

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Barnwell County

Doyet A. Early, III, Circuit Court Judge

RECEIVED

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

DEMONTAY MARKEITH PAYNE,

APPELLANT

APPELLATE CASE NO. 2017-002014

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial judge err in failing to instruct the jury on voluntary manslaughter where (1) the undisputed evidence showed that Appellant and the deceased were in a heated argument immediately prior to the shooting, (2) there was additional evidence that the deceased pulled a gun and shot at Appellant immediately prior to Appellant returning fire, and (3) the judge based his decision not to instruct the jury on the lesser-included offense because Appellant did not remember the content of the argument?

II. Did the trial judge err in failing to tailor the self-defense instruction to the evidence presented, including that if a defendant is justified in firing the first shot, the defendant is justified in continuing to shoot until it is apparent that the danger to his life and body has ceased?

STATEMENT OF THE CASE

A Barnwell County grand jury indicted Appellant for murder (2017-GS-06-00066) on March 9, 2017. R. *(indictment). On September 18-19, 2017, the state, represented by David Miller and Jackson Cooper, called the case for trial before the Honorable Doyet A. Early, III, and a jury. Tr. 1. Joshua Koger represented Appellant. Tr. 1. Judge Early refused defense counsel's request to instruct the jury on the lesser-included offense of voluntary manslaughter; therefore, the jury considered only the murder charge. Tr. 230, l. 23 – Tr. 232, l. 3.

During the deliberations, the jury requested the elements of self-defense in writing. Tr. 294, ll. 23-25; R. *(Court's Exhibit #2). Judge Early declined the jury's request to provide the instruction in writing, but he verbally re-instructed the jury on self-defense. Tr. 295, l. 2 – Tr. 296, l. 16. Additionally, the jury questioned what would happen if the jurors could not agree. Tr. 296, ll. 17-18; R. *(Court's Exhibit #3). Judge Early told the jurors that it was "way too early to be deciding that." Tr. 296, ll. 18-19. He noted the jury had "only been out less than two hours." Tr. 296, ll. 19-20. However, he then told the jurors:

So, you know, there's been a lot of time and effort put into the trial of this case. And, I mean, if at the end of six or seven hours you aren't able to agree, then I may - - but here's what happens: We do it again. It's a mistrial we bring in another set of jurors, the same witnesses, maybe the same judge or another judge will be telling the jury the same thing.

So we encourage, please try to reach a unanimous decision. Obviously, if you can't - - but we're way too early in it to decide that. You know it's 5:30 now.

Tr. 296, l. 20 – Tr. 297, l. 6. An hour later, the jury returned to the courtroom to announce its verdict. Tr. 297, ll. 12-22. The jury found Appellant guilty as charged. Tr. 298, l. 23 – Tr. 299, l. 9. Judge Early sentenced Appellant to thirty-five years imprisonment. Tr. 316, ll. 6-8; R. *(sentence sheet).

On September 29, 2017, Appellant served his notice of appeal. This brief follows.

STATEMENT OF FACTS

On May 23, 2015, Appellant stopped at his next door neighbor's home to visit with some friends, Alicia Youmans, Tyeisha Youmans, and Yvette Walker. Tr. 48, ll. 20-24; Tr. 51, l. 19 – Tr. 52, l. 9; Tr. 53, ll. 2-5; Tr. 161, l. 12 – Tr. 162, l. 11; Tr. 164, ll. 13-14; Tr. 206, ll. 2-6. The foursome was sitting outside. Tr. 49, ll. 9-10; Tr. 162, ll. 15-19; Tr. 206, l. 7 – Tr. 207, l. 1. Suddenly, Devante Odom appeared. Tr. 52, ll. 10-23; Tr. 207, ll. 19-23. Odom asked to buy two cigarettes from Alicia. Tr. 53, ll. 11-14; Tr. 208, ll. 15-20.

Odom and Appellant began arguing. Tr. 53, ll. 20-23; Tr. 69, l. 24 – Tr. 70, l. 1; Tr. 165, ll. 1-5; Tr. 166, ll. 17-23; Tr. 167, ll. 10-1; Tr. 209, ll. 7-12. Appellant did not remember what Odom said to him, but he remembered telling Odom that he was not “worrying about it.” Tr. 209, ll. 13-19; Tr. 217, l. 24 – Tr. 218, l. 2. The argument ended when Odom walked in the road toward Appellant's home. Tr. 54, ll. 5-7; Tr. 54, l. 18 – Tr. 55, l. 2; Tr. 210, ll. 4-8; Tr. 210, ll. 13-15. Shortly thereafter, Appellant got into his car and drove toward his home. Tr. 54, ll. 5-7; Tr. 56, ll. 1-8; Tr. 164, ll. 11-25; Tr. 168, ll. 11-15; Tr. 168, ll. 20-25; Tr. 211, ll. 8-24.

