STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Saluda County
Certiorari to the Court of Appeals
Thomas A. Russo, Circuit Court Judge

THE STATE,

PETITIONER,

V.

STEVEN OTTS,

RESPONDENT

APPELLATE CASE NO. 2018-001671

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S QUESTION PRESENTED

Whether the Court of Appeals ignored the standard of review when the jury charge was substantially correct, when read in its entirety adequately covered the law, was supported by the evidence and was responsive to the defense's theory of the case. The Court also created new law in holding the state could not request a jury instruction ordinarily requested by the defense, without citing any support for why this would constitute error.

RESPONDENT'S COUNTER-QUESTION PRESENTED

Did the Court of Appeals, applying the proper standard of review, correctly hold that the trial judge erred in instructing the jury with "defense of others" language where the facts did not support the issuance of the instruction because the state requested the instruction to be used to consider the conduct of the deceased, not as a defense to the charged offense, and the instruction as given was incomplete and confusing as it failed to describe the necessary elements of the defense or how to apply the defense to the evidence presented?

STATEMENT OF THE CASE

On January 27, 2011, Lakeisha Stallworth, Antonio Valentine, Saca Jawea Coleman, and Respondent were together in Ridge Springs, South Carolina. R. 23, line 21 – R. 26, line 6. Although there was some dispute concerning how long the foursome had been together and their activities, the evidence indicated at least some of them had been drinking alcohol. R. 29, line 24 – R. 30, line 4; R. 40, lines 2-24; R. 201, lines 2-17; R. 203, lines 4-8; R. 174, lines 1-10. Traveling in Valentine's truck, the four went to Orchard Park Apartments, where Respondent resided.[1] R. 27, lines 12-22; R. 174, line 25 – R. 175, line 9; R. 202, lines 16-22. Upon their arrival, Respondent and his girlfriend, Coleman, began arguing because Respondent wanted Coleman to go home with him, but Coleman wanted to continue partying. R. 30, lines 15-22; R. 38, lines 6-7: R. 175, lines 17-21; R. 184, lines 18-25; R. 190, lines 5-21; R. 191, lines 7-16; R. 192, lines 2-16; R. 203, lines 11-21.

Stallworth claimed Respondent was "kind of aggressive" with Coleman while the foursome remained in the truck. R. 30, line 24. Stallworth further claimed that Respondent was "pulling" on Coleman to get her out of the truck. R. 31, lines 8-23. According to Stallworth, Respondent pulled Coleman's coat over her head, leaving her only in a bra because she was not wearing a shirt under her coat. R. 32, lines 2-11; R. 42, lines 12-19.[2] Respondent then got out of the truck and walked to Coleman's side, but Coleman had locked the door. R. 32, lines 15-24. Stallworth claimed Valentine then instructed Coleman and Stallworth to get out of his truck and they did; however, Stallworth was forced to admit that she had not been truthful with the jury regarding this testimony.

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[1] Respondent resided with Jane Burno and Charles Rayford, who were the aunt and uncle of Hydrick Burno, the deceased. R. 199, lines 15-18.

[2] Coleman contradicted Stallworth by explaining that she was wearing a shirt, was not wearing a jacket, and Respondent did not pull off her clothing. R. 175, line 22 – R. 176, line 8.

In fact, Stallworth had informed the police that she had remained in Valentine's truck until after Respondent struck Burno. Stallworth had lied to the jury because Valentine did not want to be involved, and she was trying to keep the police from finding out about Valentine's involvement. R. 33, lines 2-10; R. 49, line 14 – R. 52, line 11. Coleman and Respondent continued to argue outside the truck. R. 33, lines 21-25. Hydrick Burno, a mutual friend and resident at the apartment complex, intervened. Burno was highly intoxicated. R. 33, lines 18-20; R. 34, lines 3-13; R. 133, lines 7-18.[3]

Angela Creech, another resident at the apartment complex, heard noises and yelling outside of her apartment. R. 59, lines 4-8; R. 68, lines 19-21. At the instigation of others, Creech, who had "a couple of beers or something," walked outside her apartment and upstairs to observe. R. 59, lines 11-24; R. 69, lines 8; R. 72, lines 8-10. Creech claimed she could see Respondent and Coleman "arguing and tussling inside the vehicle." R. 61, lines 3-7. She further claimed that from the second story balcony, she could hear "licks" inside the moving car. R. 61, line 23 – R. 62, line 4; R. 68, lines 22-25; R. 69, lines 6-18. According to Creech, Respondent was pulling on Coleman to get her out of the vehicle and the two were "tussling and fighting." R. 62, lines 20-24.

