

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

THE STATE,

RESPONDENT,

V.

PRESTON RYAN OATES,

PETITIONER

APPELLATE CASE NO. 2014-001404

RECEIVED

Appeal from Beaufort County

AUG 09 2017

Honorable Brooks P. Goldsmith, Circuit Court Judge

SC Court of Appeals

Opinion No. 5502

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, counsel for Preston Ryan Oates petitions the Court for rehearing and respectfully submits there are four factors that this Court overlooked or misapprehended in affirming the conviction for voluntary manslaughter. First, counsel respectfully submits, in regard to S.C. Code §16-11-440(A)(1), that this Court overlooked the fact that even if, at the time of the shooting, the argument between Petitioner and the deceased had subsided and everyone was calm, the Olivera brothers were still attempting to remove Petitioner, against his will, from his tow truck in order to force him to remove the boot from the minivan. Petitioner was entitled to the presumption of reasonable fear of imminent peril of death or great bodily injury

because at the time of the shooting the deceased was attempting to remove Petitioner from his tow truck.

Second and as an alternative argument, Petitioner is entitled to immunity pursuant to §16-11-440(C). Counsel respectfully submits that this Court, in addressing subsection (C), overlooked the fact that in order to find that the record does not support the lower court's finding that, at the time of the shooting, the argument had ended, this Court does not have to re-weigh the evidence or second-guess the lower court's assessment of witness credibility. The record fully supports the fact that the deceased was still intent on preventing his minivan from being towed. The deceased intended to force Petitioner to unlock the boot and had already made his intentions clear by either brandishing or pointing a firearm at Petitioner. These factors do not require this Court to re-weigh the evidence or second-guess the lower court's assessment of witness credibility. The lower court's finding that Petitioner's actions were not reasonable was based on a finding that, at the time of the shooting, the argument had ended.

Third, counsel respectfully submits that this Court overlooked the fact that, as discussed above, the evidence of the ongoing conflict was not susceptible of more than one reasonable inference and there was not a question of fact to be submitted to the jury. Petitioner was entitled to a directed verdict of acquittal on the issue of self-defense because the uncontroverted facts establish self-defense as a matter of law.

Fourth, counsel respectfully submits that this Court misapprehended what constitutes sudden heat of passion required for voluntary manslaughter placing undue emphasis on the six shots fired. Neither the six shots fired nor Petitioner's actions after the shooting nor Petitioner's statements that he was "freaking out a little bit," and "was really scared" and "really nervous" are sufficient to constitute the sudden heat of passion required to submit the lesser included voluntary manslaughter

charge to the jury. The trial judge erred in charging the jury with voluntary manslaughter. Petitioner respectfully seeks rehearing.

The lower court erred in refusing to find that at the time of the shooting the deceased was attempting to forcibly remove Petitioner from the cab of his tow truck. S.C. Code §16-11-440(A) provides:

(A) A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended 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, or has unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, or if he **removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle**; and

(2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.

(Emphasis added).

In addressing Section (A) of the Act in the order denying immunity from prosecution, the lower court failed to address the fact that the Act provides that a person is presumed to have a reasonable fear of imminent peril or death or great bodily injury when using deadly force against another person if the person against whom the deadly force is used **removes or is attempting to remove another person against his will from an occupied vehicle**. Instead, the judge relied solely on the portion of the statute providing the presumption of reasonable fear if the person against whom the deadly force is used is in the process of unlawfully and forcibly entering or has unlawfully and forcibly entered an occupied vehicle. In the order the judge wrote:

It is clear to the Court from the evidence presented that the case at hand is not covered by the{sic]this portion of the Act. The facts presented do not show that at the time of the shooting Carlos was unlawfully or forcibly entering or had entered,

Oates' vehicle. Carlos was walking away from Oates' tow truck at the time Oates got out of the vehicle and shot Carlos. Statements from witnesses as well as the video of the incident support these findings

(R. p. 239).