Appellant explained that as he was getting out of his car, he saw Odom approach him. Tr. 212, ll. 9-11; Tr. 220, ll. 16-22. The two men then “exchanged words.” Tr. 212, ll. 22-23. Odom fired a shot at him. Tr. 212, ll. 9-11; Tr. 212, l. 23. In fear for his life, Appellant then fired back at Odom. Tr. 212, l. 11; Tr. 212, ll. 23-24; Tr. 213, ll. 11-12; Tr. 216, ll. 6-12.¹ Appellant explained that he was shooting at Odom as he was backing away from Odom and moving toward his house. Tr. 213, ll. 3-12; Tr. 222, ll. 3-5. Appellant did not remember how many shots he fired. Tr. 213, ll. 18-21.

¹ Appellant had started carrying a gun because he had received threats from Odom's friends. Tr. 225, ll. 14-19.

Tyeisha's testimony differed only slightly from Appellant's memory of the events. Tyeisha explained that Appellant parked his car at his home and walked to the roadway where Odom, who was taunting Appellant, stood. Tr. 170, ll. 7-15. Appellant and Odom continued to have words with each other. Tr. 170, ll. 2-6. According to Tyeisha, Appellant swung at Odom, trying to punch him. Tr. 170, ll. 18-20; Tr. 171, ll. 1-3; Tr. 186, ll. 2-7; Tr. 188, ll. 5-7. Odom stepped back to avoid the hit. Tr. 171, ll. 4-7.

After the attempted punch, Odom pulled a gun on Appellant. Tr. 171, ll. 7-18; Tr. 186, ll. 8-10. Although the two men continued to exchange heated words, Appellant turned to go toward his house and car. Tr. 171, l. 19 – Tr. 172, l. 1; Tr. 186, ll. 11-15. Odom followed Appellant into his yard. Tr. 172, ll. 5-25; Tr. 173, ll. 3-8; Tr. 187, ll. 5-7. As the verbal argument and Odom's pursuit continued, Appellant turned around to face Odom. Tr. 173, ll. 9-10; Tr. 187, ll. 7-8. Odom then fired a shot at Appellant, who fired back. Tr. 174, ll. 4-15; Tr. 186, ll. 17-21; Tr. 187, ll. 8-9. When Appellant started shooting at Odom, Odom started running. Tr. 174, ll. 16-24; Tr. 175, ll. 1-2. Appellant then got into his car and left. Tr. 175, ll. 19-24.

When Tyeisha saw that Odom had fallen to the ground, she went to check on him. Tr. 175, l. 19 – Tr. 176, l. 10. Although only a few other people were gathered around Odom initially, "more and more people" arrived as time passed. Tr. 176, ll. 11-17. Tyeisha saw Odom's gun beside his body when she first got to him. Tr. 176, ll. 18-23. Approximately fifteen minutes later, Tyeisha left. Tr. 178, ll. 3-5. Although the police had not arrived yet, there were about thirty people near Odom at that time. Tr. 179, ll. 5-16.

Alicia claimed she was alone outside after Appellant left because her sister and Yvette walked inside. Tr. 57, ll. 11-15.² According to Alicia, Appellant drove to where Odom was in the roadway and the two “had another verbal dispute or whatever.” Tr. 57, ll. 16-20; Tr. 58, ll. 12-16. She further claimed Appellant got out of his car while the two men continued to argue. Tr. 57, ll. 20-22. Then, Appellant “turned to go back to his car,” but he never made it all the way back to his car. Tr. 57, l. 22; Tr. 58, l. 22 – Tr. 59, l. 1.

Alicia was uncertain “if something was said or what happened,” but she next saw Appellant turn around to face Odom and begin shooting at him. Tr. 57, ll. 22-25; Tr. 59, ll. 2-5. Odom started running. Tr. 59, ll. 6-8. Alicia claimed she saw Odom “fall to the ground” and “start[] waving his arm in the air.” Tr. 60, ll. 20-23. Alicia called 911. Tr. 60, l. 24 – Tr. 61, l. 5. Alicia told the 911 dispatcher that Appellant shot Odom. Tr. 61, ll. 8-20. Alicia walked up to Odom where she joined more than five people who had gathered already around him. Tr. 63, ll. 4-11.

Brandy Williams, who was visiting her parents nearby, heard seven to nine gunshots. Tr. 83, ll. 19-20. After calling for help, Williams went to where Odom was on the ground and performed CPR on Odom for thirty minutes – the time it took law enforcement to arrive. Tr. 85, ll. 19-20; Tr. 87, ll. 7-10. By the time the police arrived, there were between ten and fifteen people gathered around Odom. Tr. 87, ll. 3-6; Tr. 88, ll. 1-15.

² Appellant contradicted Alicia Youmans’ testimony on this point. Appellant saw Alicia go inside the house to get the cigarettes for Odom. Tr. 208, l. 25 – Tr. 209, l. 6.

