself from serious bodily harm or losing his own life. These elements are not in dispute in this case.

Mitchell testified that the decedent was getting "the better" of appellant during the fight inside the SUV, and the location of the decedent's body corroborated the fact that the struggle occurred with the decedent attacking appellant *in a moving vehicle.*

Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance. State v. Fuller, 297 S.C. 440, 442-43, 377 S.E.2d 328, 330 (1989). Again, appellant was being beaten in a moving vehicle, and retreat was not possible.

Thus, there was evidence of self-defense in this case. The judge erred by ruling appellant was not without fault in bringing on the difficulty. The record shows that the decedent was the first person to make physical contact once there was a disagreement. Further, the fact that appellant apparently did not have a concealed weapons permit for the gun was irrelevant. The fact appellant "voluntarily went to the drug transaction, or was engaged in illegal activity" also

did not deny him his right to act in self-defense. Appellant was not obligated to suffer great bodily injury or be killed once he was physically attacked.

As appellant argued to this Court: The right to self-defense often arises when the defendant **is doing something stupid or illegal, or likely both.** For example, in State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1988), defendant Fuller was soliciting a prostitute when the difficulty arose. The Supreme Court found not only that Fuller was entitled to a self-defense instruction, but that he was entitled to a self-defense instruction tailored to the facts of that case. See, also, State v. Day, 341 S.C. 410, 535 S.E.2d 431 (2000).

Further, in State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999), our Supreme Court made clear that a defendant being in unlawful possession of a weapon is merely incidental to the defendant's lawful act of arming himself in self-defense. In short, the unlawful possession of the weapon will not prevent the defenses of self-defense or accident from being viable. The gun was not produced until the decedent attacked appellant. Appellant had no legal duty to allow the decedent to strangle him unabated.

Although Burriss involved the defense of accident our Supreme Court held the analysis is equally applicable in determining if a defendant is in unlawful possession of a weapon is entitled to a charge on self-defense. See, State v. Slater, 373 S.C. 66, 71, 644 S.E.2d 50, 52 (2007).

Finally, the judge erred by reasoning that appellant did not meet the last element of self-defense. Retreat was not possible in the back seat a moving automobile. The fourth element of self-defense is that "the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious injury than to act as he did in this particular incident. See, State v. Wiggins, 330 S.C. 538, 545, 500 S.E.2d489, 493 (1998). Certainly, this was an issue for the jury.

In the light most favorable to appellant, the evidence showed that the decedent grabbed appellant, and they were "locked together" as appellant attempted to get the decedent off of him. The decedent's body was found lying in the back seat from the front seat corroborating both appellant and Mitchell's testimony about the violent altercation.

Appellant testified he feared for his life during this violent attack, and that he was fortunate to be able to get the handgun from his pocket to shoot the attacking decedent. The judge made his another error of law in reasoning appellant had some other probable means of avoiding the danger as this violent attack occurred in moving automobile. Even if it was reasonable for appellant to be expected to jump out of a moving vehicle -- which it was not -- appellant testified that the door was locked during the violent struggle.

Appellant believed he was in imminent danger, and any reasonable man of ordinary fitness and firmness would have believed he had to strike the fatal blow to save himself from suffering serious bodily injury or from losing his own life. Appellant thus met the second and third elements of self-defense, and as argued above, the judge was in error in his legal reasoning as to appellant bringing on the difficulty, the first element. The judge also erred by reasoning appellant had an opportunity to retreat or extricate himself from the violent attack by the decedent, the fourth element of self-defense. See, State v. Davis, 282 S.C. 45, 317 S.E.2d 452 (1984).

Appellant properly raised the issue of self-defense in this case, and presented the "any evidence" on each element of self-defense, which was required to get the case to the jury. The judge should have charged it. The state would then have had the burden of disproving appellant acted in self-defense beyond a reasonable if the judge had properly charged the jury. See, State

v. Burkhart, 350 S.C.252, 565 S.E.2d 298 (2002); State v. Dickey, 394 S.C. 491, 716 S.E.2d 97 (2011). Rehearing should respectfully be granted.

Respectfully Submitted,

ROBERT M. DUDEK
Chief Appellate Defender

This 26th day of January, 2017.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JALANN LEE WILLIAMS,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Sherrie Butterbaugh, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Jalann Williams, #362634, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 26th day of January, 2017.

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 26th day of January, 2017.

(L.S)
Notary Public for South Carolina
My Commission Expires: November 3, 2026.

The South Carolina Court of Appeals

The State, Respondent,

v.

Jalann Lee Williams, Appellant.

Appellate Case No. 2015-000115

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

J.

J.

Stephanie P. McDonald J.

Columbia, South Carolina

cc: Robert Michael Dudek, Esquire
Alan McCrory Wilson, Esquire
Donald J. Zelenka, Esquire
John W. McIntosh, Esquire
Sherrie Butterbaugh, Esquire

FILED

February 23, 2017

Scarlett Anne Wilson, Esquire
The Honorable R. Lawton McIntosh