STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Sumter County

Honorable R. Ferrell Cothran, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JERMAINE ANTONIO HODGE,

APPELLANT

APPELLATE CASE NO 2016-001175

INITIAL BRIEF OF APPELLANT

WANDA H. CARTER
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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II. The lower court erred in allowing the jury to view Lawrence Cooley's stab wound via a photograph and an up close and personal view of Cooley's flesh exposing the wound for the jury to see when he raised his shirt because this evidence was prejudicial and inflammatory in nature.

III. The lower court erred in overruling an objection to the solicitor's closing argument imploring the jury to convict appellant on the charge as a "symbolic verdict" because the jurors' oath required a verdict issued upon the evidence presented at trial only.

STATEMENT OF THE CASE

Appellant Jermaine Hodge was convicted of assault and battery of a high and aggravated nature during a jury trial held at the May 2016 term of the Sumter County General Sessions Court before Judge R. Ferrell Cothran. Jacob McFadden represented appellant at trial and Assistant Solicitor John Meadors appeared on behalf of the state. Appellant was sentenced to imprisonment for an aggregate term of fifteen years.

Appellant appealed. This brief follows.

QUESTION I

The trial judge erred in denying appellant's pre-trial motion for a dismissal of the case via immunity under the Protection of Persons and Property Act because based on the facts of the case appellant established by a preponderance of the evidence that he was entitled to this immunity from prosecution.

At trial, Lyvonnia Copeland testified that she and petitioner, who was her live-in boyfriend, were arguing into the early morning hours of April 21, 2015, and that she called her cousin Lawrence Cooley to come over to her residence and talk to appellant. Copeland stated that when Cooley pulled into the driveway and got out of his vehicle, he (Cooley) began walking towards her, and that as soon as she approached and began her greetings, she realized that Cooley had been stabbed just that quickly. Tr. 142, l. 1 – p. 151, l. 16. Copeland stated that she did not witness the stabbing, but that Cooley didn't stab himself. Tr. 154, lines 1-3; Tr. 158, l. 25 – p. 159, l. 1.

Lawrence Cooley testified at trial and stated that when he stepped out of his vehicle and walked up to Lyvonnia Copeland, he noticed appellant walking from the back to the side of the house, and then he saw appellant just came up to him and stab him with a knife. Tr. 107, l. 23 – p. 123 1, l. 11.

Appellant testified at trial and explained that while he and Copeland argued on that night, she told him that she was calling Cooley to come over to beat him up. Appellant stated that Cooley came over to their house immediately thereafter looking angry. Appellant explained that Cooley pushed him twice and that after he stumbled per Cooley's second push, he responded by stabbing Cooley. Tr. 249, l. 8 – p. 264, l. 18.

Prior to trial, defense counsel moved to have the case dismissed on the ground that appellant was immune from prosecution under the Castle Doctrine. Tr. 15, lines 18-25. An in camera pretrial hearing followed. Lyvonnia Copeland testified during the pre-trial hearing and admitted that appellant was living with her as a boyfriend then, and that they had been dating since 2013 (two years). Copeland testified that she did not witness the stabbing or any altercation between Cooley and appellant. Tr. 16, l. 14 – p. 28, l. 24.

Appellant testified at the pretrial hearing and stated that he had been living with Lyvonnia Copeland every night at Copeland's house as her boyfriend since 2013, and that they both paid bills at that residence. Appellant explained that as they argued during the early morning hours in question, Copeland hollered that she was calling Cooley to come over and "beat [his] ass." Therefore, when Cooley, who was bigger and taller (6'2" and 300 lbs), arrived looking unhappy and pushed him and said "what the f___ is going on," and then pushed him again (harder the second time) even after appellant asked that the pushing stop, then fear begin to set in. Appellant claimed that as he stumbled from the second hard shove from Cooley, he "fear[ed] for his life" and responded with the stabbing. Tr. 30, l. 5 – p. 49, l. 25. Appellant stated that he did not push or attack Cooley and was attempting to walk away. Tr. 30, l. 5 – p. 49, l. 25.

Lawrence Cooley did not testify during this pre-trial hearing.

The trial judge denied appellant's motion for immunity under the Protection Of Persons and Property Act. Tr. 57, l. 8- p. 59, l. 14. The trial judge's findings follow:

> 1.) That appellant and Cooley were both guests on Copeland's property;
> 2.) That appellant in effect was not acting in self defense; and
> 3.) That appellant in effect had a duty to retreat in this instance.
> Tr. 57, l.8- Tr. 59, l. 5.

A.) Appellant and Cooley were not guests in Copeland's home.

Section (A) of the Protection of Persons and Property Act reads as follows:

> (A) A person is presumed to have a reasonable dear of imminent peril of death or great bodily injury to himself or another person using deadly force that is intending or likely to cause death or great bodily injury to another person if the person:
>
> (1.) Against whom the deadly force is used is in the process of unlawfully and forcefully entering of has unlawfully and forcibly entered a dwelling, residence...or if he removes or is attempting to remove another person against his will from the dwelling/residence and
>
> (2.) Who uses deadly force knows or has reason to believe that an unlawful and forcibly entry or unlawful and forcible act is occurring or has occurred.