When the first officer arrived on the scene, there were more than twenty people present. Tr. 188, ll. 10-16. The scene was “chaotic.” Tr. 199, ll. 20-23. Initially, “there was a bit of confusion on exactly where the crime scene was or the incident location was.” Tr. 200, ll. 2-4. When the police “finally got there,” they found “a large number of people” and had difficulty securing the scene. Tr. 200, ll. 4-6. In light of the crowd, the local police department “had to call for additional units from Barnwell, Williston, and Blackville” to help “control the crowd and secure everything.” Tr. 200, ll. 7-10.

When law enforcement finally secured at the scene, the investigator processing the scene collected six .380 caliber shell casings. Tr. 93, ll. 6-12; Tr. 94, ll. 12-13.³ Unfortunately, there was no way for the jury to know where the shell casings were located because the photographs the investigator took were lost by the police prior to trial. Tr. 92, ll. 12-17; Tr. 93, ll. 13-18. When asked where he found the casings, the investigator was uncertain of the exact location, but estimated they were found in the front yard of a particular residence. Tr. 93, l. 19 – Tr. 94, l. 7; Tr. 100, ll. 6-10; Tr. 101, ll. 6-8. He thought the .380 shell casings were found within six to eight feet of each other. Tr. 94, ll. 14-17. According to the forensic firearms examiner, the six .380 caliber shell casings were fired by the same firearm. Tr. 131, ll. 11-17; Tr. 133, ll. 13-14.

Additionally, and most importantly, the investigator found a .40 caliber shell casing close to where Odom was lying on the ground. Tr. 95, ll. 3-9. The examiner explained the .40 Smith and Wesson caliber casing that was found close to Odom’s body “was not fired by the same gun” that fired the .380 caliber shell casings. Tr. 132, ll. 17-19; Tr. 133, ll. 13-16. Furthermore, forensic testing revealed Odom had gunshot residue on both of his hands. Tr. 122, l. 22 – Tr. 123, l. 12.

³ Appellant admitted he was using a Hi-Point .380 firearm. Tr. 225, ll. 5-8.

The pathologist observed four gunshot wounds on Odom's body. Tr. 237, ll. 21-23. The first wound she observed was an entrance wound on the upper left chest. Tr. 239, ll. 10-14. This bullet went out of Odom's left back. Tr. 239, ll. 10-14. The second went through the right arm, then entered the right chest and out the right back. Tr. 239, ll. 15-21. The third wound entered the left lower back. Tr. 239, ll. 24-25. This one hit the aorta and pancreas. Tr. 240, ll. 1-2. The pathologist found this bullet under the skin of the abdomen. Tr. 240, ll. 2-3. The fourth shot went through the right calf. Tr. 240, ll. 4-6. There was some soot and stippling around the wound to the upper left chest. Tr. 240, l. 22 – Tr. 241, l. 15. According to the pathologist, this meant the barrel of the gun was within eighteen inches to two feet of Odom's chest at the time the gun was fired. Tr. 241, ll. 16-24.

According to the firearms examiner, the projectile removed from the deceased's body by the pathologist during the autopsy was a .380 auto-caliber bullet. Tr. 136, ll. 5-6. Further, the examiner explained that the casings that were found at the scene could have been fired by the same firearm that fired the projectile that was removed from the deceased's body. Tr. 137, ll. 8-13.

ARGUMENT

I. The trial judge erred in failing to instruct the jury on voluntary manslaughter where (1) the undisputed evidence showed that Appellant and the deceased were in a heated argument immediately prior to the shooting, (2) there was additional evidence that the deceased pulled a gun and shot at Appellant immediately prior to Appellant returning fire, and (3) the judge based his decision not to instruct the jury on the lesser-included offense because Appellant did not remember the content of the argument.

Standard of review

“In criminal cases, appellate courts sit to review only errors of law.” State v. Sams, 410 S.C. 303, 307, 764 S.E.2d 511, 513 (2014); see also State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (2006); State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001). “An appellate court will not reverse the trial [court]’s decision absent an abuse of discretion.” State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 166 (2007). “An abuse of discretion occurs when the trial court’s ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support.” Id. at 570, 647 S.E.2d at 166–67.

“The law to be charged to the jury is determined by the evidence presented at trial.” State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). “The trial court is required to charge a jury on a lesser-included offense if there is evidence from which it could be inferred that the defendant committed the lesser, rather than the greater, offense.” Sams, 410 S.C. at 308, 764 S.E.2d at 513; see also State v. Drafts, 288 S.C. 30, 340 S.E.2d 784 (1986); Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005); State v. Gourdine, 322 S.C. 396, 472 S.E.2d 241 (1996). “The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand is an error of law.” Pittman, 373 S.C. at 570, 647 S.E.2d at 167.