This Court found that the lower court adequately addressed the issue writing:

However, the circuit court adequately addressed the language highlighted by Petitioner. In its order denying Petitioner's motion for immunity, the circuit court addressed the last phrase in subsection (A) in the "Facts" section of the order. In the order's recitation of the facts, the circuit court stated, "[Petitioner] alleges that [Victim] was forcing him from the car at gunpoint. However, there are at least three other witnesses to the incident who state that the argument between the two men had subsided and that everyone present was calm at the time [Petitioner] shot [Victim]."⁶

Admittedly, the circuit court did not address the last phrase in subsection (A) in its legal analysis. Nonetheless, because the circuit court addressed Victim's alleged attempt to force Petitioner from his truck in the fact section of the order and implicitly found this version of the incident incredible, the failure to address this precise question in the order's legal analysis does not constitute reversible error.

State v. Oates, No. 2014-001404, 2017 WL 3161126, at *5 (S.C. Ct. App. July 26, 2017)

In footnote #6 this Court wrote:

In the hearing on Petitioner's motion for reconsideration, the circuit court commented on its review of Petitioner's two interviews with law enforcement, stating, "[T]here was much of his logic that ... I did not believe. I don't concur. I didn't agree with it. I didn't think that it was logical." The circuit court also stated, "In this particular case, I believed the version of facts testified [to] by the other witnesses, corroborated by scientific evidence of the gunshot wounds[, a]nd the witnesses' testimony of how it all happened, uh,—just simply it doesn't—it's more consistent with the other witnesses than it is his version."

State v. Oates, No. 2014-001404, 2017 WL 3161126, at *5 (S.C. Ct. App. July 26, 2017)

The lower court did not adequately address the issue. The lower court avoided ruling on the issue of whether the deceased was attempting to force or had forced Petitioner from the cab

of his tow truck. Respectfully, contrary to this Court's finding, the lower court did not find that Petitioner's version of the incident was incredible. Instead, the lower court noted that other witnesses testified that the argument had subsided and everyone was calm. Even if, at the time of the shooting, the argument between Petitioner and the deceased had subsided and everyone was calm¹, the Olivera brothers were still attempting to remove Petitioner, against his will, from his tow truck in order to force him to remove the boot from the minivan. The testimony from other witnesses did not contradict the fact that the Olivera brothers were intent on preventing the minivan from being towed. In order to prevent the minivan from being towed they needed Petitioner to leave the safety of the cab of his tow truck and remove the boot.

The evidence and testimony established that the deceased, Carlos Olivera, during the argument with Petitioner in which he was demanding that Petitioner release his booted vehicle, either brandished or displayed a weapon while Petitioner sat in the cab of his tow truck. On the night of the incident Nelson Olivera, the brother of the deceased, told Investigator Angela Biens of the Beaufort County Sheriff's Department that "his brother pulled a gun out of his pants and demanded that the subject, that would be Mr. Oates, release his car. Nelson stated that the subject ran to his truck, closed the door and appeared very nervous." (R. p. 27, lines 1-6; R. p. 500). Investigator Biens testified that Nelson Olivera provided a written statement on the night of the incident indicating, "My brother pull his gun and toll (sic) him to release the car." (R. p. 34, lines 15-16). Nelson Olivera also stated in the written statement given the night of the incident, "The guy said \$400, then when the guy saw my brother with the gun in hand, the guy handed the keys and said, 'Do it. Unlock the padlock.'" (R. p. 34, lines 20-23).

When Nelson Olivera was unable to remove the boot, Petitioner told officers:

¹ As noted by this Court later in the opinion when discussing the jury charge, this is contradicted by the testimony of Elizabeth and Edwin Sorto.

And he [Carlos] looks at me and he goes, okay, you're gonna come get this shit off ...come get this shit off now. I said okay... No problem No problem. He unlocked the door of my truck and pulled the handle and opened it and as he opened it, he was stepping down off the running board ... so he was opening it with his left hand.