Appellant was not a guest in Copeland's home. Appellant lived in the home with Copeland. In State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013), the Court held that since the defendant and Collins were both social guests in the defendant's mother's apartment when they fought, then Collins (deceased victim) had an equal right to be in the dwelling, and therefore the defendant could not use immunity under 16-11-440(A), **but** that he could default into using immunity under 16-11-440(C), which carries no presumption like section (A), but still offered immunity if the one who used force was attacked in a place where he had a right to be. Specifically, under 16-11-440 (C) the Act provides that one is justified in using deadly force if:

> A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person...

Additionally, compare also the relevant case of State v. Jones, 416 S.C. 283, 786 S.E.2d 132 (2016), where the Court held that "another place" under § 16-14-440 (C) encompassed a

residence and that there is immunity for use of deadly force by a person within the residence who is not engaged in an unlawful activity and who is attacked in this "another place," i.e., a residence where he or she has a right to be present. In Jones, there was a domestic dispute between a man and a woman (Jones) who lived together inside a particular residence. The woman, i.e., Jones, who killed the man, was acting in self-defense and rightfully in another place where she had a right to be, and as a result was granted immunity for her acts under the Castle Doctrine. In Jones, both Jones and her live-in male friend were lawful residents together, and therefore her claim under 16-11-440(A) was properly and successfully moved to a claim under 16-11-440(C).

This case is similar to Jones to the extent that Copeland and appellant both lived together in the same residence, and both had a right to be there, and therefore appellant was not a guest. Therefore, since appellant lived at the residence with Copeland where Cooley arrived, and since appellant paid bills at that residence, and cohabitated with Copeland there, then appellant was not a guest, but rather present in another place where he had a right to be under 16-11-440 (C), and thus had a right to claim immunity from his acts under the Castle Doctrine. Although 16-11-440 (C) does not contain the presumption of subsection (A), nonetheless it allows one the privilege of claiming the immunity from prosecution of using deadly force by a person who is not engaged in an unlawful activity and is attacked in another place where he has a right to be present. See also State v. Douglas, 411 S.C. 307, 768 S.E.2d 232 (Ct. App. 2015), where it was held that another place would include a place where attackers who are invited into one's home later place the homeowner in reasonable fear of death or great bodily harm.

B.) .Self Defense Was Supported By the Evidence and Given as a Jury Charge

Consistent with the Castle Doctrine and the text of the Act, "a valid case of self-defense must exist" in order to successfully claim the immunity. In Curry, the Court held that the self-defense elements were non-existent in the case. Appellant acted in self-defense in this case. Note that the trial judge charged the jury on the law of self-defense. Tr. 334, l. 25 – p. 338, l. 2. In Jones, the Court held that one who uses deadly force in response to an attack in his or her own home by a cohabitant can seek immunity from prosecution under that provision under 16-11-440(C) as long as the person can establish his reasonable fear of the attacker and there is evidence supporting a self-defense claim. In Jones, the Court held as follows:

> "Consistent with the Castle Doctrine and the text of the Act, a valid case of self-defense must exist, and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity." State v. Curry. 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013). Therefore, the defendant must demonstrate the elements of self-defense, save the duty to retreat, by a preponderance of the evidence. Id. However, if section 16-11-440 (A) applies, there is not requirement that the defendant prove he believed he was in imminent danger of losing his life or sustaining serious bodily injury given the presumption of reasonable fear of imminent peril of death or great bodily injury is included in subsection (A).

In order to establish self-defense, the defendant must have been without fault in bringing on the difficulty and was or believed he was in actual imminent danger of losing his life or sustaining serious bodily injury, which a reasonably prudent person would have so believed, and he had no other means of avoiding the danger. State v. Davis, 282 S.C. 45, 317 S.E.2d 452 (1984). Also, depending on the circumstances, words accompanied by hostile acts may establish self-defense and one has a right to act on appearances. State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989). Moreover, when a one claims self-defense, the state is required to disprove the elements of self-

defense beyond a reasonable doubt. State v. Wiggins, 330 S.C. 538, 500 S.E.2d 4 89 (1998); State v. Williams, 400 S.C. 308, 733 S.E.2d 605 (2012).

Clearly, appellant acted in self-defense in the case. For example, Copeland asked Cooley to come to their residence for the express purpose of fighting appellant; and true to his mission, Cooley came there and got out his truck with an angry demeanor and immediately pushed appellant, who was near enough to do so, and asked appellant what was going on. Appellant was not the aggressor during this incident. To the contrary, Cooley was the aggressor. Then, despite appellant's request that the shoving and pushing stop, Cooley shoved appellant again, and this second act of aggression made appellant stumble and almost fall. Keeping in mind that since Cooley was a big guy and appellant was much smaller, and that Cooley was the aggressor and his (Cooley's) aggression was escalating, and also that appellant had a reason to be fearful for his life against the attacker, then the knifing of Cooley was appellant's act in self-defense. Hence the elements of self-defense were met here.

