

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Charleston County  
Honorable J.C. Buddy Nicholson, Circuit Court Judge

Appellate Case No. 2016-000616

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THE STATE,

vs.

DAVID ALAN WHITE,

RECEIVED  
OCT 30 2018  
SC Court of Appeals

Appellant.

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**STATE'S PETITION FOR REHEARING**

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Pursuant to Rules 221 and 240, SCACR, the Petitioner State now requests a rehearing on the following points that this Court may have overlooked or misapprehended. In so doing, the State maintains all its prior arguments as set out in its brief of respondent.

I.

This Court found the trial court erred in declining to instruct the jury on self-defense, opining some evidence supported each element of self-defense. The State respectfully submits no evidence was presented that White was at risk of death or serious bodily injury and no evidence was presented White held a reasonable fear that he was at risk of death or bodily injury. In order for a defendant to be entitled to a jury instruction on self-defense, evidence of the

following four elements must be presented:

(1) The defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, defendant must show that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that he was in actually in imminent danger and that the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or the loss of his life; and (4) the defendant had no other probable means of avoiding the danger.

State v. Day, 341 S.C. 410, 416, 535 S.E.2d 431, 434 (2000). “A jury charge on self-defense is not required unless it is supported by the evidence.” State v. Wigington, 375 S.C. 25, 31, 649 S.E.2d 185, 188 (Ct. App. 2007).

In the instant case, no evidence was presented White believed he was imminent danger of losing his life or sustaining serious bodily injury, and no evidence was presented that he could reasonably believe he was actually in imminent danger of losing life or sustaining serious bodily injury.

White testified in camera that while Victim was cutting White’s hair, Victim told him he had a knife and gun in his moped. R. p. 327, lines 3-4. Before the jury, White testified that after Victim finished cutting White’s hair, White paid Victim and there was no disagreement. R. p. 320, p. 323. White left the gathering briefly and then returned. R. pp. 343-44. White, Victim, and others were gathered in conversation at the fire pit. White was about to call his wife to leave when he was hit behind. R. pp. 344-45. At best, White was inconsistent about whether he knew who hit him. However, White testified he reacted and swung out at whoever hit him. R. pp.

357-58. He testified he did it in self-defense. R. p. 349. However, White never testified before the jury **or in camera** that he swung at Victim with a knife because he was afraid Victim might be armed. State v. Knighton, 334 S.C. 125, 136, 512 S.E.2d 117, 123 (Ct. App. 1999) (finding an appellant bears the burden of presenting an adequate record that is sufficiently complete so that the appellate court is able to review the lower court's actions).

This Court indicated in its opinion, "White indicated he did not believe he could safely leave after he was punched because of Johnson's statement **and the possibility that Johnson may have had access to a weapon.**" State v David Alan White, Op. No. 5603 (S.C. Ct. App. filed October 17, 2018). However, the State would respectfully point out that at no point during his trial testimony or his in camera testimony did White indicate that he believed he could not leave because Johnson might have a weapon. He never testified that at the time he reacted and swung his knife, he thought Johnson could have a weapon. There is simply no evidence that when he swung his knife at Johnson, White considered the possibility that Johnson might be armed – no evidence in the record indicates it was a factor in his decision to use lethal force.

Accordingly, no evidence was presented he was actually in fear of death or serious bodily harm when he swung his knife. Further, such a belief was not reasonable. This Court overlooks the fact that while it is plausible Victim might have retrieved a weapon from his moped after he cut White's hair and before White returned to the party, it is only conjecture that he might have done so. Specifically, this Court stated "Johnson testified he accessed his moped directly before the incident." However, Victim Johnson's specific testimony is he **put away** his belongings in his moped because he was preparing to leave, Johnson never indicated he retrieved any items. R. p. 106, lines 10-12; p. 107, lines 21-25. More importantly, White never testified he saw Johnson

access the moped immediately before the incident, so Johnson's testimony to that effect has no bearing on White's state of mind. Accordingly, this evidence does not support a self-defense instruction.

The State would further argue that conversations by Johnson or about Johnson, a man in his fifties, about how he was a high school wrestler have no relevance in a self-defense claim. Nor is the fact he made shanks in prison relevant to the analysis since he did not claim to have a shank on him that day.

Also, White testified he did not know who was behind him when he swung his knife. Other times he testified he knew it was Johnson that hit him. However, that testimony does not specify what he knew **when he acted**, which is the relevant question. He testified on direct examination that he did not know where Johnson was when he swung his knife and did not look where he swung. R. p. 349, lines 8-19. He then admitted on direct examination, "I didn't know it was him behind me that close or whatever when I swung my arm." R. p. 351, lines 8-12. He admitted "Spencer could have been behind me" and agreed anyone could have been behind him. R. p. 357, lines 16-21. When his counsel attempt to rehabilitate his testimony on redirect examination, instead White admitted, "**At the time I didn't know who it was.**" R. p. 360, lines 8-11. The trial court did not err in declining a self-defense instruction.

Additionally, White's actions were not reasonable. By no stretch was his response proportional to the "danger" from being bumped or hit. See State v. Wood, 1 S.C.L. 351 (1 Bay 351) (1794) (key to self-defense is the defendant can only respond with proportionality). In State v. Quin, 5 S.C.L. 515 (S.C. Const. App. 1815), the court held: "Proof that the prosecutor was the

aggressor would not justify an enormous battery; nor, indeed, any, beyond the bounds of self-defense.”