(R. p. 304, lines 1-7). When Nelson Olivera was unable to remove the boot with the keys and tool, the next step was for Carlos Olivera to force Petitioner out of his truck and force him to remove the boot. At the time Carlos Olivera was shot by Petitioner, Carlos was either attempting to remove Petitioner against his will from his tow truck or had forcibly removed Petitioner from the tow truck in order to force Petitioner to remove the boot. Pursuant to the statute it does not matter that Carlos Olivera may have been walking away from Petitioner when he was shot because Carlos Olivera was either in the process of forcing Petitioner from his tow truck or had forced him out to remove the boot when Petitioner shot him. Carlos Olivera was still armed. Petitioner is entitled to the presumption of having a reasonable fear of imminent peril or death or great bodily injury to himself when he used deadly force and shot Olivera provided by S.C. Code §16-11-440(A) because the deceased was either attempting to remove Petitioner or had forcibly removed Petitioner from his tow truck. The trial judge avoided ruling on whether the deceased was attempting or had forcibly removed Petitioner from the cab of his tow truck at the time of the shooting. The trial judge could have ignored Petitioner's version and still found that Petitioner was entitled to the presumption of reasonable fear of imminent peril or death or great bodily pursuant to subsection (A) because the testimony of other witnesses, referenced by the lower court in footnote six, established that the deceased was attempting or had forced Petitioner from the shelter of the cab of his tow truck in order to release the boot on the minivan. The record establishes that Petitioner is entitled to immunity pursuant to subsection (A). The lower court's ruling constitutes an abuse of discretion requiring reversal by this Court.

In regard to the alternative argument that Petitioner was entitled to relief pursuant to subsection (C) of the Act, the lower court's finding that the conflict had ended at the time of the shooting is not supported by the record. This Court does not have to re-weigh the evidence or second guess the lower court's assessment of witness credibility in order to hold that trial judge's finding is not supported by the record. The testimony and evidence establish that the conflict had not ended. S.C. Code §16-11-440(C) provides:

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 or to prevent the commission of a violent crime as defined in Section 16-1-60.

In the order denying immunity the lower court wrote, "Assuming that there was an 'attack' previously, there was no such event at the time of the shooting. In short, there was no force to be met. Carlos was walking away from Oates when he was shot five times in the back and once in the side. Other evidence presented supports the Court's finding that the argument had ended at the time Oates fired the fatal shots. The Court will not interpret the language of the statute to mean that a person may shoot and kill another when a perceived attack has ended." (R. p. 240). The record does not support the judge's conclusion that the attack had ended.

At the time of the shooting the Olivera brothers still had keys and a tool belonging to Petitioner. The minivan belonging to Carlos Olivera was still demobilized by the boot. Carlos Olivera was not simply walking away from Petitioner when he was shot. As discussed above, at the time Carlos Olivera was shot, he was attempting to force Petitioner out of his tow truck in order to force Petitioner to unlock the boot and release the minivan. Even if Petitioner was not forced from his tow truck, he would still be entitled to immunity pursuant to §16-11-440(C)

because at the time of the shooting Petitioner was in a place where he had a right to be, as found by the lower court in the Order Denying immunity (R. p. 237) and Petitioner had no duty to retreat and had the right to stand his ground and meet force with force, including deadly force because he reasonably believed that it was necessary to prevent death or great bodily injury.

The confrontation between the Olivera brothers and Petitioner had not ended at the time of the shooting. Carlos Olivera intended to force Petitioner to unlock the boot and had already made his intentions clear by either brandishing or pointing a firearm at Petitioner. The record does not support the judge's finding that the argument had ended at the time of the shooting. While there is testimony that Claudia Olivera and Dhyan Olivera, wives of the Olivera brothers who were present at the time of the shooting, indicated that the arguing ended after Carlos Olivera obtained the keys from Petitioner (R. p 143, line 20 – p. 144, lines 1-25), this does not support a finding that conflict had been resolved. While Nelson Olivera told Investigator Bien that his brother calmed down and put the gun back in his waist band after Petitioner handed over the keys, this also does not support a finding that the conflict had been resolved. The arguing had stopped momentarily because the Olivera brothers got what they wanted, the keys to unlock the boot. Petitioner handed over the keys, at gun point, in order to prevent being shot in the cab of his tow truck. At the time of the shooting Petitioner knew Carlos Olivera was still armed. This is not a situation where Carlos Olivera had given up on trying to convince Petitioner not to tow his minivan and was walking back to his brother's house to either call the police or prepare to pay the tow fine. Carlos Olivera was determined to prevent his van from being towed and threatened Petitioner with a gun. Petitioner stood his ground and met force with force, as provided by the statute. The lower court erred in refusing to grant Petitioner immunity from prosecution pursuant to §16-11-440(C).