Coleman testified that when the foursome arrived at Orchard Apartments, Respondent wanted her to get out of the truck, but she was not ready to go because she had not "finished partying yet." R. 175, lines 10-13. She admitted the two argued, but she emphatically denied that Respondent assaulted her in any way. R. 175, lines 17-21; R. 184, lines 18-25; R. 190, lines 5-21; R. 191, lines 7-16; R. 192, lines 2-16. Respondent also denied hitting Coleman, but he admitted the

[3] When he was admitted to the hospital, his blood alcohol level was 0.274. At the time of the autopsy, Burno's blood alcohol level was 0.15. R. 133, lines 3-18.

two argued. R. 203, line 13 – R. 204, line 2. When he grabbed Coleman's arm to escort her out of the truck, she jerked away and refused to exit. R. 204, lines 3-25.

Stallworth did not remember Burno putting his hands on Respondent. R. 34, lines 6-8; R. 34, lines 14-16; R. 35, lines 11-16; R. 37, lines 8-9; R, 43, lines 14-22. However, Creech testified that Burno put his hand around Respondent and held him in a "bear hug." Further, Creech claimed Respondent said to Burno, "When you let me go, I'm going to knock your punk ass out." R. 63, lines 4-11; R. 74, lines 6-8. Additionally, Coleman testified that Burno, who was significantly larger than Respondent, "kept grabbing" Respondent. R. 177, lines 3-13. She heard Respondent tell Burno that if Burno did not let him go, he was going to hit him, but she did not see Respondent hit Burno because of her location. R. 177, lines 14-24. Respondent also testified that Burno, who was obviously intoxicated, was grabbing him and pulling him. R. 207, line 5; R. 208, lines 12-22. Then, Burno grabbed Respondent in a "bear hug" and carried him away from the truck. R. 207, lines 8-23. Respondent admitted telling Burno he was going to hit him if he did not let him go. R. 209, lines 2-14. When Respondent wiggled from Burno's bear hug, he walked back to the truck. R. 209, line 17. Burno grabbed Respondent again, ripping his coat. Respondent turned and struck Burno once to get away from him. R. 210, line 6 – R. 211, line 2; R. 227, lines 13-25. Respondent never meant to hurt Burno. R. 211, lines 15-20; R. 228, lines 1-2.

Everyone, including Respondent, agreed that Respondent hit Burno and Burno fell to the ground unconscious. R. 34, lines 1-5; R. 63, lines 13-16. Everyone also agreed that Respondent was surprised that Burno was knocked out. In disbelief of Burno's actual injuries, Respondent instructed Burno to "get up" and "stop playing." R. 36, lines 5-9; R. 44, lines 5-18; R. 64, lines 11-17; R. 181, lines 17-18; R. 212, line 5 – R. 213, line 8. Thereafter, Respondent left the area. R. 36, lines 12-19; R. 65, lines 20-24; R. 181, line 18; R. 215, lines 15-16.

When the police and emergency services arrived at the apartment complex, Burno was awake and sitting on the curb. He was swaying and "a little confused." Due to strong smell of alcohol on Burno, the medical personnel were unsure if the swaying and confusion were the result of the injury or intoxication. R. 81, lines 11-13; R. 82, lines 12-24; R. 155, lines 13-18; R. 162, lines 12-20. However, during the transport of Burno to Lexington Medical Center, Burno's behavior changed – he became combative and uncooperative. Burno also showed more persistent signs of confusion leading the medical personnel to believe he had suffered a more serious head injury than initially thought. R. 85, line 10 – R. 86, line 21.

Several days after his admission to the hospital on January 27, 2011, Burno died. R. 101, lines 18-23. According to the pathologist, Burno died from brain herniation due to cerebral edema, which was caused by blunt-force trauma to the left side of Burno's head. R. 117, line 20 – R. 118, line 3. The pathologist was clear that Burno's death was the result of the blow to the left side of his head and not the injury he suffered when he fell to the ground. R. 129, lines 8-25. Respondent stipulated to the cause of death as well. R. 121, line 19 – R. 122, line 6. Further, the pathologist testified that Burno suffered only two blows to the head, one caused injury to the left side and one caused injury to the back when he fell to the ground. R. 130, line 10-13.

