STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

ALTON JAMAUL CROSBY,

APPELLANT

APPELLATE CASE NO 2017-000282

Appeal from Spartanburg County

Honorable R. Keith Kelly, Circuit Court Judge

Opinion No. 2019-UP-035

PETITION FOR REHEARING

Pursuant to Rules 221 and 240, SCACR, counsel for appellant would petition for rehearing on this Court's finding that self-defense was not applicable in the case, and on this Court's failure to address appellant's **entire** appellate question regarding the accompanying companion self-defense issue of appellant's involuntary waiver of his right to remain silent and the submission of his testimony at trial on the subject of self-defense **per the trial judge's remark that no self-defense charge would be given sans his testimony**, and whereinafter the trial judge ultimately denied the self-defense charge despite his testimony. In support of this motion counsel would submit the following points.

This was an assault and battery case. Appellant raised the following issue on appeal:

> The trial judge erred in denying appellant's motion for a mistrial because the Fifth Amendment was violated when appellant was coerced into involuntarily waiving his right to remain silent and testifying in order to obtain a self-defense jury instruction, which the trial judge ultimately failed to charge despite appellant's testimony, because the state's evidence supported the self-defense claim in the case.

After the state rested, appellant stated that "[he] decided not to testify." R. 23, l. 19. The defense rested and then counsel in effect raised the issue of self-defense in the case. The trial judge responded by stating that self-defense had not been raised and that no self-defense instruction would be charged unless appellant testified in the case. R. 24, l.5 – R. 26, l.11. **Counsel asked "you will not instruct [self-defense] if [appellant] does not testify," and the trial judge answered "yeah."** R. 26, lines 2-4. As a result, appellant, who previously informed the trial judge that he did not wish to testify, (R. 23, lines 19-21), was forced to reverse his initial decision not to testify and actually testify in his defense of self-defense at trial, presumably because this was the only way to secure a self-defense jury instruction in the case. R. 26, lines 1-25.

Thus, appellant testified involuntarily at trial. Appellant testified that he was living at Miracle Hill Rescue Mission and that Talford lived there also, and that when he passed Talford in the stairwell in question, he (Talford) hit him, and that he felt trapped and fearful so he responded in effect in self-defense when he struck Talford. Also, there was a prior altercation between the two men that occurred before this event. R. 28, l. 1 – R. 31, l. 19. After appellant testified, the defense rested. R. 32, l. 1-3.

Then, defense counsel moved for a mistrial as follows:

> [Appellant] would not have testified but for the fact that he thought he had to [testify] to get a charge of self-defense...as the Court instructed some evidence from the defense would have to be presented to get the charge of self-defense. R. 34, l. 15-19.
>
> The evidence in the case that was presented was there was a video...[which showed] that Mr. Talford punched Mr. Crosby first...I believe that raised the question that any actions on his part was in self-defense..R. 35, lines 8-13.
>
> Again, [appellant] did not want to testify at trial and felt like he needed to get the charge of self-defense, and as the case law proves or demonstrates that one would be entitled to that charge regardless of whether or not we present any evidence. R. 35, l. 17-21.

The trial judge subsequently ruled that appellant was not entitled to a self-defense jury charge. R. 36, l. 17 – R. 38, l. 7; R. 39, l. 2-6.

Then, after the trial judge improperly coerced appellant into waiving his right to remain silent and into testifying at trial in violation of the Fifth Amendment, and article 1, §12 of the South Carolina State Constitution, the trial judge failed to give a self-defense jury charge, which was supported by the evidence.

On appeal, this Court held as follows:

> **PER CURIAM**: Affirmed pursuant to Rule 220(b), SCACR, and the following authorities: *State v. Santiago*, 370 S.C. 153, 159, 634 S.E.2d 23, 26 (Ct. App. 2006) ("An appellate court will not reverse the [circuit court's] decision regarding jury charges absent an abuse of discretion."); *id.* ("A self-defense charge is not required unless the evidence supports it."); *State v. Douglas*, 411 S.C. 307, 318, 768 S.E.2d 232, 238-39 (Ct. App. 2014) (listing the elements of self-defense as: (1) the defendant must have been without fault in bringing on the difficulty; (2) the defendant must have (a) been in imminent danger of losing his life or sustaining serious bodily injury or (b) believed he was in such imminent danger; (3) if his defense is based on his belief of imminent danger, "a reasonably prudent man of ordinary firmness and courage would have entertained the same belief." If he actually was in imminent danger, the circumstances would have warranted "a man of ordinary prudence, firmness and courage" to act as he did; and (4) he had "no other probable means of avoiding the danger" than to act as he did); *State v. Bryant*, 336 S.C. 340, 346, 520 S.E.2d 319, 322 (1999) (stating the appellant

> easily could have avoided the conflict by leaving the open parking lot where the situation arose); *State v. Inman*, 395 S.C. 539, 656, 720 S.E.2d 31, 45 (2011) ("The decision to grant or deny a mistrial is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion amounting to an error of law."); *id.* (concluding that the circuit court correctly denied the defendant's motion for a mistrial because he did not show prejudice).

