

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

RECEIVED

Appeal from Charleston County

MAY 11 2017

Honorable Carmen T. Mullen, Circuit Court Judge

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

HERSHEL MARK JEFFERSON, JR.,

APPELLANT

APPELLATE CASE NO 2016-001799

FINAL BRIEF OF APPELLANT

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### **STATEMENT OF ISSUE ON APPEAL**

The trial judge erred in allowing the state's police officer to testify that appellant was the primary aggressor in this criminal domestic violence case because this pivotal assessment invaded the province of the jury, particularly since self-defense was raised and charged, as only the jurors were assigned with the duty of deciding the factual issues at trial.

## **STATEMENT OF THE CASE**

Appellant Hershel M. Jefferson Jr. was convicted of criminal domestic violence, third offense, during a trial held in his absence at the July 2016 term of the Charleston County General Sessions Court before Judge Carmen T. Mullen. A sealed sentence was imposed thereafter. The sentence was published to appellant by Judge R. Markley Dennis during the August 2016 term of the Charleston County General Sessions Court. Appellant was sentenced to five years imprisonment, suspended upon the service of three years and five years probation.

Appellant appealed his conviction and sentence. This brief follows.

## ARGUMENT

The trial judge erred in allowing the state's police officer to testify that appellant was the primary aggressor in this criminal domestic violence case because this pivotal assessment invaded the province of the jury, particularly since self-defense was raised and charged, as only the jurors were assigned the duty of deciding the factual issues at trial.

The state's case consisted of the testimony of only three witnesses at trial: appellant's girlfriend Felicia Edwards, neighbor Amanda Powell, and police officer Michael Burton. Appellant neither testified nor presented witnesses in his defense at trial. State's witness Felicia Edwards testified that she and appellant were having relationship issues on July 3, 2014, as they argued and debated separating from cohabitating at her residence when the altercation between them became physical. Edwards stated that she fled to her girlfriend's residence on that evening, but that appellant entered there, "punched her" in the face, and then placed her in a "headlock" and hit her again. Edwards admitted that she started hitting appellant back and that they began to tussle. Edwards stated that the fighting ended when she hit him in the head twice with a candle and used the glass candle holder to cut him on his arm until he bled. R. 20, l. 1 – R. 37, l. 2.

Edwards' friend Amanda Powell, in whose house the events in question took place, testified that she witnessed the fighting and responded by calling 911. Powell explained that the fighting between the two was "mutual" and that the fighting escalated. R. 45, l. 7 – R. 48, l. 5.

Police Officer Michael Burton testified that he was dispatched to the crime scene on the date in question, and that after he recorded statements from Edwards and Powell and then spoke with appellant, he made the decision that appellant was the primary aggressor in the case. Officer Burton's testimony on this ultimate question of fact follows:

Q. As a result of your investigation you arrested the Defendant, correct?

A. Yes. We found him to be the primary aggressor.

Defense Counsel: Objection. R. 56, lines 20-25.

Q. And you determined – you made a primary aggressor determination, correct?

A. Yes, sir. R. 58, lines 12 – 14.

At the close of the state's case in chief, defense counsel made the following motion:

Mr. Cochran: Your Honor, at this time I will move for a directed verdict. I would move for a mistrial based on my previous objection and the testimony for the ultimate issue of the case in terms of [appellant] being the primary aggressor...would in the same vein I would argue that the State has not proven beyond a reasonable doubt that [appellant] is not acting in self defense....[appellant] defending himself causing scratches to her while she was attacking him with a broken piece of glass.

Solicitor: [Appellant] entered the house, began hitting Ms. Edwards and that she only hit him back in order to fend him off, not just her, but the independent witness stated such things as well.

The Court: All right. Well, I respectfully am going to deny the motion for directed verdict. I believe the victim's testimony was that he punched her in the face to begin this entire incident. And based on that testimony alone it should go to the jury to determine.