On May 4, 2011, a Saluda County grand jury indicted Respondent for murder (2011-GS-41-288). R. 429-430. The state, represented by Ervin J. Maye and H. Franklin Young, called the case for trial on July 22, 2013, before the Honorable Thomas A. Russo and a jury. Tristan M. Shaffer and Catherine T. Johnson represented Respondent. R. 1. The jury found Respondent guilty as charged. R. 409, lines 9-12. Judge Russo sentenced Respondent to thirty years' imprisonment. R. 411, lines 19-25; R. 431. Respondent filed a written motion for new trial on August 3, 2013. R. 421. By an order filed on January 30, 2014, Judge Russo denied the motion for new trial. R. 428.

After receiving the order denying the motion for new trial on February 3, 2014, Respondent served his notice of appeal on February 11, 2014. Respondent, represented by undersigned counsel, filed his brief raising four issues. App. 1-38. The Court of Appeals heard argument on April 20, 2016. App. 79. On June 27, 2018, the Court of Appeals reversed Respondent's conviction and remanded his case for a new trial. Specifically, the Court held the trial judge "erred in instructing the jury with the 'defense of others' language requested by the state because, when used appropriately, this jury instruction presents a possible *defense* to a criminal charge; it is not an instruction for the state to use *offensively*, nor was it an accurate instruction under the facts of this case." App. 82 (emphasis in original). The Court further held "the instruction was incomplete and confusing to the jury in that it failed to set forth either the necessary elements of the 'defense' or any framework for its application to the facts here." App. 82. Thereafter, the state filed a petition for rehearing. App. 89-102. On August 16, 2018, the Court of Appeals denied the petition. App. 103. The state filed a petition for writ of certiorari. This return follows.

ARGUMENT

The Court of Appeals, applying the proper standard of review, correctly held that the trial judge erred in instructing the jury with "defense of others" language where the facts did not support the issuance of the instruction because the state requested the instruction to be used to consider the conduct of the deceased, not as a defense to the criminal charges, and the instruction, as given, was incomplete and confusing as it failed to describe the necessary elements of the defense or how to apply the defense to the evidence presented.

Reasons to deny certiorari

Respondent respectfully requests this Court deny certiorari because no special or important reason exists that requires review of the well-reasoned opinion from the Court of Appeals. See Rule 243(b), SCACR. The issue considered and resolved by the Court of Appeals involved a straight-forward application of decades-old law regarding jury instructions, not any novel issues. See Rule 243(b)(1), SCACR. No judge on the Court of Appeals' panel dissented. See Rule 243(b)(2), SCACR. The Court of Appeals' decision relied heavily upon this Court's jurisprudence regarding jury instructions, and in particular the laws governing self-defense and defense of others; thus, there was no conflict between this Court's opinions and the one rendered by the Court of Appeals in this case. See Rule 243(b)(3), SCACR. While the issue considered and resolved on appeal involved substantial constitutional issues, including the federal question of the assignment of the burden of proof, the Court of Appeals' opinion did not conflict with any opinions from the United States Supreme Court on the topic. See Rules 243(b)(4)(5), SCACR.

In its petition for writ of certiorari, the state mischaracterized the opinion of the Court of Appeals in an attempt to make this case appeal worthy of this Court's review. According to the state, "the Court of Appeals created a limitation on the use of jury instructions unsupported by

South Carolina precedent." Pet. at 4. The state claimed this limitation was created "[b]y erroneously labeling the charges as offensive or defensive, rather than as correct statements of law required by the evidence presented at trial." Pet. at 4. However, even a cursory review of the Court of Appeals' opinion reveals the Court of Appeals upheld and applied this Court's long-standing legal principle that the jury instructions must be based upon the evidence presented, regardless of the identity of the party requesting the instruction or the nature of the instruction itself.

By describing a jury instruction regarding defense of others as "defensive," the Court of Appeals correctly captured that defense of others as a defense to a criminal charge. By describing the solicitor's use of the instruction as "offensive," the Court of Appeals correctly captured how the solicitor argued for the jury to use the instruction and the lack of any evidence in the record to support the instruction on the defense. Not once did the Court of Appeals restrict the instructions a party could request or that a judge could give based upon the party's role in the matter. Instead, the Court of Appeals applied the long-standing restriction on jury instructions that an instruction must be supported by the evidence presented. Additionally, the Court of Appeals applied the long-standing restriction that jury instructions must not confuse or mislead the jury and must not shift the burden of proof to the defendant.