C.) No Duty to Retreat

Appellant had no duty to retreat as he was at his home. The Castle Doctrine did not require appellant to retreat in the case. State v. Curry, supra; State v. Jones, supra.

D.) Conclusion

A defendant claiming immunity under the Castle Doctrine must show by a preponderance of the evidence that he was not engaged in an unlawful activity, and was in a place where he had a right to be, and was attacked there, and used deadly force via self-defense to protect himself, and had no duty to retreat. Appellant established this by a preponderance of the evidence. Thus, the lower court erred in denying appellant's pretrial motion for immunity from prosecution in this case.

QUESTION II

The lower court erred in allowing the jury to view Lawrence Cooley's stab wound via a photograph and an up close and personal view of Cooley's flesh exposing the wound for the jury to see when he raised his shirt because this evidence was prejudicial and inflammatory in nature.

Prior to trial, defense counsel moved to exclude the inflammatory photograph of Cooley's stab wound from evidence, but the trial judge denied the motion and the photograph in question (State's Exhibit #5) was admitted into evidence. Tr. 76, l. 2 – p. 77, l. 2. Tr. 126, lines 6-25. Then, later at trial, Cooley was called back to the stand to testify. At that time, Cooley pulled his shirt up to show the jury the stab wound that punctured his intestines. Counsel objected accordingly to the irrelevance and prejudice. Tr. 187, l. 8 – p. 190, l. 17.

A photograph should be excluded if it is calculated to arouse sympathy or prejudice of the jury and is irrelevant or unnecessary to substantiate facts. State v. Livingston, 327 S.C. 17, 488 S.E.2d 313 (1997), citing to State v. Todd, 290 S.C. 212, 349 S.E. 2d 339 (1986). Relevant evidence is defined as having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. State v. Douglas, 359 S.C. 187, 597 S.E.2d 1 (Ct. App. 2004). However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. State v. Douglas, supra.

Here, there was very little probative effect of the photographs. The stabbing occurred and the surgery was described. Therefore, no further corroboration was needed. Thus, the pre-operation photograph was unnecessary and prejudicial; and in addition there was undue emphasis that added increased and irrevocable prejudice regarding this matter when Cooley raised his shirt to show his wound to the jury. This depicted a post-operation scar. Clearly, there was little

probative value in this instance and the prejudicial value outweighed any probative value in this instance. Allowing the jury to view the human body of Cooley beneath his clothing constituted undue emphasis that was beyond prejudicial. See State v. Gulledge, 277 S.C. 368, 287 S.E.2d 488 (1982), where there was undue emphasis placed on the evidence of a tape recording transcript taken to the jury room. The showing of the photograph and Cooley's actual flesh violated SCRE, Rule 403, and his right to a fair trial guaranteed under the Fourteenth Amendment to the United States Constitution and article 1, §3 of the South Caroline State Constitution.

QUESTION III

The lower court erred in overruling an objection to the solicitor's closing argument imploring the jury to convict appellant on the charge as a "symbolic verdict" because the jurors' oath required a verdict issued upon the evidence presented at trial only.

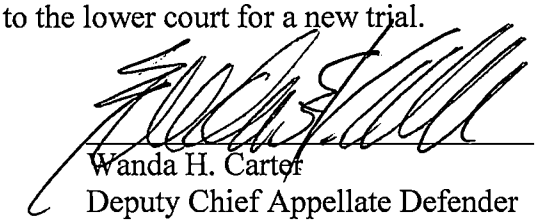
Pertinent sections of the solicitor's closing remarks regarding this issue follow:

> Solicitor: When you come back in with that verdict, bring the shirt in symbolically. Bring it in symbolically because the only innocent person in this room is Lawrence Cooley. And with your verdict symbolically give him that shirt, that cloak and let it keep him warm. Thank you.
>
> Defense Counsel: Your Honor, I'm going to object that he asked the jury to decide this case on a basis other than the law and evidence provided.
>
> Solicitor: I certainly did not, Judge.
>
> Defense Counsel: As a symbolic gesture restore the victim, the alleged victim. Tr. 329, lines 12 – 22.

A true verdict is required by the jury according to the oath taken prior to trial as they fulfill their duty to carefully deliberate on the matters at issue. State v. Ballen, 333 S.C. 378, 510 S.E.2d 226 (1998). Any verdict issued symbolically cannot pass constitutional standards.

CONCLUSION

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



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 30th day of May, 2017.

STATE OF SOUTH CAROLINA

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Jermaine Antonio Hodge, #273774, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 30th day of May, 2017.

Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 30th day of May, 2017.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: 10/30/2022