In affirming the lower court's denial of immunity pursuant to §16-11-44-(C) this Court wrote:

While these arguments are compelling, this court cannot “reweigh the evidence or second-guess the [circuit] court's assessment of witness credibility.” Douglas, 411 S.C. at 316, 768 S.E.2d at 238. A review of the order denying immunity indicates the circuit court was not convinced of the reasonableness of Petitioner's asserted belief that deadly force was necessary to prevent death or great bodily injury. *See id.* at 320 n.7, 768 S.E.2d at 239 n.7 (“[T]he standard for evaluating whether an accused had a reasonable belief that deadly force was necessary to prevent great bodily harm to himself is objective, rather than subjective.”). Even if the uncontroverted facts show Victim was still intent on preventing his minivan from being towed when he had his back turned to Petitioner, this is not necessarily inconsistent with the circuit court's perception that the aggression had abated at that precise moment. Such a finding supports the circuit court's conclusion that it was unreasonable for Petitioner to believe deadly force was necessary at that particular point in time.

State v. Oates, No. 2014-001404, 2017 WL 3161126, at *6 (S.C. Ct. App. July 26, 2017).

The lower court's finding that Petitioner's actions and fear were not reasonable was based on a finding that, at the time of the shooting, the argument had ended. The trial court's finding that the argument had ended, however, is not supported by the record. Based on the evidence and testimony presented, the argument may have momentarily subsided but it had not ended. Because the conflict between Petitioner and the deceased was ongoing, Petitioner reasonably believed that his actions were necessary to prevent death or great bodily injury. Respectfully, the fact that the deceased was intent on preventing his minivan from being towed is inconsistent with the trial judge's finding that the conflict had ended. Petitioner's actions were reasonable in light of the overwhelming evidence supporting the fact that the conflict had not ended. This Court does not have to re-weigh the evidence or second guess the lower court's assessment of witness credibility in order to hold that lower court's finding that the conflict at ended is not supported by the record. The record establishes that Petitioner is entitled to immunity pursuant to subsection (C). The lower court's ruling constitutes an abuse of discretion requiring reversal by this Court.

As an alternative argument, the trial judge erred in refusing to direct a verdict of acquittal when the State's evidence did not create a question of fact to be determined by the jury. As discussed above, the State's evidence established that, at the time of the shooting, Petitioner was engaged in an on-going conflict with the deceased who was attempting to forcibly remove Petitioner from the cab of his tow truck to remove the boot demobilizing the minivan. While there may have been differences between Petitioner's version of events and the testimony from witnesses called by the State, the testimony of the State witnesses alone establishes that Petitioner acted in self-defense as a matter of law.

There are four elements required by law to establish a case of self-defense: First, the defendant must be without fault in bringing on the difficulty. 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 belief of imminent danger, a reasonably 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 save himself from serious bodily harm or losing his own life. 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. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984)

Petitioner was without fault in bringing on the difficulty. As noted by the lower court in the order denying immunity, Petitioner, a tow truck operator working in the Edgefield neighborhood in Beaufort County, located an illegally parked car belonging to Carlos Olivera. Petitioner placed a boot on the vehicle in preparation to tow. The Olivera brothers confronted

Petitioner and an argument ensued. By his own brother's statement, Carlos Olivera brandished a weapon. Petitioner was without fault in bringing on the difficulty. Petitioner actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, and was actually in such imminent danger. Petitioner and the Olivera brothers were involved in a heated argument. Petitioner was outnumbered and Carlos Olivera had brandished a pistol. Nelson Olivera testified that as he was talking with Petitioner, who was inside the cab of his tow truck, he heard a ratchet like noise and then heard his brother state, "Nobody's going to take my car." (R. p. 635, line 17 – p. 636, lines 1-4). Petitioner's fear was reasonable under the circumstances. "[W]ords accompanied by hostile acts may, depending on the circumstances, establish a plea of self-defense." State v. Fuller, 297 S.C. 440, 444, 377 S.E.2d 328, 331 (1989) (quoting State v. Harvey, 220 S.C. 506, 68 S.E.2d 409 (1951)).

Petitioner 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. As to the duty to retreat, "A defendant is not required to retreat if he has "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 [the] particular instance." State v. Wiggins, 330 S.C. at 545, 500 S.E.2d at 493 (1998). If, after relinquishing the keys to Nelson Olivera, Petitioner had driven off in his tow truck with the minivan still demobilized by the boot, he risked being shot and killed by Carlos Olivera who he knew was armed, or by others who may have retrieved a shotgun. The trial judge erred in refusing to direct a verdict of acquittal for murder when the State's evidence failed to create a question of fact.