In deciding the issue presented, the Court of Appeals rendered a well-reasoned and thoroughly researched opinion. After determining the judge erred by instructing the jury on defense of others to evaluate the conduct of the deceased, not to be used as a defense against a charged offense, the Court of Appeals found the error was not harmless in light of how the state relied upon the instruction in its argument to the jury and the lack of any guidance offered by the judge on how the jury could utilize the instruction to evaluate the facts of the case. As explained, no special or important reason for review by this Court exists; therefore, certiorari should be denied.

Relevant facts

Solicitor's opening statement

During his opening statement, the prosecutor told the jury that the state would present evidence regarding "how Hydrick Burno went and tried to intercede on his cousin's behalf." R. 10, lines 13-14. He further stated the jury would "hear about ... the law of defense of others; about how, if there's a family member or a friend of yours and they're being attacked, that you can stand in their shoes and you can try to help them and you can try to save them and intercede." R. 10, lines 14-19. On this point, the prosecutor concluded that "Burno was trying to help his cousin, Saca Jawea Coleman, and was murdered for his troubles." R. 10, lines 20-22.

Evidence

The only evidence presented in the state's case-in-chief on this point was one response from Stallworth that Burno was trying to help Coleman. R. 36, lines 20-22. Respondent called Russ Padgett, the police officer who responded to the scene, to testify as a witness. On cross-examination by the prosecutor, Padgett claimed Stallworth told him that Burno "came out to assist his cousin and to try to calm" Respondent down. R. 165, line 25 – R. 166, line 4. Padgett further claimed that "in this case [he] found that Hydrick Burno was coming out to assist his cousin" and this "factor[ed] into [his] consideration of what charge to give." Through questioning by the prosecutor, this was characterized as "coming in defense of another person, a family member." R. 168, lines 18-24.[4] During the prosecutor's cross-examination of Coleman, the following exchange occurred concerning this point:

[4] The judge sustained Respondent's objection to Padgett testifying that "someone has the right to defend [his or her] family members." R. 355, lines 4-14.

Q. Because you recognize the fact that Hydrick, whether or not he was your cousin by blood or not, but somebody that you were very close to came out to try to save you that day, didn't he?

A. Yes.

R. 186, lines 18-22. When the prosecutor asked Respondent if Burno "came out to help [Coleman]," Respondent responded, "I'm assuming." The prosecutor followed up by asking if Burno was acting in defense of her. Respondent answered that Burno "came out to calm us down." R. 239, lines 4-9.

Charge conference

During the charge conference, the prosecutor requested "a defense-of-others charge." Specifically, the prosecutor requested the judge charge the jury that "[i]f one comes to the assistance of a friend or relative and takes part in a difficulty in which a friend or relative is engaged, he enters the combat on the same footing as the person whose assistance he comes and under the same legal status." R. 301, lines 3-4; R. 301, lines 14-19.

Respondent objected and argued that "defense of other[s] is a defense to a charge." Therefore, it was inapplicable to the instant matter because there was no charge against Burno, and no defense was needed. Respondent argued the charge would be confusing to the jury. Initially, the judge admitted the charge would be confusing to the jury because it was a defense, but was not being used as a defense in this case. R. 301, lines 6-13. Respondent found no reported case in South Carolina "where the state was able to get a defense based off of the victim's actions." R. 308, lines 1-7. Again, Respondent noted the confusion created in charging the jury on a defense – the defense of others – when Burno had not been charged with any crime and no defense to his conduct was needed. R. 308, lines 8-15; R. 310, line 14 – R. 311, line 3; R. 311, line 16-21.

However, in support of the charge, the prosecutor argued it was "consistent in this case, especially if you're talking about self-defense." R. 301, line 24 – R. 302, line 1. According to the prosecutor, Burno "came to the aid" of Coleman. R. 302, lines 1-6. He then claimed that "with stand-your-ground law," Coleman "could've killed him and used deadly force." The prosecutor argued that Burno had the same legal status as Coleman. R. 302, lines 7-12.