“In determining whether the evidence requires a charge on a lesser-included offense, the [appellate court] must view the facts in the light most favorable to the defendant.” Sams, 410 S.C. at 308, 764 S.E.2d at 513 (citing State v. Cole, 338 S.C. 97, 525 S.E.2d 511 (2000)). “The charge request is properly rejected when there is no evidence tending to show the defendant was guilty of the lesser offense.” Id. (citing State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996); State v. Cooney, 320 S.C. 107, 463 S.E.2d 597 (1995); State v. Gadsden, 314 S.C. 229, 442 S.E.2d 594 (1994)).

Relevant facts

During the charge conference, defense counsel requested the judge instruct the jury on the lesser-included offense of voluntary manslaughter. Tr. 228, ll. 6-7; Tr. 228, ll. 17-21. Counsel explained that two witnesses testified regarding “interactions exchanged” at the residence. Tr. 229, l. 21 – Tr. 230, l.4. The state objected to the instruction, arguing there was no evidence of “any sufficient legal provocation.” Tr. 228, ll. 9-16.

Despite recognizing there was evidence in the record regarding an argument between Appellant and the deceased and testimony that Appellant swung at the deceased prior to the shooting, the judge refused to instruct the jury on voluntary manslaughter based upon Appellant’s testimony. Tr. 230, l. 5 – Tr. 232, l. 3. According to the judge, Appellant’s testimony that he did not remember an argument with or swinging at the deceased barred an instruction on voluntary manslaughter. Tr. 230, l. 5 – Tr. 232, l. 3. The judge questioned how defense counsel could get a sudden heat of passion during an argument if Appellant testified he did not remember the argument occurring. Tr. 230, ll. 5-20. The judge explained that in light of Appellant not remembering the argument, or more specifically that Appellant did not remember the exact words the two men exchanged during the argument, then the argument “certainly

wasn't the kind of argument that would arise to the level of sudden heat of passion." Tr. 230, l. 23 – Tr. 231, l. 3.

Relying upon Cook v. State, 415 S.C. 551, 784 S.E.2d 665 (Ct. App. 2015), the judge determined the evidence did not warrant a charge of voluntary manslaughter. Tr. 231, ll. 4-8. The judge found "no factual basis that [Appellant] was in a sudden heat of passion." Tr. 231, ll. 9-15. In the judge's view, the evidence presented showed the death was "either a murder case or self-defense." Tr. 231, ll. 16-18. Put succinctly, the judge determined there was "certainly nothing in the evidence to warrant a sudden heat of passion to the extent that is required to mandate a voluntary manslaughter charge." Tr. 231, ll. 16-21. In order for voluntary manslaughter to be considered by the jury, according to the judge, there must be evidence that the defendant's fear manifested itself in an uncontrollable impulse to do violence. Tr. 231, l. 22 – Tr. 232, l. 3. However, the judge found "no evidence that [Appellant] was acting under an uncontrollable impulse resulting from an argument he can't even remember happening. That's the argument that allegedly took place right before they started shooting at each other." Tr. 231, l. 23 – Tr. 232, l. 3.

Discussion

A jury charge to a lesser-included offense is required when the evidence warrants such an instruction. State v. Geiger, 370 S.C. 600, 606, 635 S.E.2d 669, 673 (Ct. App. 2006). South Carolina law mandates a jury instruction on a lesser-included offense when there is any evidence from which it could be inferred that the lesser, rather than the greater, offense was committed. State v. Watson, 349 S.C. 372, 375, 563 S.E.2d 336, 337 (2002); see also State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241, 241 (1996). In other words, the evidence must allow "a rational inference" that the defendant committed the lesser offense. Geiger, 370 S.C. at 607, 635 S.E.2d

at 673. In determining whether such a rational inference exists the court must examine the totality of evidence. Id. As this Court explained in State v. Patterson, 337 S.C. 215, 233, 522 S.E.2d 845, 854 (Ct. App. 1999), “[i]n order to justify a charge of a lesser included offense, the evidence must be capable of sustaining either the greater or the lesser offense, depending on the jury’s view of the facts.” A trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence. Frasier v. State, 306 S.C. 158, 162, 410 S.E.2d 572, 574 (1991) (citing State v. Lee, 298 S.C. 362, 364, 380 S.E.2d 834, 835 (1989)).

An appellate court views the evidence in the light most favorable to the defendant in determining whether the evidence required a charge of voluntary manslaughter. State v. Gadsden, 314 S.C. 229, 442 S.E.2d 594 (1994). Only when the record contained no evidence to support voluntary manslaughter should the trial court decline to charge the jury concerning the lesser-included offense. State v. Cooley, 342 S.C. 63, 67-68, 536 S.E.2d 666, 668-669 (2000). “To warrant the court in eliminating the offense of manslaughter it should very clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter.” State v. Wharton, 381 S.C. 209, 214, 672 S.E.2d 786, 788 (2009); see also Casey v. State, 305 S.C. 445, 447, 409 S.E.2d 391, 392 (1991) (emphasis in original) (holding that in murder cases, trial courts should charge manslaughter unless “there is no evidence whatsoever tending to reduce the crime from murder to manslaughter”).