This Court found that, based on the testimony of the State's witnesses, the jury could have concluded that Petitioner's belief that his life was in danger was unreasonable and could

have inferred from the evidence that Petitioner could have avoided the danger. This Court wrote:

Several witness accounts of the entire incident omitted any reference to an extended heated argument. According to Nelson, when he and Victim first approached Petitioner, Victim ratcheted his gun and stated, "Nobody's going to take my car," but when Nelson told Victim to put his gun away, Victim placed the gun back into his waistband and never pulled it back out. Nelson expressly stated there was "no arguing, ... no fighting, ... no bad words" and Victim never talked to, threatened, or "attempt[ed] to do anything to [Petitioner]."

When asked if she heard any of the conversation between Victim and Petitioner, Victim's widow replied, "No. [Victim] ... used to talk very soft[ly]." She also testified Victim was directing the traffic that was partially blocked by his minivan and the tow truck when Petitioner shot him, and Nelson's wife gave similar testimony. The testimony of Nelson, Nelson's wife, Nelson's neighbors, Victim's widow, and Dr. Riemer established that most of the six shots fired by Petitioner hit Victim in his back. Based on all of this testimony, the jury could have concluded that Petitioner's belief that his life was in danger was unreasonable.

Further, Dr. Riemer testified that an exit wound from Victim's chest was "shored," indicating that Victim was pressed against a hard object when the bullet exited his body. This is consistent with the testimony of Nelson's wife and Victim's widow that Petitioner continued shooting Victim even after he fell onto the street. The jury could have concluded that Petitioner's recklessness rose to the level of malice. Moreover, the jury could have inferred from the evidence that Petitioner could have avoided the danger by continuing to cooperate with Victim and then driving away and calling 911 to report the incident.

State v. Oates, No. 2014-001404, 2017 WL 3161126, at *9 (S.C. Ct. App. July 26, 2017) (n# 9 omitted).

The testimony from the State witnesses does not render Petitioner's fear as unreasonable in light of the uncontroverted evidence that the deceased brandished a pistol, chambered a round and stated, "Nobody's going to take my car." While Nelson Olivera testified that the Carlos Olivera put the gun away, Nelson Olivera confirmed that it was only after Petitioner relinquished the keys to Nelson. (R. p. 623, line 18 – p. 624, lines 1-15). Nelson Olivera also testified that, after getting the

keys from Petitioner, he was unable to unlock the boot on his brother's minivan. (R, p. 625, line 1 – p. 626, lines 1-4).

In regard to Petitioner's ability to avoid the danger, in State v. Frazier, 401 S.C. 224, 234, 736 S.E.2d 301, 306 (Ct. App. 2013), this Court wrote:

Once the right to fire in self-defense arises, a person is not required to wait until his adversary is on equal terms in order to defend himself. State v. Starnes, 340 S.C. 312, 322, 531 S.E.2d 907, 913 (2000). Thus, assuming Frazier satisfied the other elements of self-defense, he was not required to risk serious injury by running toward Stalk's apartment or waiting for his alleged assailants to flank or shoot through the Explorer. See also id. (providing one "doesn't have to wait until his assailant gets the drop on him, he has the right to act under the law of self-preservation and prevent his assailant [from] getting the drop on him" (internal quotation marks omitted)); State v. Jackson, 227 S.C. 271, 279, 87 S.E.2d 681, 685 (1955) ("[I]t is one's duty to avoid taking human life where it is possible to prevent it even to the extent of retreating from his adversary unless by doing so the danger of being killed or suffering serious bodily harm is increased or it is reasonably apparent that such danger would be increased.").

The law does not require Petitioner to place himself in greater danger by leaving the shelter of the cab of his tow truck to continue and cooperate with an individual who is armed. As in State v. Dickey, 394 S.C. 491, 716 S.E.2d 97 (2011), Petitioner was entitled to a directed verdict on the issue of self-defense because the uncontroverted facts establish self-defense as a matter of law.