He continued, arguing the charge was significant for two reasons. First, informing the jury that Burno was acting in defense of Coleman and "stood in her shoes" would negate the element of sufficient legal provocation required for voluntary manslaughter. Second, the charge would "counter any self-defense issues." R. 302, line 13 – R. 304, line 3. According to the prosecutor, this was a "Good Samaritan case" with an "unusual fact circumstance." R. 309, lines 3-15. Under the prosecutor's view of the facts, if Burno had killed Respondent, Burno would "be entitled to complete and total immunity under the new stand-your-ground statute." R. 309, lines 16-21. The prosecutor argued that the instruction on defense-of-others and its component about Burno standing in her shoes was "vitally important when they're trying to raise self-defense." R. 309, lines 22-25.

Specifically, the prosecutor wanted "a statement from the judge that that's the state of the law in this case." He reasoned that if Respondent were entitled to a self-defense charge, then the state was entitled to a charge on defense-of-others. He argued it would be unfair for the jury not have this information. On this point, the prosecutor stated that it was "information that a jury should have to make an informed decision, certainly where they're being called upon to consider self-defense[b]ecause that is a total negation of the self-defense claim." He also explained that if Burno were standing in Coleman's shoes, then voluntary manslaughter was "out the window." R. 312, line 9 – R. 313, line 9.

Jury instruction

Ultimately, the judge decided to charge the jury as requested by the prosecution. Specifically, after the trial judge instructed the jury concerning the elements of self-defense, the judge instructed the jury as follows concerning the law of defense of others in South Carolina: "Now, under South Carolina law, if one comes to the assistance of a friend or a relative and takes part in a difficulty in which a friend or a relative is engaged, he enters the combat on the same footing as the person whose assistance he comes and under the same legal status." R. 405, lines 16-20.

Discussion

Utilization of the proper standard of review

Petitioner asserted the Court of Appeals ignored the proper standard of review when reaching its conclusion in this case. However, the Court cited and applied the correct standard of review. App. 82. Specifically, the Court of Appeals explained that it was determining whether the jury charge at issue on appeal was "'substantially correct and cover[ed] the law.'" App. 82 (citing State v. Adkins, 353 S.C. 312, 319, 577 S.E.2d 460, 464 (Ct. App. 2003)). Additionally, the Court of Appeals noted that in order for an appellate court to reverse, "'a jury charge must be both erroneous and prejudicial.'" App. 82 (quoting State v. Taylor, 356 S.C. 227, 231, 589 S.E.2d 1, 3 (2003)). Finally, the Court of Appeals noted that an instruction that was confusing or misleading to the jury would be erroneous. App. 82 (citing State v. Rothell, 301 S.C. 168, 169-170, 391 S.E.2d 228, 229 (1990)). Thereafter, the Court of Appeals applied the standard of review by analyzing the charge given by the trial judge and the prejudice resulting from the erroneous charge. App. 79-88. Contrary to Petitioner's assertion, the Court of Appeals did not ignore the standard of review applicable to jury instructions.

Jury charge not supported by the evidence presented

When analyzing whether the evidence supported the jury charge on defense of others, the Court of Appeals explained it was "unable to find any South Carolina case law supporting the circuit court's charging the jury on the offensive 'defense of others,' at the request of the state, to address a victim's behavior." App. 84. Likewise, Respondent is unaware of any case in South Carolina, any other state, or the federal courts, in which a trial judge instructed a jury on the defense of others to explain the conduct of a deceased individual. Additionally, Petitioner cited no cases to support its contention that such an instruction was proper. Rather, the only cases where the defense of others appears are where it is used as a defense to the charged offense, usually a homicide. This is exactly what the Court of Appeals determined after a thorough and exhaustive review of the case law. App. 84 (stating "our only case law addressing the defense of others is found in cases in which the instruction was presented as a possible defense to a charged offense").

As explained by the Court of Appeals, "[t]he law to be charged is determined from the evidence presented at trial." App. 85 (quoting State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241, 241 (1996)). "The office and purpose of instructions are to enlighten the jury and to aid them in arriving at a correct verdict. It is error to give instructions which are calculated to confuse or mislead the jury." State v. Hewitt, 205 S.C. 207, 31 S.E.2d 257, 259 (1944). Therefore, the trial judge may instruct the jury only regarding those matters as presented by the evidence and the instruction must not confuse or mislead the jury.