Manslaughter is defined by Section 16-3-50 of the South Carolina Code as “the unlawful killing of another without malice, express or implied.” S.C. Code Ann § 16-3-50. Voluntary manslaughter is the unlawful killing of another in sudden heat of passion upon sufficient legal provocation. State v. Kornahrens, 290 S.C. 281, 350 S.E.2d 180 (1986). The South Carolina Supreme Court made it clear that both of these elements must be present in order to warrant a

voluntary manslaughter charge. See State v. Starnes, 388 S.C. 590, 596, 698 S.E.2d 604, 608 (2010). Thus, “[w]hether a voluntary manslaughter charge is warranted turns on the facts.” Starnes, 388 S.C. at 597, 698 S.E.2d at 608; see also, State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001) (“The law to be charged must be determined from the evidence presented at trial.”).

Quoting a trial judge’s jury instruction, the Supreme Court explained voluntary manslaughter as follows:

The law recognizes the frailties of human nature, and appreciates the fact that there may be occasions in one’s life when he may lose control of himself temporarily, be swept off his feet, to act upon the spur of the moment rather from premeditation or design. And, if under those circumstances one slays his fellow man, the law will not excuse him entirely, but will not visit upon him the extreme penalty it would have if the act had been accompanied by malice. ... [T]he provocation which the law recognizes as being one sufficient to reduce the homicide from murder to manslaughter must be such as to involve some indignity to throw a man in sudden heat and passion. ... So, also by way of illustration, if he should meet another on the street and that one should pull his nose, or spit in his face, and on the spur of the moment he should slay him, he would be guilty, not of murder, but of manslaughter. ... [W]ords, however opprobrious, could never be sufficient to reduce a homicide from murder to manslaughter.

State v. Cleland, 148 S.C. 86, 86, 145 S.E. 628, 629 (1928) overruled on other grounds by State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009).

“Sudden heat of passion upon sufficient legal provocation” mitigating felonious killing to manslaughter “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.” State v. Wiggins, 330 S.C. 538, 549, 500 S.E.2d 489, 495 (1998) (citing State v. Lowry, 315 S.C. 396, 399, 434 S.E.2d 272, 274 (1993)) (quotations omitted).

“The provocation must be such as to render the mind of an ordinary person incapable of cool reflection and produce an uncontrollable impulse to do violence.” Cooley, 342 S.C. at 67, 536 S.E.2d at 668. “A legal provocation is some act which, either alone or in connection with words or circumstances is calculated to throw one into a passion.” State v. Gadsden, 314 S.C. 229, 232, 442 S.E.2d 594, 596 (1994). “[I]n 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.” State v. Starnes, 388 S.C. 590, 598, 698 S.E.2d 604, 609 (2010). “[A]n overt, threatening act or a physical encounter may constitute sufficient legal provocation.” Pittman, 373 S.C. 527, 573, 647 S.E.2d 144, 168 (2007) (citing State v. Gardner, 219 S.C. 97, 105, 64 S.E.2d 130, 134 (1951)). However, evidence of a struggle during an armed robbery is not sufficient legal provocation. State v. Tyson, 283 S.C. 375, 379, 323 S.E.2d 770, 772 (1984); see also State v. Shuler, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001).

“[F]ear resulting from an attack can constitute a basis for voluntary manslaughter.” Starnes, 388 S.C. at 598, 698 S.E.2d at 609. While fear of an attack, by itself, is not enough to satisfy the heat of passion element, Starnes reaffirmed “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.” Id. One’s mind may be rendered incapable of cool reflection by “exasperation, rage, anger, sudden resentment, or terror.” State v. Franklin, 310 S.C. 122, 125, 425 S.E.2d 758, 760 (Ct. App. 1992).

The South Carolina Supreme Court reversed a murder conviction and remanded for a new trial where a trial judge refused to charge the jury on voluntary manslaughter where the evidence required such an instruction. State v. Lowry, 315 S.C. 396, 399, 434 S.E.2d 272, 274

(1993). Lowry and the deceased were “arguing and ‘bumped chests’” during an altercation near a grocery store. Id. at 398, 434 S.E.2d at 273. Lowry aimed his pistol at the deceased and pulled the trigger; however, the pistol was not loaded. Id. Lowry’s friend broke up the fight, and the deceased entered the grocery store. Id. Lowry then loaded his pistol, fired a single shot, and entered the grocery store as well. Id. The men “began arguing and shouting at each other again.” Id.