Finally, the trial judge erred in charging the jury with the lesser included offense of voluntary manslaughter when there was no evidence of the element of sudden heat of passion required for voluntary manslaughter. Respectfully, in affirming the trial judge's decision to charge voluntary manslaughter this Court misapprehends what constitutes sudden heat of passion required for voluntary manslaughter placing undue emphasis on the six shots fired. Neither the six shots fired nor Petitioner's actions after the shooting nor Petitioner's statements that he was "freaking out a little bit," and "was really scared" and "really nervous" are sufficient to constitute

the sudden heat of passion required to submit the lesser included voluntary manslaughter charge to the jury.

In Cook v. State, 415 S.C. 551, 556–57, 784 S.E.2d 665, 668 (2015), the South Carolina

Supreme Court wrote:

“Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation.” State v. Walker, 324 S.C. 257, 260, 478 S.E.2d 280, 281 (1996). “Both heat of passion and sufficient legal *557 provocation must be present at the time of the killing.” Id. At trial, Cook conceded that there was sufficient legal provocation. Therefore, the narrow issue on appeal is whether Cook was acting in the sudden heat of passion when he killed Victim.

“Whether or not the facts constitute a sudden heat of passion is an appropriate question for the court.” State v. Niles, 412 S.C. 515, 522, 772 S.E.2d 877, 880 (2015). This Court has defined the sudden heat of passion as that which:

upon sufficient legal provocation, ... mitigates a felonious killing to manslaughter, while it need not dethrone reason entirely, or shut out knowledge and volition, must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence. Id. (citing State v. Walker, 324 S.C. 257, 260, 478 S.E.2d 280, 281 (1996)).

In State v. Starnes, 388 S.C. 590, 598–99, 698 S.E.2d 604, 609 (2010) the South Carolina

Supreme Court wrote:

We also have held that fear resulting from an attack can constitute a basis for voluntary manslaughter. See State v. Wiggins, 330 S.C. 538, 549, 500 S.E.2d 489, 495 (1998) (“[F]ear can constitute a basis for voluntary manslaughter.”). Yet the presence of fear does not end the inquiry regarding the propriety of a voluntary manslaughter instruction. We have consistently held that sudden heat of passion upon sufficient legal provocation is defined as an act or event that “must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence.” Pittman, 373 S.C. at 572, 647 S.E.2d at 167. While the act or event “need not dethrone the reason entirely, or shut out knowledge and volition,” it must cause a person to lose control. Id.

We reaffirm the principle that a person's fear immediately following an attack or threatening act may cause the person to act in a sudden heat of passion. However, the mere fact that a person is afraid is not sufficient, by itself, to entitle a defendant to a voluntary manslaughter charge. Consistent with our law on voluntary manslaughter, in order to constitute "sudden heat of passion upon sufficient legal provocation," the fear must be the result of sufficient legal provocation **and** cause the defendant to lose control and create an uncontrollable impulse to do violence. Succinctly stated, to warrant a voluntary manslaughter charge, the defendant's fear must manifest itself in an uncontrollable impulse to do violence.

In both Cook and Starnes the South Carolina Supreme Court concluded there was no evidence of sudden heat of passion, affirming the trial judge's refusal to charge the jury with voluntary manslaughter in Starnes and reversing the voluntary manslaughter conviction in Cook. In Cook, as in the present case, the State requested the lesser included voluntary manslaughter charge and the defense objected. The Court in Cook noted:

"[D]ue process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction." Hopper v. Evans, 456 U.S. 605, 611, 102 S.Ct. 2049, 72 L.Ed.2d 367 (1982). "The jury's discretion is thus channeled so that it may convict a defendant of any crime fairly supported by the evidence." *Id.* Here, the evidence presented at trial indicates Cook either shot Victim with malice or in self-defense. Unfortunately, however, as this Court has previously articulated:

due to the error in granting the solicitor's request for a voluntary manslaughter charge, [Cook] will not have to face a jury of his peers on the charge of murder again. This is a cautionary tale for solicitors as to the pitfalls of requesting a potential "compromise" charge which is unsupported by the evidence. State v. Cooley, 342 S.C. 63, 70, 536 S.E.2d 666, 670 (2000).

Cook v. State, 415 S.C. 551, 559, 784 S.E.2d 665, 669 (2015).