To determine whether the evidence supported the trial judge's decision to instruct the jury on defense of others, the Court of Appeals first examined the legal concept. App. 84-85. "Under the theory of defense of others, one is not guilty of taking the life of an assailant who assaults a friend, relative, or bystander if that friend, relative, or bystander would likewise have the right to take the life of the assailant in self-defense." State v. Long, 325 S.C. 59, 64, 480 S.E.2d 62, 64

(1997); see also App. 85 (quoting State v. Starnes, 340 S.C. 312, 322-323, 531 S.E.2d 907, 913 (2000)); Mack v. State, 348 So.2d 524, 527 (Ala. Crim. App. 1977) (holding the defendant could not assert defense of others where the person being defended was the initial aggressor and therefore at fault in bringing on the difficulty). Additionally, the Court of Appeals recognized this Court's holding that in order for the trial judge to give a defense of others instruction, there must be "some evidence adduced at trial that the defendant was indeed lawfully defending others." App. 85 (citing Starnes, 340 S.C. at 323, 531 S.E.2d at 913; Douglas v. State, 332 S.C. 67, 73, 504 S.E.2d 307, 310 (1998)); see also State v. Long, 325 S.C. 59, 64, 480 S.E.2d 62, 64 (1997); Bozeman v. State, 307 S.C. 172, 414 S.E.2d 144 (1992); State v. Alford, 264 S.C. 26, 212 S.E.2d 252 (1975), overruled on other grounds State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009).

When a person acts in defense of another, the person "is in the same situation and upon the same plane as those who act in defense of themselves." Hewitt, 205 S.C. at ___, 31 S.E.2d at 258. Only those facts "which excuse the killing in defense of self likewise excuse a killing in defense of [another]." Id.; see also, State v. Harvey, 110 S.C. 274, 96 S.E. 399, 400 (1918) (noting that "[w]hile a man may take life in defense of himself or another, yet the slayer, or the person in whose behalf the slayer strikes, must not only be without fault in provoking the difficulty, but there must be a necessity to kill"); State v. Norris, 253 S.C. 31, 38, 168 S.E.2d 564, 567 (1969) (holding "[t]he right of the father to defend his daughter is coextensive with the right of the daughter to defend herself").

> The right of one to justify a slaying on the ground that it was necessary in defense of another person stands upon the same plane or footing as, and is coextensive with, the right of the person to whose aid he or she goes, under the existing circumstances of the particular occasion; or as is sometimes stated, the right to justify killing in defense of another depends upon the same conditions as would be necessary to excuse such other person under the plea of self-defense.

40 Am.Jr.2d Homicide § 168 (2014). In other words, "[t]he right is commensurate with self-defense, and every fact requisite to excuse a killing in the defense of self must be present in order to excuse a killing in defense of another." Id.

The defense of others imposes the "alter ego" rule, meaning "an intervenor who used deadly force to defend a person not entitled to use deadly force himself would be held criminally liable." Marco F. Bendinelli, James T. Edsall, Defense of Others: Origins, Requirements, Limitations and Ramifications, 5 Regent U. L. Rev. 153, 153 (Spring 1995).[5] "'[A] person is justified or excused in killing in defense of another person when, and only when, the circumstances are such that the latter would be justified or excused if he had committed the homicide in his own defense.'" Id. at 158 (quoting Lovejoy v. State, 15 So.2d 300, 301 (Ala. Ct. App. 1943)) (emphasis in the original). When a person interferes in a difficulty on behalf of another, "he may lawfully do in another's defense what such other might lawfully do in his own defense but no more; he ... is subject to the same conditions, limitations, and responsibilities as the person defended." Id. (quoting Lovejoy, 15 So.2d at 301) (emphasis in the original).

In State v. Sales, 285 S.C. 113, 328 S.E.2d 619 (1985), this Court examined the defense of others instruction as it applied to the defendant in the criminal case. Sales' sister and her boyfriend were fighting in their shared home over the boyfriend's use of grocery money to buy liquor. The boyfriend hit the sister in the face with an iron poker. Sales' nieces ran to his home and begged him to help sister. Sales found sister at her home holding her face. When sister and boyfriend began to struggle over a heavy object, Sales separated the two. The boyfriend then

[5] Although many jurisdictions have abandoned a strict adherence to the alter ego rule, they have done so only to "allow exculpation based upon the intervenor's reasonable belief that his defensive action was required." Marco F. Bendinelli, James T. Edsall, Defense of Others: Origins, Requirements, Limitations and Ramifications, 5 Regent U. L. Rev. 153, 159-160 (Spring 1995).

