STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

HERSHEL MARK JEFFERSON, JR.,

APPELLANT

APPELLATE CASE NO 2016-001799

Appeal from Charleston County

Honorable Carmen T. Mullen, Circuit Court Judge

RECEIVED
FEB 07 2019
SC Court of Appeals

Opinion No. 2019-UP-034

PETITION FOR REHEARING

Pursuant to Rules 221 and 240 SCACR, counsel for appellant would petition for rehearing on this Court's holding that appellant's direct appeal issue (citing to error where a police officer, rather than the jury, concluded that appellant was the aggressor in connection with a self-defense claim) was not preserved for appellate review on the ground that the objection regarding the police officer's testimony in question was not a specific objection when in fact, the objection was contextually apparent under Rule 103, SCRE, which rendered the matter properly presented to this Court. In support of this matter, counsel submits the following points.

(1) This case involved a fight between appellant and his girlfriend Felicia Edwards. Appellant was convicted of CDV. At trial, the judge charged self- defense.

(2) The state's case consisted of the testimony of only three witnesses at trial: appellant's girlfriend Felicia Edwards, neighbor Amanda Powell, and police officer Michael Burton. Appellant neither testified nor presented witnesses in his defense at trial. State's witness Felicia Edwards testified that she and appellant were having relationship issues on July 3, 2014, as they argued and debated separating from cohabitating at her residence when the alteration between them became physical. Edwards stated that she fled to her girlfriend's residence on that evening, but that appellant entered there, "punched her" in the face, and then placed her in a "headlock" and hit her again. Edwards admitted that she started hitting appellant back and that they began to tussle. Edwards stated that the fighting ended when she hit him in the head twice with a candle and used the glass candle holder to cut him on his arm until he bled. R. 20, l. 1 – R. 37, l. 2.

Edwards' friend Amanda Powell, in whose house the events in question took place, testified that she witnessed the fighting and responded by calling 911. Powell explained that the fighting between the two was "mutual" and that the fighting escalated. R. 45, l. 7 – R. 48, l. 5.

(3) At the close of the state's case in chief, defense counsel made the following motion:

> Mr. Cochran: Your Honor, at this time I will move for a directed verdict. I would move for a mistrial based on my previous objection and the testimony for the ultimate issue of the case in terms of [appellant] being the primary aggressor...would in the same vein I would argue that the State has not proven beyond a reasonable doubt that [appellant] is not acting in self defense....[appellant] defending himself causing scratches to her while she was attacking him with a broken piece of glass.
>
> Solicitor: [Appellant] entered the house, began hitting Ms. Edwards and that she only hit him back in order to fend him off, not just her, but the independent witness stated such things as well.

> The Court: All right. Well, I respectfully am going to deny the motion for directed verdict. I believe the victim's testimony was that he punched her in the face to begin this entire incident. And based on that testimony alone it should go to the jury to determine.
>
> The Court: I denied it. The mistrial motion, yes. R. 61, l. 21 – R. 63, l. 14

The reason underlying the abuse motion was based on the police officer's testimony answering the factual question that appellant was the aggressor. The testimony and objection follow:

Police Officer Michael Burton testified that he was dispatched to the crime scene on the date in question, and that after he recorded statements from Edwards and Powell and then spoke with appellant, he made the decision that appellant was the primary aggressor in the case. Officer Burton's testimony on this ultimate question of fact follows:

> Q. As a result of your investigation you arrested the Defendant, correct?
>
> A. Yes. We found him to be the primary aggressor.
>
> Defense Counsel: Objection. R. 56, lines 20-25.
>
> Q. And you determined – you made a primary aggressor determination, correct?
> A. Yes, sir. R. 58, lines 12 – 14.
>
> Q: You personally made contact with Mr. Jefferson?
>
> A. Yes, sir.
>
> Q. You said you got this side of the story as well?
>
> A. Yes, sir.
>
> Q. And you determined – you made a primary aggressor determination, correct?
>
> A. Yes, sir.

Q: And the reason you had to do that was because both parties had injuries, correct?

A. Yes, sir.

Q. Both parties were claiming opposite things, correct?

A. Correct. Tr. 84, lines 6-20.

Q. And Mr. Jefferson's injuries, he had an injury I believe to his ear, correct?

A. Yes, sir. He had injuries to his right arm, left eye and his left ear.

Q. The nature of those injuries would be I guess more lacerations from the glass that was broken?

A. Correct. R. 59, l. 23- R. 60, l. 5.

(4) Appellant raised the following issue on appeal:

> The trial judge erred in allowing the state's police officer to testify that appellant was the primary aggressor in this criminal domestic violence case because this pivotal assessment invaded the province of the jury, particularly since self-defense was raised and charged, as only the jurors were assigned with the duty of deciding the factual issues as trial.

