ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County

Honorable DeAndrea G. Benjamin, Circuit Court Judge

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

ROBIN RENEE HERNDON,

APPELLANT

APPELLATE CASE NO. 2016-001109

INITIAL REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT IN REPLY 1

CONCLUSION 6

TABLE OF AUTHORITIES

Cases

State v. Cain, 419 S.C. 24, 795 S.E.2d 846 (2017).. 4

State v. Ellis, 345 S.C. 175, 547 S.E.2d 490 (2001).. 3

State v. Jones, 416 S.C. 283, 786 S.E.2d 132 (2016) 2

State v. King, ___ S.C. ___, ___ S.E.2d ___, 2017 WL 480004 (Oct. 25, 2017) 4

State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013) 4, 5

State v. Slater, 373 S.C. 66, 644 S.E.2d 50 (2007).. 2

Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169 (2010).. 3

Statutes

Rule 701, SCRE.. 3

Rule 702, SCRE.. 3

ARGUMENT IN REPLY

Issue 1

The State argues Herndon cannot claim immunity because she testified that she did not intentionally fire the gun at Rowley. The State's argument is wholly inconsistent with the intent of the Legislature. Imagine the following scenario under the State's proposed view of the immunity statute. A woman in her home hears an unknown intruder break into her house in the dead of night. Terrified, she pulls a gun out of her nightstand. She points it at her bedroom door, but when the intruder enters, she freezes and cannot pull the trigger. The intruder attacks her and in the ensuing struggle, the gun discharges and the intruder is shot. Under the State's theory, this hypothetical woman would not be entitled to any protection under the immunity act because she did not pull the trigger.

If a person lawfully arms themselves in self-defense she can claim immunity under the statute. It does not matter how the gun fires if the citizen would be justified in firing. The State's argument, if adopted by the Court, would lead to absurd results and exclude deserving citizens from the Act's protections. Herndon lawfully armed herself and whether, in the confusing and traumatic melee, the gun fired when Rowley charged at her and slapped at the gun or she pulled the trigger is of no matter for the immunity analysis. Herndon had the right to defend herself, which is all the Act requires.

The State's attempts to make hay out of minor factual points demonstrate the weakness of its position. For example, the State criticizes Herndon for taking Rowley to a wrestling match. Br. Resp. at 7. The State claims Herndon said she was "angry, not fearful" during the confrontation—implying that human beings are not capable of feeling multiple emotions at the same time. Br. Resp. at 7. Expecting too much from the traumatized Herndon, the State

criticizes minor inconsistencies between her testimony and the videotaped statement given shortly after she shot a man she loved and was drenched in his blood. (State's Ex. 34). The State implies Herndon lied about photographs on her phone that documented Rowley's abuse by stating that she "never produced those images during the hearing and trial"—when the photographs existed and were produced during the sentencing hearing. (Def. Ex. 1-6, Sentencing Hearing).

The State wholly failed to distinguish State v. Jones, 416 S.C. 283, 295, 786 S.E.2d 132, 138 (2016) from Herndon's case, devoting only one sentence of analysis to a case nearly directly on point. Br. Resp. at 16-17. The best decision the State musters in response to Jones is State v. Slater, 373 S.C. 66, 644 S.E.2d 50 (2007). In Slater, the defendant was in a crowded high school parking lot after an event and retrieved a gun from his car "with the intention of shooting it into the air to cause a commotion." Slater at 68, 644 S.E.2d at 51. The State compares Slater's decision to get his gun and cause a commotion in a crowded parking lot to Herndon returning to her own home out of concern for her property and Rowley. The State claims this situation is "[s]imilar to the defendant in Slater" because Herndon "went into what she knew was an explosive situation carrying her loaded weapon." Br. Resp. at 18. Comparing Herndon's carrying of her pistol **to her own home while on duty as a law enforcement officer** to Slater's unlawful possession of a gun in a crowded parking lot looking for trouble betrays the desperation of the State's position. The trial judge erred as a matter of law in finding Herndon brought on the difficulty by returning to her own home.

Issue 2

Appellant has difficulty understanding the State's argument that Issue 2 is not preserved for appeal. The State writes, "Because the parties agreed on the reliability of Dr. Ross's

testimony, the trial judge did not rule on this issue." Br. Resp. at 24. Possibly the State confuses appellant's acknowledgment that Dr. Ross was qualified to testify as a pathologist with some form of concession that she could testify on any subject under the sun.

Appellant is unsure what more could have been done by trial counsel to preserve this issue for appeal. First, trial counsel anticipated the State's strategy for Dr. Ross's testimony and filed a motion in limine **before the trial**. Tr. 676, ll. 17 – 24. R. ___ (Court's Ex. 2). Citing Rules 701, 702, SCRE and Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169 (2010), Appellant asked in the motion for the Court to exercise its gatekeeping function to ensure witnesses were properly qualified before giving opinion testimony. R. ___ (Court's Ex. 2).