As in Cook and Starnes, there is no evidence that Petitioner acted in the sudden heat of passion. There is no evidence that Petitioner was acting under an uncontrollable impulse to do violence and incapable of cool reflection as a result of fear. Petitioner's statements that he was scared, freaking out, nervous and that it happened in a snap and was panic fire do not constitute

evidence that Petitioner was acting under an uncontrollable impulse to do violence and incapable of cool reflection as a result of fear. Based on the facts of this case, Petitioner either shot in self-defense or he acted with malice.

In Petitioner's statement to police he said:

...From training, I ...you know... assess your situation, learn your distances, learn your ...I got attacked at knife point when I was in Istanbul back in October so ... I 've been through anti ... classes, all that stuff ...so I'm stalling to regain my composure, get my surroundings ...I was looking at his line of sight, my line of sight, how many people, look around at my mirrors, just stalling, buying time. So I had my keys and the actual lock tool that holds the boot onto the vehicle. And I've got my hand...I'm kind of fumbling, and I drop my keys and I said oh I'm sorry ...just...un momento, por favor...un momento por favor...one moment please... and pick the keys back up and I drop them again and I was...I'm sorry, I'm sorry, I'm scared...I'm sorry...I'm scared...I'm sorry, just one minute. I kept kind of freaking out a little bit fumbling my keys around.

(R. p. 298, line 16 – p. 299, lines 1-8). Petitioner then told officers that one of the men grabbed the keys that had no relation to the boot. Petitioner admitted that he had been using the keys as a distraction. (R. p. 299, lines 10-15). Petitioner's acts of stalling to regain his composure and using the keys as a distraction prior to the shooting support that he made a calculated decision to shoot in self-defense. These actions support that Petitioner was not acting under an uncontrollable impulse to do violence, incapable of cool reflection as a result of fear.

Petitioner additionally told officers:

Yeah, I've been in this business a long time. So now I'm really nervous. I knew I had my Glock in the glove box. His friend was on the way to retrieve a shotgun and I heard a pistol ratchet already, so I figured It'd be ... since it was my right to retreed [sic]...I really couldn't retreed, [sic] I had a guy standing on my truck, so said you know, let me step back into conservation mode. So I said, no, no, no, paperwork...and I pulled my metal ledger out which I keep all my tow tickets in. So I pulled it up and flip it open and I say see look and I just ...and I open up my glove box where my Glock was. And I knew I had my insurance paperwork and just some whatever random

So by doing that, I was able to pick up both my holstered weapon and my papers in one and sit it right on my lap. And I said see look, this Acura, this Mazda, this Ford,

this ...no...none of your car, I have not towed it yet...If I tow it, then yes, paperwork. But no like tavaho...don't like to work...(makes a sound)...like that...just trying to relax him, trying to stall and buy time again.

(R. p. 300, line 15 – p. 301, lines 1-11). Petitioner then described how he kept the gun hidden but managed to unholster it. (R. p. 302, line 7 – p. 303, lines 1-23). Petitioner described how one of the men opened the door to the truck and demanded that Petitioner take the boot off the van as the man pulled his weapon. (R. p. 304, lines 2-15). Petitioner told officers, “And I was backing out, and I looked and my line of sight was through him straight down to the ground. It’s now or never. He’s already in motion and he’s in draw. Whether he’s drawing it to intimidate me, to keep me to go do what he wants me to do, or, if he knew I didn’t have any paperwork on his vehicle and ...ah, bye, bye Preston...regardless, he was in motion, he was in draw and I reacted. I know...I remember the very fist shot. I caught him on the left side.” (R. p. 306, line 22 – p. 307, lines 1-7). These are either the actions of a man acting in self-defense or with malice. These are not the actions of a man acting under an uncontrollable impulse to do violence, incapable of cool reflection as a result of fear.

In a later interview Petitioner told officers, “And when his elbow come up like that, I saw the gun come out of his pants, that’s when I said, I’m gonna die... “ (R. p. 400, lines 8-14). He also told officers, “ At an angle, yeah ...cause I remember he had the gun in his right hand and I don’t know why I thought this, but I said okay...if he’s got the gun in his right hand, disable his right hand.” (R. p. 402, lines 13-16). Petitioner made a calculated decision to try and disable the armed man. This is not an action of sudden heat of passion. Petitioner described the fourth shot as panic fire. (R. p. 412, lines 15-18). Petitioner told officers, “When we made eye contact and his body was turning toward me, it was fight or flight, I just closed my eyes and squeezed the trigger.” (R. p. 412, lines 20-22). These statements do not support sudden heat of passion. Instead, the statements

reflect a decision to shoot in self-defense. There was no evidence presented that Petitioner was overcome by a sudden heat of passion as would produce an uncontrollable impulse to do violence. See State v. Niles, 412 S.C. 515, 525, 772 S.E.2d 877, 882 (2015). The trial judge erred in charging the jury with voluntary manslaughter.

