STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Aiken County

Honorable DeAndrea G. Benjamin, Circuit Court Judge

Opinion No. 2018-UP-458

THE STATE,

RESPONDENT,

V.

ROBIN RENEE HERNDON,

APPELLANT

APPELLATE CASE NO. 2016-001109

PETITION FOR REHEARING

Appellant petitions for rehearing on the third issue raised in appellant's brief regarding the trial court's failure to give the required charge on circumstantial evidence from State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013). Respectfully, the Court's opinion that the error is harmless fails to consider the evidence in the case and the relevant law. If the Logan error in this case is harmless, it is difficult to imagine any case where the error would be prejudicial and that would render the Supreme Court's mandate that the charge be given when requested a nullity.

This Court's analysis appears to have ended at the language of the jury charge itself and failed to consider both the mandatory language of Logan and the evidence in the case. The Supreme Court made the Logan charge mandatory for all cases that followed. The Supreme Court would not have made the charge mandatory if its language were merely surplusage. Therefore, relying solely on an inadequate circumstantial evidence charge to find the error harmless is improper and is contrary to the Supreme Court's explicit instructions in Logan.

Second, this Court failed to consider the evidence in the case and concluded the error was harmless solely on the language of the charge. See, e.g., State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016) (reversing on an erroneous jury charge after examining the facts of the case to decide whether the error was harmless). The error here cannot be harmless beyond a reasonable doubt because of the requested charge dealt precisely with the nature of the evidence in this specific case. See Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018) (examining the precise nature of the error and how it affected the specific case in conducting a prejudice analysis in a PCR case). The State's case against Herndon was entirely circumstantial. No direct evidence existed that disproved self-defense. The State's entirely circumstantial case was pitted against Herndon's direct evidence that she acted in self-defense. A erroneous charge on circumstantial evidence cannot be harmless where the defendant's case is based on direct evidence and the State's case is based solely on circumstantial evidence.

The State's best evidence was the pathologist's inadmissible testimony that asked the jury to infer that Herndon shot Rowley as he walked up the steps. The State's case was built on speculative inferences and the Logan charge that circumstantial evidence must generate consistent inferences which point conclusively to guilt was essential. Not giving the Logan charge allowed the jury to convict Herndon based on circumstantial evidence that merely

portrayed her conduct as suspicious. The Logan charge would have told the jury that this means the State's proof failed.

Every significant piece of evidence the State used to disprove self-defense and convict appellant required the jury to make inferences. As explained in Issue 2, the pathologist's testimony about the angle of the bullet in Rowley's body required the jury to infer that Rowley was shot on the steps, not inside the house. This testimony required the jury to disregard an inference that Rowley may have been bent over as he charged Herndon.

Burton's testimony that she did not see any physical confrontation in the yard required the jury to make several logical leaps. It required the jury to infer that the shoves Herndon described could only have occurred during the limited time Burton was watching and that her vision was not obscured by the trees in her yard. Even the solicitor conceded that Burton may not have seen the shoving described by Herndon when he said, "Lacey might not see that first push." R. 1326, ll. 11 – 12. The jury had to infer that Herndon's description of the assaults inside the house could not have occurred within the 30-60 seconds described by Burton. From all of Burton's testimony, the jury was then required to make the additional inference that Herndon was lying and intentionally killed Rowley from some evil motive.

The evidence from the crime scene required additional inferences. The State argued no struggle occurred inside the house. Accepting this argument required the jury to infer that no struggle occurred from the fact that the furniture was not disturbed. The State asked the jury to make this inference despite the crime scene investigator's admission that the furniture's placement also did not conclusively disprove that a struggle occurred inside the house. The State asked the jury to infer from the cigarette butt and lighter on the porch that Rowley was shot outside instead of him dropping a cigarette before entering the house and losing his lighter after

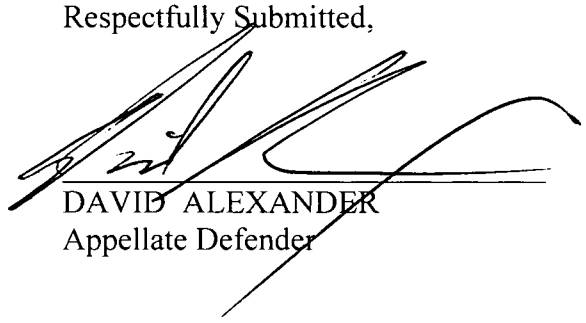
being shot in the throat, falling twice, and urgently treated by Herndon, the police, and paramedics. The State asked the jury to further infer Rowley was shot outside because of the lack of blood inside the house, instead of inferring that Rowley was shot inside the house, grabbed his throat, walked outside, and then began bleeding externally when Herndon pulled away his hand to see his wound. Making this inference also required disregarding the pathologist's testimony that Rowley's bleeding was largely internal and his "chest cavity was full of blood." R. 582, ll. 4 – 19.

The State's argument about the minor inconsistencies between Herndon's videotaped statement and her trial testimony asked the jury to infer Herndon was lying instead of piecing together what she remembered from a horrific, traumatic incident. In the videotaped statement, the police officer recognized this exact probability when he told the blood-soaked Herndon, "Let's back up and get some stuff, right? I know you probably want . . . It'll come to you a little bit more as time goes. . . . you know that you can change and look at something different for a minute, and it'll come back, some of it." (State's Ex. 34B). The State also asked the jury to infer—or speculate—from the severe bruising of Herndon's arms in Alves's photographs that she may have self-inflicted these wounds because several days had passed in the jail.

The State's inferences from circumstantial evidence were countered by the direct evidence of self-defense from Herndon. Herndon unequivocally testified that Rowley threatened her, assaulted her in her yard and in her home, and that she thought he was going to kill her. R. 824, l. 2 – 829, l. 19. She testified that she was "terrified." R. 885, ll. 9 – 17. The State's inferences asked the jury to believe that Herndon, a seasoned law enforcement officer—who minutes before, left work to give Rowley money to go to a doctor's appointment—then killed Rowley because she was mad that he threw her keys on the roof.

The State's inferences from the circumstantial evidence were not consistent. The State's inferences did not point conclusively to Herndon's guilt beyond a reasonable doubt. The State's inferences barely portrayed Herndon's behavior as suspicious. Had the trial judge given the defendant's requested Logan charge, the jury would have concluded that the State's proof failed. This Court should grant rehearing and reverse.

Respectfully Submitted,



DAVID ALEXANDER
Appellate Defender

This 21st day of December, 2018.

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THE STATE,

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon William F. Schumacher, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Robin Renee Herndon, #368111, at Leath Correctional Institution, 2809 Airport Road, Greenwood, SC 29649, this 21st day of December, 2018.

David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 21st day of December, 2018.

Courtney Powers (L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.