swung the heavy object at Sales. A fight between Sales and the boyfriend ensued. The boyfriend died. This Court held the trial judge properly instructed the jury that, "under the law of self-defense, a person may not only take the life in his own defense but also in defense of a relative," and "that the right to intervene to protect the relative is subject to the same limitations as the right of self-defense." However, the judge instructed the jury on the duty to retreat, which this Court found to be in error. Instead, Sales had no duty to retreat because sister had no duty to retreat from her home and Sales assumed the rights and limitations of the person he acted to protect. Id. at 114-15, 328 S.E.2d at 619-620.

As held by the Court of Appeals, in the instant case, the trial judge's instruction regarding the defense of others was confusing to the jury as the theory of defense of others is a defense to a criminal charge and the instruction was incomplete as to how the jury should evaluate the conduct of an individual who is acting in defense of others, specifically as whether the person being defended was in imminent danger of losing his life or sustaining serious bodily injury, the amount of force to be used, and the duty to retreat. App. 85-87. The trial judge's total instruction on the defense of others was as follows: "Now, under South Carolina law, if one comes to the assistance of a friend or a relative and takes part in a difficulty in which a friend or a relative is engaged, he enters the combat on the same footing as the person whose assistance he comes and under the same legal status." R. 405, lines 16-20. This instruction had no place in the case because it concerned a defense to a criminal charge that was not being asserted in this case. Respondent was not claiming that he was acting in defense of others, and no criminal charges had been filed against Burno. Defense of others is a defense and should not have been charged to the jury because it was not asserted as a defense by Respondent; thus, as the Court of Appeals correctly observed, the facts did not support the instruction.

Additionally, the instruction provided no explanation of what the theory of defense of others means or how it related to the case; thus, creating greater confusion. Specifically, the judge failed to instruct that a person being defended must satisfy all the elements of self-defense, including not being at fault in bringing on the difficulty, being in imminent danger of losing his life or sustaining serious bodily injury, the reasonableness of that belief, the limitation on the use of force, and the duty to retreat.

There was no evidence that Coleman was in imminent danger of losing her life or great bodily injury or had a reasonable belief of such an imminent threat. At worst, the evidence showed that Respondent and Coleman were verbally arguing, that Respondent was "pulling" on Coleman, and that "licks" were passed. There was no evidence that Coleman was in danger of great bodily injury or would have entertained a reasonable belief of such a threat. Burno's act of grabbing Respondent in a bear hug, picking him up, and moving several feet exceeded the amount of force that Coleman would have been permitted to use under the law of self-defense. Coleman was permitted only to use the amount of force as appeared to be necessary against any perceived threat from Respondent if the threat amounted to imminent danger of losing her life or great bodily injury. The bear hug and moving of Respondent surpassed the amount of force necessary to repel any threat posed by Respondent. Additionally, Coleman may have been under a duty to retreat because the argument began when Coleman was in the car, Respondent exited the car leaving Coleman in the car, and Coleman was not in her home or place of business.

Perhaps, most importantly, the trial judge failed to explain to the jury what burden of proof was applicable to the defense of other instruction. See App. 86-87. Petitioner argued both that "the state always has the burden of proof" and that the state did not have the burden to prove the deceased stepped into the shoes of Coleman during the altercation. Cf. Pet. at 14 with Pet. at 15.

According to the state, at trial and on appeal, the requested instruction was simply "a principle of law" for the jury to accept. Pet. at 15. Despite the state's contention that the instruction was merely a principle of law to assist the jury in considering the evidence, to the extent the instruction was proper for the jury's consideration, which Respondent disputes, it was necessary for the jury to understand the state had the burden to prove the deceased's conduct satisfied the principle of law.

The trial judge's instruction to the jury regarding the defense of others simply did not belong in this case because it provided no defense to the charged offense. The charge was inaccurate and incomplete further confusing the jury and failing to guide the jury regarding proper consideration of the conduct of the players as it related to the criminal charges.