However, the Court failed to address the self-incrimination issue. The trial judge improperly coerced appellant into waiving his right to remain silent and into testifying at trial in violation of the Fifth Amendment, and article 1, §12 of the South Carolina State Constitution, the trial judge failed to give a self-defense jury charge, which was supported by the evidence. Appellant's Fifth Amendment's right to remain silent was violated in this case. Appellant invoked his right to remain silent, but subsequently withdrew and waived this right and testified per the belief that his self-defense claim would not be entertained sans his testimony. An accused has a right to remain silent, and not testify, and put the state to its burden of proof. State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987) citing to State v. Sloan, 278 S.C. 435, 298 S.E.2d 92 (1982); State v. Atkins, 353 S.C. 312, 577 S.E.2d 450 (2003). See Doyle v. Ohio, 426 U.S. 610 (1978), where the Court held that an accused has the right to remain silent and the exercise of that right cannot be used against him. The Fifth Amendment provides that no person shall be compelled in any criminal case to be a witness against himself. See also South Carolina State Constitution Article 1, §12. In Brown v. State, 340 S.C. 590, 533 S.E.2d 308 (2000), the Court held that "the decision to testify or not is as perilous one [because] if a defendant does not testify, he [will] forego the opportunity to tell the jury his version of events [and] on the other hand, if a defendant chooses to testify, he subjects himself to cross-examination, including possible impeachment with prior convictions [but nonetheless] a waiver of this Fifth Amendment right must be knowing and voluntary.

In addition, this Court erred in ruing that self-defense did not apply in this case. Only three witnesses testified at trial: appellant and state's witnesses Calvin Vinson and Officer Shanetta Thompson. Calvin Vinson, who was the Director of the Miracle Hill Rescue Mission testified that he found Talford bleeding and lying at the bottom of a staircase of the building on December 31, 2015. Vinson stated that he was told that an incident occurred between petitioner and Talford, and that the event was captured on a (DVD) surveillance camera. R. 5, l. 11 – R. 8, l. 25.

Police officer Shanetta Thompson testified that she found Talford injured upon her arrival at the scene on the date in question, and that she arrested appellant at the scene after watching the DVD taped recording of the event. R. 10, l. 1 – R. 15, l. 18. However, on cross examination, Officer Thompson admitted that the videotape showed that Talford initiated the contact with appellant during the physical altercation and that Talford punched appellant. R. 16, lines 1-10.

Indeed, the evidence presented at trial revealed that there was a physical altercation between appellant and Talford at the top of a staircase inside that building and that Talford was the aggressor who hit appellant first and that appellant then struck Talford about the head in self-defense. R. 3, l. 14 – R. 4, l. 8.

Appellant's self-defense claim was supported by the videotape and the testimony of the state's witness (police officer). Defense counsel's opening statement also reveals this when he asked the jury "to pay close attention to the video...[in order to] see that [appellant] was defending himself." R. 4, l. 11-25. The trial judge in effect coerced appellant to prove self-defense by forcing to him to testify at trial rather than allow reliance on the state's evidence presented at trial sans his testimony on the issue of self-defense. In effect, this forced appellant to prove self-defense by testifying when it was the state's burden to disprove self-defense. Here,

Talford was the aggressor who began the fight and thereafter, appellant acted out of fear in self-defense. In a case of self-defense, the law to be charged is determined from the facts presented in the case. State v. Bryant, 336 S.C. 340, 520 S.E. 2d 319 (1999). If there is any evidence in the record from which it can be reasonably inferred that an accused justifiably inflicted a wound in self-defense, then the accused is entitled to a charge on the law of self-defense. State v. Stone, 285 SC 386, 330 S.E. 2d 286 (1985). In order to establish self-defense, the defendant must have been without fault in bringing on the difficulty and was or believed he was in actual imminent danger of losing his life or sustaining serious bodily injury, which a reasonably prudent person would have so believed, and that he had no other means of avoiding the danger. State v. Davis, 282 S.C. 45, 317 S.E.2d 452 (1984). Moreover, when one claims self-defense, the state is required to disprove the elements of self–defense beyond a reasonable doubt. State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489 (1998); State v. Williams, 400 S.C. 308, 733 S.E.2d 605 (2012). This Court erred in upholding the trial judge's failure to charge self-defense in the case!

WHEREFORE, based on the foregoing points, counsel for appellant would request a rehearing on the applicability of a self-defense charge, and on the accompanying companion question referencing error regarding appellant's involuntary waiver of his right to remain silent and the submission of his testimony regarding self-defense per the trial judge's warning that no such charge would be given sans his testimony.

Respectfully Submitted,

WANDA H. CARTER
Deputy Chief Appellate Defender

This 7th day of February, 2019.

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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 Alton Jamaul Crosby, at 504 Franklin Street, Spartanburg, SC 29301, this7th day of February, 2019.

Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 7th day of February, 2019.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.