The state’s witnesses claimed the deceased told Lowry he was unarmed and refused to “take it outside” as Lowry suggested. Id. The deceased also spread his arms away from his body purportedly to show he was unarmed. Id. However, Lowry’s witnesses claimed the deceased denigrated Lowry by saying, “You think you are a big man because you got a gun.” Id. Then, the deceased “moved toward Lowry in a menacing fashion with his arms and hands outstretched toward Lowry as if to grab him.” Id. All witnesses agreed that after the deceased raised his arms, Lowry shot him in the chest. Id. The witnesses agreed that after the deceased fell, Lowry cursed him and shot him in the head. Id.

The Court held the trial judge erred by refusing to instruct the jury regarding voluntary manslaughter. Id. at 399, 434 S.E.2d at 274. The Court explained there was “testimony which, if believed, tend[ed] to show that the decedent and Lowry were in a heated argument and that the decedent was about to initiate a physical encounter when the shooting occurred.” Id. Because it did not “very clearly appear that there [was] no evidence whatsoever tending to reduce the crime from murder to manslaughter,” the judge erred in failing to so instruct the jury. Id.

The Supreme Court concluded a trial judge correctly instructed a jury on voluntary manslaughter where “there [was] evidence in the record which [tended] to show [Wiggins] acted in sudden heat of passion upon sufficient legal provocation” because it was undisputed Wiggins

was in a “heated argument” with the deceased and the deceased’s sister and the deceased “physically threatened him.” State v. Wiggins, 330 S.C. 538, 549, 500 S.E.2d 489, 496 (1998).

Like the evidence in State v. Gilliam, 296 S.C. 395, 373 S.E.2d 596 (1988), the evidence at Appellant’s trial supported a charge of voluntary manslaughter. Believing that his former girlfriend’s lover wanted to see him, Gilliam went to the lover’s place of business. Gilliam, 296 S.C. at 396, 373 S.E.2d at 597. The two men argued and the lover “made threatening statements” to Gilliam. Id. Gilliam claimed the lover “took a gun from his pocket and shot at” Gilliam. Id. Gilliam then shot back at the lover, killing him. Id. After confirming that self-defense and voluntary manslaughter are not mutually exclusive, the Court held that “the jury may fail to find all the elements of self-defense but could find sufficient legal provocation and heat of passion to conclude the defendant was guilty of voluntary manslaughter.” Id. at 397, 373 S.E.2d at 597. According to the Court, Gilliam’s “testimony that the victim threatened him and then fired at him would support a finding of sufficient legal provocation and heat of passion.” Id.

The South Carolina Supreme Court held a defendant was entitled to a jury instruction on voluntary manslaughter based upon one of the defendant’s statements to law enforcement indicating the decedent had cut the defendant prior to the defendant striking the final blow. State v. Knoten, 347 S.C. 296, 305-306, 555 S.E.2d 391, 396 (2001). In the second statement, Knoten told police that the decedent cut him, then chased Knoten out of the apartment. Id. at 305, 555 S.E.2d at 396. Outside, Knoten went to his car and got a metal pipe. Id. Thereafter, Knoten reentered the apartment and killed the decedent after she cut him again. Id. The Court explained that if the jury were to believe the facts presented in Knoten’s second statement, then the jury could conclude Knoten and the decedent were in a heated encounter and the decedent had twice

cut him with a knife when he struck her with a pipe; thus, “it follow[ed] that a charge on voluntary manslaughter was required.” Id. at 306, 555 S.E.2d at 396.

In relying upon Cook v. State, 415 S.C. 551, 559, 784 S.E.2d 665, 669 (2015), the judge may have determined Appellant was not entitled to a jury charge on voluntary manslaughter because “words alone, however opprobrious, are not sufficient to constitute a legal provocation.” At any rate, the judge’s refusal to charge voluntary manslaughter because Appellant could not remember the content of the argument was reversible error. What the judge failed to consider was the ample evidence in the record that Odom’s conduct was not limited to mere words – no matter the content of the undisputed argument the two men were having. Instead, the evidence presented showed Odom pulled a gun and fired a single shot at Appellant, which supported a charge on voluntary manslaughter. See Lowry, 315 S.C. at 399, 434 S.E.2d at 274 (explaining that “when death is caused by the use of a deadly weapon, the opprobrious words must be accompanied by the appearance of an assault – by some overt, threatening act – which could have produced the heat of passion”); Gilliam, 296 S.C. at 397, 373 S.E.2d at 597 (finding evidence to support a charge of voluntary manslaughter where the defendant testified that the victim threatened him and then fired at him because this testimony supported a finding of sufficient legal provocation and heat of passion); State v. Johnson, 333 S.C. 62, 66, 508 S.E.2d 29, 31 (1998) (“Here, Johnson and the victim had ‘had words’ and were engaged in a fight at the time the shooting occurred. ... [I]t is patent Johnson was entitled to a voluntary manslaughter charge”).