Dr. Ross then testified about the path of the bullet within Rowley's body, which is within the scope of expertise of the forensic pathologist who performed the autopsy. Tr. 666, l. 3 – 667, l. 23. However, her expertise stopped at the autopsy table and did not extend to the crime scene. When the solicitor attempted to use the pathologist as a crime scene reconstructionist, appellant promptly objected. Tr. 669, l. 22 – 670, l. 4. Appellant's objection was: "Objection, Your Honor. This is beyond the scope of a forensic pathologist to be able to say. Now we're going into more crime scene reconstruction, which she is not qualified as an expert in." Tr. 669, l. 25 – 670, l. 4. During the *in camera* argument, trial counsel again argued "once we get into the realm of the crime scene, that is not what she's qualified as an expert in." Tr. 670, l. 18 – 671, l. 11. Trial counsel again citied the court's gatekeeping role under Rule 702, SCRE. Tr. 670, l. 18 – 671, l. 11. Citing State v. Ellis, 345 S.C. 175, 547 S.E.2d 490 (2001), trial counsel explained the State could argue the inferences from Dr. Ross's testimony about the path of the bullet through the body, but Dr. Ross could not testify about the crime scene as that would exceed her expertise and invade the province of the jury. Tr. 670, l. 15 – 676, l. 24. The trial judge ruled, "I'm going

to allow the question. I think based on her qualifications as a forensic pathologist, she can answer that question, if she can." Tr. 676, ll. 9 – 16.

Trial counsel filed a written motion. R. ___. Trial counsel made the proper objection at the proper time. Tr. 669, l. 25 – 670, l. 4. The trial judge ruled. Tr. 676, ll. 9 – 16. "Our appellate courts have consistently found issues preserved for review when the issue was raised to and ruled upon by the trial judge." State v. Cain, 419 S.C. 24, 33-34, 795 S.E.2d 846, 851 (2017). "While a party may not argue one ground at trial and another ground on appeal, we do not require a party to use the same language on appeal as it did at trial." Id. (internal citations omitted). This issue is preserved. In a case involving a justified shooting in self-defense, the error in allowing Dr. Ross to speculate about the position of Herndon and Rowley at the house cannot be harmless beyond a reasonable doubt. See State v. King, ___ S.C. ___, ___ S.E.2d ___, 2017 WL 480004 (Oct. 25, 2017) (rejecting State's argument that error could be harmless beyond a reasonable doubt).

Issue 3

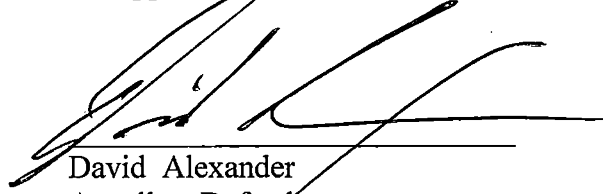
The State asks this Court to disregard the mandatory language of our Supreme Court regarding circumstantial evidence charges. State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013). In Logan, the Supreme Court wrote, "Thus, we hold that trial courts **should provide the following language** as a circumstantial evidence charge . . . **when so requested by a defendant.**" Id. at 99, 747 S.E.2d at 452 (emphasis added). The Court reasoned that "at times, a separate framework is necessary to the jury's analysis of circumstantial evidence." Id. at 100, 747 S.E.2d at 453. The Supreme Court did not make a suggestion to trial judges; it issued a command. Appellant requested the Logan charge and the court erroneously refused to give it.

If the Court finds the failure to give a charge mandated by the Supreme Court to be harmless error in this case, it will reduce Logan to a nullity. The State relied wholly on weak circumstantial evidence regarding the timing of the parties in the yard and the house, the lack of disturbed furniture in the house, and inferences of the path of the bullet through the body. Furthermore, the State had to rely completely on circumstantial evidence to prove Herndon's *mens rea* and disprove self-defense.

The State pitted its circumstantial evidence against the direct evidence of Herndon's testimony. Failure to give a Logan charge when the State attempts to disprove direct evidence of self-defense with circumstantial evidence cannot be harmless beyond a reasonable doubt. This Court must reverse.

CONCLUSION

For the reasons stated above and in the brief of appellant, this Court should reverse appellant's conviction.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 9th day of November, 2017.

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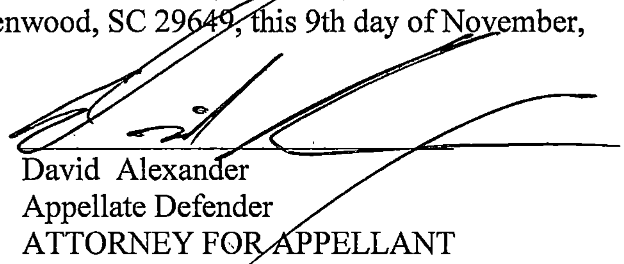
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Reply Brief of Appellant and Additional Designation of Matter in the above referenced case has been served upon William F. Schumacher, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Reply Brief of Appellant and Additional Designation of Matter have been served on Robin Renee Herndon, #368111, at Leath Correctional Institution, 2809 Airport Road, Greenwood, SC 29649, this 9th day of November, 2017.



David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me this 9th day of November, 2017.

_________________ (L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023