In State v. Campbell, 111 S.C. 112, 96 S.E. 543 (1918), the Supreme Court held, “The defendant, if without fault, had the right to use such **necessary** force as required for his complete protection from loss of life or serious bodily harm, and could not be limited to the degree or quantity of attacking opposing force.” Id. 111 S.C. at 112, 96 S.E. at 544 (emphasis added). White’s response to merely being bumped in the back of the head did not warrant the use of deadly force. Accordingly, his testimony failed to support self-defense. Therefore, the trial court did not err in declining to instruct the jury on self-defense.

## II.

Further, the trial court did not err in declining to admit White’s testimony that Victim claimed to keep a gun and knife in his moped. This Court found that it should have been admitted because the testimony was not for the truth of the matter asserted and therefore, not hearsay on the basis that it went to White’s state of mind, which would be relevant to self-defense. The problem is White never testified in camera, or otherwise, **how** it affected his state of mind, if at all, **when** he swung the knife. It only matters if White swung his knife because he feared Johnson was armed. White never testified to that.

“Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Rule 801, SCRE. Hearsay is inadmissible except as provided by statute, the Rules of Evidence, or other court rules. Rule 802, SCRE; State v. LaCoste, 347 S.C. 153, 553 S.E.2d 464 (Ct. App. 2001).

Johnson’s alleged out of court statement would be admissible to show White’s state of

mind only if White established he was acting in self-defense. At the time that White sought to admit the testimony, he failed to establish a foundation showing self-defense. Prior to seeking to admit White's hearsay testimony, White testified (1) he did not try to kill Little Bear; (2) he admitted he cut Little Bear; (3) he did not mean to cut Little Bear; and (4) he did not aim for Little Bear's throat. R. p. 320, lines 14-23. He further testified he never met Little Bear before the gathering, there was no tension between them, and there was no dispute over money or the quality of the haircut. R. p. 323, lines 5-24. At this point defense counsel attempted to elicit testimony that Little Bear told White he made shanks in prison, and he kept a knife and gun in his moped. R. pp. 324-27. Defense counsel claimed it was admissible because it went to White's state of mind for purposes of self-defense. R. pp. 328-29.

The trial court observed that "based upon what he has already said how can you possibly raise self-defense because self-defense is a [purposeful] act you intentionally inflicted physical harm on a person that you were in imminent fear of. Well, he's already said he did not cut him on purpose. . . . Now where is self-defense going to come into this?" R. p. 329, lines 7-14. The trial court further observed, "So none of this testimony he has said so far has any relevancy at all unless there is a valid self-defense case." R. p. 329, lines 21-23.

At the point during White's direct testimony that defense counsel sought to elicit this testimony, there was insufficient foundation to show the evidence was not for the truth of the matter asserted because White had not testified to acting in self-defense, only that he did not intend to cause the injury to Victim. Accordingly, the trial court's ruling was correct and appropriate. "The relevance, materiality, and admissibility of evidence are matters within the sound discretion of the trial court and a ruling will be disturbed only upon a showing of an abuse

of discretion.” State v. Shuler, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003).

Further, at no point afterwards did defense counsel make another attempt to admit the testimony on the basis that he had laid sufficient foundation since the trial court’s initial ruling. Because White never testified he was afraid or concerned Victim was armed when he slashed Victim’s throat, the testimony never became relevant. Additionally, counsel could have elicited any such testimony in camera and failed to do so. This deficiency was hinted at during counsel’s proffer when he advised the court his client did not know if Johnson was armed. Counsel never asserted that his client would testify he was worried Johnson might be armed and that caused him to act. Nor did counsel attempt to elicit in camera testimony from White that he was fearful Johnson was armed and that is why he struck his knife at Johnson.

Of course, White admitted on redirect examination that he did not know who hit him when he swung his knife. R. p. 360, lines 8-11. Therefore, the trial court did not abuse its discretion in disallowing the testimony since ultimately evidence supports the trial court’s determination that White was seeking to admit Johnson’s out of court statement for the truth of the matter asserted and not for White’s state of mind since he admitted not knowing who he swung his knife at.

Accordingly, the trial court did not err in declining to admit the testimony.

WHEREFORE, the State requests this Court to grant the petition for rehearing and affirm the convictions and sentences. Given that the convictions and sentences were reversed without oral argument, the State would respectfully request oral argument on the State’s petition for rehearing.

Respectfully submitted,

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Senior Assistant Attorney General

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October 30, 2018

STATE OF SOUTH CAROLINA

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Appeal From Charleston County  
The Honorable J. C. Buddy Nicholson, Circuit Court Judge

Appellate Case No: 2016-000616

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THE STATE,

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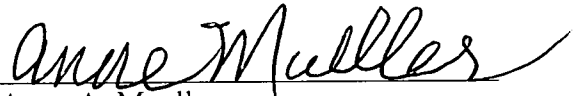
DAVID ALAN WHITE,

Appellant.

**PROOF OF SERVICE**

I, Anne Mueller, certify that I have served the within State's Petition For Rehearing on Appellant by delivering two copies of the same addressed to his attorney of record, Wanda H. Carter, Esquire, SCCID, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.  
This 30<sup>th</sup> day of October, 2018.



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ATTORNEY GENERAL

October 30, 2018

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SC Court of Appeals

RE: The State v. David Alan White  
Appellate Case No: 2016-000616

Dear Ms. Carter:

Enclosed please find two copies of the State's Petition For Rehearing in the above-referenced case.

Sincerely,

for  
David Spencer  
Senior Assistant Attorney General  
S.C. Bar No: 68571

DS/aam  
Enclosures

cc: The Honorable Jenny A. Kitchings (with original and 6 copies)  
Victim Advocacy Division