Harmless error analysis

Petitioner asserted the Court of Appeals' harmless error analysis was flawed because it focused on the lack of an instruction on the burden of proof accompanying the improper defense of others instruction. Pet. at 14-17. While the failure to clarify the burden of proof applicable to the defense of others instruction was part of the Court of Appeals' consideration, the Court primarily focused on how the erroneous instruction, which was incomplete, confusing, and misleading, contributed to the verdict. In arriving at its conclusion that the error was not harmless beyond a reasonable doubt, the Court of Appeals examined the prosecutor's reliance upon in the instruction throughout the trial and the prosecutor's insistence that the instruction was "vitally important" to the case. App 87-88.

When arguing for the instruction, the solicitor argued defense of others negated the element of sufficient legal provocation required for voluntary and would "counter any self-defense issues." R. 302, line 13 – R. 304, line 3. The prosecutor argued the instruction on defense-of-others was "vitally important when they're trying to raise self-defense." R. 309, lines 22-25. Important for

analyzing whether the instruction contributed to the verdict was the prosecutor's request for "a statement **from the judge** that that's the state of the law in this case." R. 312, line 9 – R. 313, line 9 (emphasis added).

Not surprising given the prosecutor's opening statement and argument that defense of others was "vitally important" to his ability to get a murder conviction, the prosecutor crafted his closing arguments around the theme that Burno was defending Coleman. He told the jurors that "Burno was the only person man enough there to responsibly come out and defend her." R. 326, lines 2-3; R. 332, lines 19-20; R. 333, lines 16-19; R. 334, lines 16-18; R. 372, lines 19-23; R. 373, lines 2-4. Immediately, he discussed with the jury "the doctrine of defense of others." He characterized this as a person's "right to defend a friend or family member." He explained "a person coming to the defense of a friend or family member stands in their shoes and can exercise any rights that they have." R. 326, lines 4-11; R. 333, lines 20-21. He elaborated on this point – "The law in that case is if one comes to the assistance of his friend or relative and takes part in a difficulty in which a friend or relative is engaged, he enters the combat on the same footing as the person to whose assistance he comes and under the same legal status." R. 333, line 22 – R. 334, line 1.

He then told the jurors that a person being attacked can resist the attack and can try to stop it. According to the prosecutor, "when Hydrick Burno came out of the house there and tried to come to [Coleman's] defense, to the defense of others, he stood in her shoes." R. 326, lines 16-18; R. 334, lines 5-14; R. 383, line 24 – R. 384, line 1. He characterized Burno's conduct as coming out "to defend this woman in an appropriate and responsible fashion." R. 332, lines 21-22. Thus, the prosecutor argued, Respondent could not exercise self-defense against Burno. R. 326, lines 19-20. Furthermore, the prosecutor claimed that Respondent did not have sufficient legal provocation, as

required for voluntary manslaughter, because Burno "had every right to intercede on behalf of a friend or loved one and stood in her shoes." R. 334, lines 1-4; R. 388, lines 10-14.

As the Court of Appeals held, the state's argument that the jury could not decide the case without the defense of others instruction and the state's heavy reliance upon that theory throughout its case, as evidenced most clearly in the closing argument, the state failed to prove the erroneous instruction was harmless beyond a reasonable doubt. The state's own argument for its entitlement to the instruction proved the improper instruction contributed to the verdict. Thus, the Court of Appeals correctly concluded the error was not harmless beyond a reasonable doubt and reversed Respondent's conviction.

CONCLUSION

Respondent respectfully requests this Court deny the petition for writ of certiorari. In the event this Court grants the petition for writ of certiorari, Respondent respectfully requests the opportunity to brief fully the issue presented. Further, Respondent requests that if this Court were to reverse the Court of Appeals' ruling, then his case must be remanded to the Court of Appeals for a decision on the remaining appellate issues, which were not ruled upon previously. See State v. Grovenstein, 335 S.C. 347, 354 n. 6, 517 S.E.2d 216, 219 n. 6 (1999) (remanding to the Court of Appeals for consideration of remaining issues on appeal).

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR RESPONDENT

This 12th day of October, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Saluda County
Certiorari to the Court of Appeals
Thomas A. Russo, Circuit Court Judge

THE STATE,

PETITIONER,

V.

STEVEN OTTS,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the return to petition for writ of certiorari in the above referenced case has been served upon Susannah R. Cole, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Steven Otts, #356290, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 12th day of October, 2018.

Susan B. Hackett
Susan B. Hackett
Appellate Defender
ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO before me
this 12th day of October, 2018.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: September 27, 2028