In affirming the trial judge's decision to charge voluntary manslaughter this Court wrote, "In the present case, however, the jury could have reasonably inferred from the evidence that when Appellant shot Victim six times, he was acting under 'an uncontrollable impulse to do violence' even if the jury could have drawn an equally reasonable inference that Appellant acted in a 'deliberate, controlled manner.' *Id.*" State v. Oates, No. 2014-001404, 2017 WL 3161126, at *12 (S.C. Ct. App. July 26, 2017). Counsel respectfully submits that this Court places undue emphasis on the number of shots fired. As Petitioner was justified in firing the first shot in self-defense, he was justified in continuing to shoot until it is apparent that the danger to life and body has ceased. See Douglas v. State, 332 S.C. 67, 504 S.E.2d 307 (1998); State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978) (quoting 40 C.J.S. Homicide § 131(b)(1944)). Petitioner told investigators that he stopped firing once the deceased was unarmed.

In addition to the number of shots fired this Court also noted as evidence of sudden heat of passion the testimony of Elizabeth and Edwin Sorto that prior to the shooting there was yelling and the guys were getting very argumentative going back and forth.² This Court discussed testimony that Petitioner was very nervous, freaking out and really scared as well as Petitioner's account of his reaction when the deceased ordered him to exit his tow truck. This Court then wrote, "The jury could have reasonably inferred from all of this evidence that when Appellant shot Victim six times, he was "incapable of cool reflection" and was acting under an

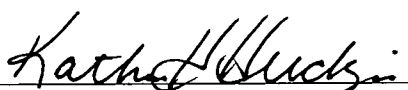
² This testimony is in contradiction to the lower court's ruling that the conflict had ended at the time of the shooting.

“uncontrollable impulse to do violence” such that there was sufficient evidence of Appellant's sudden heat of passion.” State v. Oates, No. 2014-001404, 2017 WL 3161126, at *13 (S.C. Ct. App. July 26, 2017). Respectfully, the number of shots fired, the testimony from the Sortos, testimony that Petitioner was very nervous, freaking out and really scared and Petitioner’s account of what happened when the deceased ordered him to exit the truck are not sufficient to show that Petitioner was overcome by a sudden heat of passion incapable of cool reflection and acting under an uncontrollable impulse to do violence. While Petitioner testified that he reacted, rather than sudden heat of passion, this evidence shows deliberate reaction to act in self-defense.

This Court additionally relies on Petitioner’s behavior after the shooting as evidence of sudden heat of passion. Respectfully, Petitioner’s behavior after shooting in self-defense is not evidence of sudden heat of passion but rather reasonable fear. Petitioner was outnumbered and feared that the deceased’s family members would retaliate against him for the shooting. Additionally, Petitioner was concerned about preserving the crime scene and the gun brandished by the deceased, as evidenced by the 911 call made by Petitioner. This behavior is not evidence of sudden heat of passion. Petitioner’s actions were deliberate and he either acted in self-defense or with malice. The trial judge erred in charging the lesser included offense of voluntary manslaughter.

Based on the above, counsel for Petitioner seeks rehearing.

Respectfully Submitted,


KATHRINE H. HUDGINS
Appellate Defender

This 9th day of August, 2017.

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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County

Honorable Brooks P. Goldsmith, Circuit Court Judge

THE STATE,

RESPONDENT,


V.

PRESTON RYAN OATES,

PETITIONER

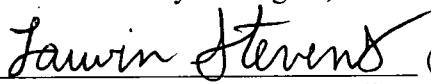
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Mark Farthing, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Preston R. Oates, #360469, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 9th day of August, 2017.



Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 9th day of August, 2017.

 (L.S)

Notary Public for South Carolina
My Commission Expires: July 5, 2027.