(5) This Court held as follows:

This issue is not preserved because Jefferson did not make a contemporaneous objection on a specific ground." *See State v. Holliday*, 333 S.C. 332, 338, 509 S.E.2d 280, 283 (Ct. App. 1998). Here, Jefferson objected twice to Officer Burton's testimony but did not give a specific ground at the time the objections were made, and the basis for the objections are not apparent from the context of the discussion. *See State v. Byers*, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011) ("For an objection to be preserved for appellate review, the objection must be made at the time the evidence is presented and with sufficient specificity to inform the circuit court judge of the point being urged by the objector." (internal citation omitted)). The record shows the parties apparently discussed the objections in an off-the-record bench conference, but neither the trial court nor Jefferson placed the basis for the objections or the trial court's rulings on the record. *See State v. Fletcher*, 363 S.C. 221, 258, 609 S.E.2d 572, 591 (Ct. App.

> 2005) ("An objection made during an off-the-record conference which is not made part of the record does not preserve the question for review."), *rev'd on other grounds*, 379 S.C. 17, 664 S.E.2d 480 (2008). Jefferson raised the specific reason for his previous objections—that Officer Burton's testimony improperly commented on an ultimate factual issue in the case—in his motion for a mistrial. However, raising the specific ground for the objections for the first time in a motion for a mistrial is not sufficient to preserve it for appellate review. *See State v. Morris*, 307 S.C. 480, 485, 415 S.E.2d 819, 823 (Ct. App. 1992) ("If a party fails to make a proper contemporaneous objection to the admission of evidence, he cannot later raise the issue by a motion for mistrial.").

(6) The question of the identity of the aggressor was a fact question that should have been determined by the jury rather than police officer Burton's conclusion, particularly where appellant claimed self-defense, and where an element of self-defense is the absence of aggression in to the extent that appellant must have been without fault in bringing on the difficulty. The officer testified regarding having found appellant to be the primary aggressor as follows:

(7) Under Rule 103, SCRE, a timely objection on a specific ground is necessary if the specific ground is not apparent from the context, which means contextually based objections are entertainable on appeal. State v. Cherry, 353 S.C. 263, 577 S.E. 2d 719 (2001). In Cherry, the Court held that although a general objection to the officer's testimony was made, it was clear that "the nature of [the] objection was contextually apparent." Here, in the instant case, it was clear that from the context of the objection supported by the obvious narrative that said objection referenced testimony resolving a fact question, i.e., the identity of the aggressor, which only the jury had the duty to decide.

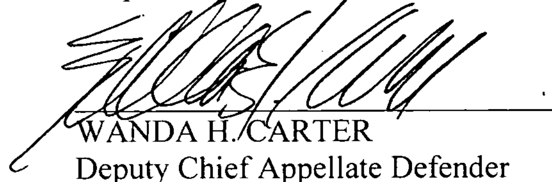
(8) The right to a jury trial is considered "inviolate." See South Carolina State Constitution Art. 1, §14. Note that South Carolina State Constitution Article V, § 21 prevents judges from commenting on the facts and in effect is designed "to preserve inviolate the jury's fact finding function" ...[as] all questions of fact are to be decided exclusively by the jury."

State v. Norris, 270 S.C. 552, 243 S.E.2d 440 (1978). It is well settled that all questions of fact are for the jury to decide. State v. Smith, 227 S.C. 400, 88 S.E.2d 345 (1955).

In the case at bar, the jurors had to decide whether Edwards or appellant was the aggressor by determining at what point the altercation began in earnest during the fight between them on that night, and who was the aggressor for the purpose of deciding on whether appellant was guilty of criminal domestic violence or whether appellant acted in self-defense therein nullifying any guilt on the domestic violence charge. Here, both actors were fighting mutually, and both possessed injuries and defensive wounds/scars, and both received medical attention for their injuries. Therefore, law enforcement's pronouncement of the identity of the aggressor in this case, whether primary or otherwise, invaded the province of the jury by summarily determining the ultimate fact questions in this case, i.e. whether appellant was guilty or not guilty by reason of self-defense. Counsel's objection to the officer's aggressor assessment, which invaded the jurors' duty, was contextually apparent from the context of the surrounding narrative; and therefore, this issue was preserved for this Court's review, particularly since self-defense applied and was charged in the case.

WHEREFORE, based on the foregoing points, counsel for appellant would request a rehearing on the issue raised above regarding this Court's holding on the appeal.

Respectfully Submitted,



WANDA H. CARTER
Deputy Chief Appellate Defender

This 7th day of February 2019.

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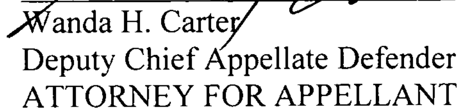
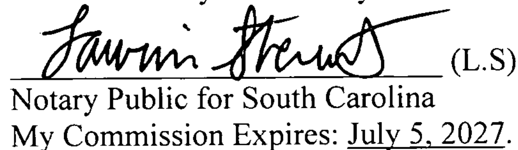
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Joshua A. Edwards, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Hershel Mark Jefferson, Jr., at 2167 Frank Gore Road, Little River, SC 29566, this 7th 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.