The undisputed evidence showed Appellant and Odom exchanged words when Odom stopped at the neighbor’s house to buy cigarettes. The undisputed evidence further showed the heated argument between Odom continued when the two men left the neighbor’s house. Two

witnesses – Appellant and Tyeshia – Odom pulled a gun and shot at Appellant. Appellant then returned fired. Although the officers, who arrived on the scene at least thirty minutes after the shooting, did not find a gun beside Odom, the officers recovered two types of shell casings from the area around the shooting. The .380 shell casings corresponded with the gun Appellant said he was using. However, the .40 shell casing, which was undisputedly not shot from the gun used by Appellant, was found very close to Odom’s body and supported Appellant’s version of events – that Odom shot first. Further, there was evidence that Odom actually shot a gun. According to the forensic testing conducted on the gunshot residue kit administered on Odom, there was gunshot primer residue on Odom’s hands. Although the state elicited testimony that Odom may have had the residue on his hands because he was shot, the expert also admitted that Odom may have had the residue on his hands because he handled a gun.

The evidence presented supported a jury instruction for voluntary manslaughter. The evidence that Odom and Appellant engaged in a heated exchange immediately prior to Odom pulling and discharging a firearm demonstrated that Appellant acted in the sudden heat of passion based on sufficient legal provocation. The trial judge erred by failing to instruct the jury on the lesser-included offense of voluntary manslaughter.

II. The trial judge erred in failing to tailor the self-defense instruction to the evidence presented, including that if a defendant is justified in firing the first shot, the defendant is justified in continuing to shoot until it is apparent that the danger to his life and body has ceased.

Standard of review

“An appellate court will not reverse the trial judge’s decision regarding a jury charge absent an abuse of discretion.” State v. Marin, 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016) (quoting State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010)). “In reviewing jury charges for error, [the appellate court] must consider the court’s jury charge as a whole in light of the evidence and issues presented at trial.” Id. (internal quotation omitted). “The trial court is required to charge only the current and correct law of South Carolina.” Id. (internal quotation omitted). “The evidence presented at trial determines the law to be charged to the jury. State v. Jackson, 384 S.C. 29, 35, 681 S.E.2d 17, 20 (Ct. App. 2009).

Relevant facts

Defense counsel requested the judge instruct the jury that an individual may continue to shoot until it is apparent that the danger to his life and body has ceased. Tr. 227, ll. 21-24; R. *(Court’s Exhibit #1). Counsel explained he wanted the self-defense instruction to include that a person may continue to shoot until the danger has ceased. Tr. 227, ll. 21-24. Specifically, counsel requested the judge instruct the jury that “[i]f the defendant is justified in firing the first shot, the defendant is justified in continuing to shoot until it is apparent that the danger to his life and body has ceased.” R. *(Court’s Exhibit #1). Finding “the stuff about firing until you quit” as “more or less a charge on the facts,” the trial judge refused. Tr. 229, ll. 17-19; Tr. 232, l. 7 – Tr. 233, l. 4. Instead, the trial judge instructed the jury regarding self-defense without tailoring the instruction to the facts presented. Tr. 288, l. 5 – Tr. 290, l. 13.

Discussion

The South Carolina Supreme Court has long held that a trial judge has the responsibility to craft a self-defense charge tailored to the facts of a case. State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011); State v. Fuller, 297 S.C. 440, 444-45, 377 S.E.2d 328, 331 (1989). As recognized in Fuller, there is a “body of common law self-defense” and trial judges must “consider the facts and circumstances of the case at bar in order to fashion an appropriate charge.” Fuller, 297 S.C. at 443, 377 S.E.2d at 330.

In Fuller, the defendant solicited a prostitute. Id. at 441, 377 S.E.2d at 329. However, when the pair arrived at the prostitute’s trailer, they discovered it was occupied. The defendant then left. Id. When the defendant later returned to the prostitute’s trailer, he found a car driven by a white woman was blocking the road. Id. The defendant asked her to move her car. Id. Two men approached the defendant’s car and asked him “what he was ‘trying to do to that white lady.’” Id. One of the men used a racial slur and grabbed the defendant by the throat. Id. at 441, 377 S.E.2d at 329-30.

The defendant fired a warning shot allowing him to drive away. Unbeknownst to the defendant, the street was a dead end. Id. at 442, 377 S.E.2d at 330. Due to the men blocking his escape, the defendant ultimately crashed his car against a rail. Id. The two men yelled, “we’re going to take care of you.” Id. The defendant thought he saw something shiny in one of the men’s hands and fired four shots at them, killing both. Id. No gun was found on the men. Id.

The trial judge only instructed the jury on the basic elements of self-defense. Id. The Court held it was error to only give the general charge when the defendant “repeatedly requested additional charges.” Id. at 443, 377 S.E.2d at 330. The Court found the trial judge erred by not giving three specific charges on self-defense that further explained the principles in the general

charge. First, the trial judge failed to charge the jury that the defendant had the right to act on appearances. Id. at 443-44, 377 S.E.2d at 330-31(citing State v. Jackson, 277 S.C. 271, 87 S.E.2d 681 (1955)). Second, the trial judge failed to charge the jury that “words accompanied by hostile acts, may, depending on the circumstances, establish a plea of self-defense.” Id. (citing State v. Harvey, 220 S.C. 506, 68 S.E.2d 409 (1951)). Third, the trial judge failed to charge that an individual has no duty to retreat “if by doing so he would increase his danger of being killed or suffering serious bodily injury.” Id. (citing State v. Hardin, 114 S.C. 280, 103 S.E. 557 (1920)).