The Court: I denied it. The mistrial motion, yes. R. 61, l. 21 – R. 63, l. 14

Self-defense<sup>1</sup> was charged in the case. R. 90, l. 19 – R. 92, l. 8. Also, the trial judge charged the jury on the law on criminal domestic violence as follows:

Now, the Defendant is charged with criminal domestic violence and the State must prove beyond a reasonable doubt that the Defendant caused physical harm or injury to a member of the Defendant's own household or the Defendant offered or attempted to cause physical harm or injury to a member of the Defendant's

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<sup>1</sup> Defense counsel requested a self-defense charge. R. 63, l. 22-24; R. 65, lines 15-24; R. 66, l. 25 – R. 67, l. 3. The trial judge granted the request for a self-defense charge. R. 67, l. 3 – R. 68, l. 25.

own household with the apparent present ability to cause harm or injury under circumstances reasonable creating a fear of imminent danger. R. 90, lines 3 -12.

Since self-defense was an issue in the case, the identity of the aggressor became a pivotal factual question at trial. Self-defense is defined as follows:

- a.) The defendant must be without fault in bringing on the difficulty;
- b.) 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;
- c.) A reasonable prudent man of ordinary firmness and courage would have entertained the same belief;
- d.) The defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury that to act as he did in this particular instance. State v. Fuller, 279 S.C. 440, 377 S.E.2d 328 (1989).

Therefore, the question of the identity of the aggressor was a fact question that should have been determined by the jury rather than police officer Burton's conclusion, particularly where appellant claimed self-defense, and where an element of self-defense is the absence of aggression in to the extent that appellant must have been without fault in bringing on the difficulty. The officer testified regarding having found appellant to be the primary aggressor as follows:

Q: You personally made contact with Mr. Jefferson?

A. Yes, sir.

Q. You said you got this side of the story as well?

A. Yes, sir.

Q. And you determined -- you made a primary aggressor determination, correct?

A. Yes, sir.

Q: And the reason you had to do that was because both parties had injuries, correct?

A. Yes, sir.

Q. Both parties were claiming opposite things, correct?

A. Correct. Tr. 84, lines 6-20.

Q. And Mr. Jefferson's injuries, he had an injury I believe to his ear, correct?

A. Yes, sir. He had injuries to his right arm, left eye and his left ear.

Q. The nature of those injuries would be I guess more lacerations from the glass that was broken?

A. Correct. R. 59, l. 23- R. 60, l. 5.

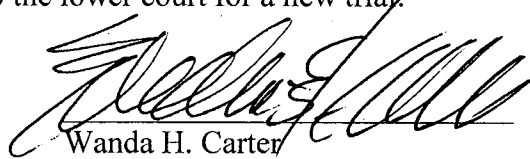
The right to a jury trial is considered "inviolable." See South Carolina State Constitution Art. 1, §14. Note that South Carolina State Constitution Article V, § 21 prevents judges from commenting on the facts and in effect is designed "to preserve inviolate the jury's fact finding function" ...[as] all questions of fact are to be decided exclusively by the jury." State v. Norris, 270 S.C. 552, 243 S.E.2d 440 (1978). It is well settled that all questions of fact are for the jury to decide. State v. Smith, 227 S.C. 400, 88 S.E.2d 345 (1955).

In the case at bar, the jurors had to decide whether Edwards or appellant was the aggressor by determining at what point the altercation began in earnest during the fight between them on that night, and who was the aggressor for the purpose of deciding on whether appellant was guilty of criminal domestic violence or whether appellant acted in self-defense therein nullifying any guilt on the domestic violence charge. Here, both actors were fighting mutually, and both possessed injuries and defensive wounds/scars, and both received medical attention for their injuries. Therefore, law enforcement's pronouncement of the identity of the aggressor in this case, whether primary or otherwise, invaded the province of the jury by summarily

determining the ultimate fact questions in this case, i.e. whether appellant was guilty or not guilty by reason of self-defense. Counsel's objection to the officer's aggressor assessment, which invaded the jurors' duty, preserved the issue for this Court's review, particularly since self-defense applied and was charged in the case.

**CONCLUSION**

Based on the foregoing argument, counsel for appellant requests that his conviction and sentence be reversed and his case remanded to the lower court for a new trial.



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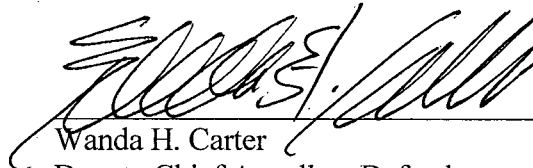
ATTORNEY FOR APPELLANT

This 11th day of May, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final 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."

May 11, 2017



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