The South Carolina Supreme Court held a trial judge erred in failing to charge on the specific elements of self-defense that were applicable to the defendant’s theory in State v. Day, 341 S.C. 410, 418, 535 S.E.2d 431, 435 (2000). As stated by the Court, “[a] self-defense charge is erroneous where the trial court fails to charge on elements of the defense which were applicable to the issues raised by the defendant.” Id. The Court found the instruction given in Day incomplete because the trial judge failed to instruct the jury that the defendant had the right to judge the conduct of the deceased more harshly than otherwise because of the deceased’s drug consumption. Id.; see also State v. Hendrix, 270 S.C. 653, 660-661, 244 S.E.2d 503, 507 (1978) (including the intoxication of the deceased under its analysis of the imminent peril element of self-defense and stating intoxication would provide a basis for the defendant to judge the conduct of his adversary more harshly than otherwise).

It has long been the law in this state that “when a person is justified in firing the first shot, he is justified in continuing to shoot until it is apparent that the danger to his life and body has ceased.” Hendrix, 270 S.C. at 661, 244 S.E.2d at 507 (internal quotation omitted). While “[t]he rule is that ordinarily one is not justified in shooting or employing a deadly weapon after the adversary has been disarmed or disabled,” where a person fired in rapid succession and the deceased did not hit

the ground until after the last shot was fired, the Court has held the person was acting in self-defense as a matter of law. Id. at 661-662, 244 S.E.2d at 507.


Recently, the South Carolina Supreme Court examined a case with an issue similar to the one presented in Appellant's case, but with important distinctions. In State v. Marin, 415 S.C. 475, 481, 783 S.E.2d 808, 811 (2016), Marin challenged the trial judge's refusal to instruct the jury that "one who is acting in self-defense and has the right to fire a first shot has the right to continue shooting until it is apparent that the danger of death or serious bodily injury has ended." At the outset, the Court made clear that Marin's request was an accurate statement of the law. Id. at 482, 783 S.E.2d at 812. However, the Court found no error in the trial judge's failure to instruct the jury on this accurate statement of the law because "the experienced and excellent trial judge gave a thorough and comprehensive self-defense charge." Id. at 483, 783 S.E.2d at 813. Important to the Court's analysis, the trial judge in Marin went "well beyond the general State v. Davis elements." Id. According to the Court, "[w]hile the 'continuing to shoot' charge may have been appropriate, its absence [did] not mandate reversal" because the "essence of the charge was encompassed in the jury instructions, particularly the instruction that 'a person may use such force as is reasonably necessary even to the point of taking human life where such is reasonable.'" Id.

Unlike the trial judge in Marin, the judge in the instant case did not "well beyond" the general self-defense instruction. See Tr. 288, l. 5 – Tr. 290, l. 13. In fact, the trial judge referred to his instruction as "succinct" and his "standard charge." Tr. 232, l. 25 – Tr. 233, l. 1. The "essence" of the requested charge, which was undoubtedly an accurate statement of the law, was not encompassed within the instructions given. Importantly, the judge did not instruct the jury that a "person may use such force as is reasonably necessary even to the point of taking human life where such is reasonable" as the judge in Marin did.

The trial judge erred in refusing to charge the jury in the context of self-defense that if a defendant is justified in firing the first shot, the defendant is justified in continuing to shoot until it is apparent that the danger to his life and body has ceased. All parties agreed Appellant was entitled to a self-defense instruction. In accordance with controlling South Carolina law, Appellant requested the self-defense instruction be tailored to the specific facts and circumstances presented by the evidence before the jury. Despite Appellant requesting an undoubtedly correct statement of the law be charged to the jury and the facts supporting the request, the trial judge erroneously refused to issue the instruction. The “succinct” and “standard” charge given by the judge did not encompass the law Appellant sought for the jury to know and it in no way conveyed that Appellant could continue to shoot until the danger passed. The judge’s refusal to issue the instruction was reversible error.

CONCLUSION

Appellant respectfully requests this Court reverse his conviction and remand for a new trial.


Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of November, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Barnwell County

Doyet A. Early, III, Circuit Court Judge

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

DEMONTAY MARKEITH PAYNE,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Melody J. Brown, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Demontay Markeith Payne, #373994, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 26th day of November, 2018.

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

SUBSCRIBED AND SWORN TO before me
this 26th day of November, 2018.

Meredith Snyder Bay (L.S)
Notary Public for South Carolina
My Commission Expires: July 26, 2028.