

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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

Appellate Case No. 2016-000616

THE STATE,

Petitioner,

vs.

DAVID ALAN WHITE,

Respondent.

**REPLY TO RETURN TO
PETITION FOR WRIT OF CERTIORARI**

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STATEMENT OF ISSUES ON APPEAL

I.

The trial court did not err in declining to admit Respondent's hearsay statement that the victim told him he kept a gun and knife in his moped because it was not relevant since Respondent never testified he thought or was worried the victim was armed when he slashed the victim's throat. White was not limited in presenting his defense to either accident or self-defense.

II.

The trial court did not err in declining to instruct the jury on self-defense since no evidence was presented that Respondent was in imminent danger of death or great bodily injury or that he had a reasonable belief he was in imminent danger of death or great bodily injury.

ARGUMENT

I.

The trial court did not err in declining to admit Respondent's hearsay statement that the victim told him he kept a gun and knife in his moped because it was not relevant since Respondent never testified he thought or was worried the victim was armed when he slashed the victim's throat. White was not limited in presenting his defense to either accident or self-defense.

White argues that White's testimony that Johnson told him he kept a knife and gun in his moped was not hearsay and should have been admissible because it is probative of the reasonableness of his belief Johnson might be armed. However, Johnson never testified he thought or even considered whether Johnson might be armed. Further, there was no evidence White was aware that Johnson accessed his moped prior to White slashing Johnson's throat. Finally, White does not address the lack of foundation showing self-defense at the time he moved to admit the hearsay statement, and White's counsel never revisited the issue again at the end of direct examination even if testimony supporting self-defense was elicited later in the examination.

The trial court could not have erred because at the time White's counsel sought for the trial court to allow this testimony, there was no evidence supporting self-defense, only possibly accident. White's testimony at that point in time was, if anything, contrary to a self-defense claim. 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 Johnson; (3) he did not mean to cut Johnson; and (4) he did not aim for Johnson's throat. R. p. 320, lines 14-23. He further testified he never met Johnson 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.

The Court of Appeals opinion is based in large part on a misunderstanding of the record. The opinion states: “At trial, White testified he became uncomfortable and felt threatened throughout the night, in part because of Johnson’s statement and decided to leave. 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.**” White, 821 S.E.2d at ___ (emphasis added). However, White never testified he considered the possibility Johnson had access to weapons or testified he contemplated the possibility Johnson was armed when he slashed Johnson’s throat. The Court of Appeals reiterated this point when it found the present case was distinguishable from State v. Washington, 367 S.C. 76, 623 S.E.2d 836 (Ct. App. 2005), *aff’d as mod.*, 379 S.C. 120, 665 S.E.2d 602 (2008), stating: “White testified Johnson said he kept a gun and a knife on his moped, and Johnson accessed his moped before the incident. **Because White had reason to believe Johnson stored weapons on his moped and accessed his moped prior to the stabbing**, we find Johnson’s statement was relevant to White’s self-defense claim.” White at ___ (emphasis added). However, no evidence was produced to show that White was aware or believed that Johnson accessed his moped prior to White slashing Johnson. The record simply does not support the Court of Appeal’s holding.

Since White never testified that he fostered a belief or concern that Johnson was armed at the moment White struck him with the knife, the testimony about the knife and gun stored in the moped was irrelevant. Additionally, in the absence of a foundation supporting self-defense, the statement constituted hearsay.

II.

The trial court did not err in declining to instruct the jury on self-defense since no evidence was presented that Respondent was in imminent danger of death or great bodily injury or that he had a reasonable belief he was in imminent danger of death or great bodily injury.

The Court of Appeals found there was some evidence White believed he was in imminent danger, and based its determination on testimony Johnson kept a gun and knife in his moped, and that Johnson accessed the moped at some point before the assault supported self-defense. However, White never testified he was concerned Johnson was armed and never testified he observed Johnson access the moped, or was concerned Johnson accessed the moped at the time he swung his knife at Johnson. Completely absent from the record is any indication White thought Johnson might be armed when he decided to swing his knife in Johnson's direction.

The elements of self-defense are as follows: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have actually believed he was in actual danger of losing his life or sustaining serious bodily injury, or he must have been in actual imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based on his belief of imminent danger, the defendant must show that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that he was actually in imminent danger and that the circumstances were such that 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 loss of his life; and (4) the defendant had no other probable means of avoiding the danger. State v. Rivera, 389 S.C. 399, 699 S.E.2d 157

(2010). If evidence is lacking supporting a single element of self-defense, then a defendant is not entitled to an instruction on self-defense. See State v. Lockamy, 369 S.C. 378, 631 S.E.2d 555 (Ct. App. 2006) (noting all four elements must exist for a defendant to be entitled to a self-defense instruction and concluding appellant was not entitled to an instruction on self-defense because the evidence failed to show the appellant did not have any other means to avoid the danger).

No evidence was presented White was at risk of death or serious bodily injury or that 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 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).

The Court of Appeals stated, "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.**" White, at _____. However, 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.

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 attempted 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.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be granted and Respondent's convictions and sentences should be affirmed. If this Court should see fit to grant the petition, the State respectfully requests permission to more fully brief the issues herein.

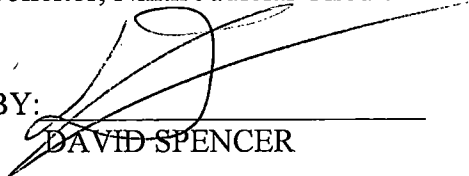
Respectfully submitted,

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March 15, 2019

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Appellate Case No: 2019-000029

THE STATE,

Petitioner,

vs.

DAVID ALAN WHITE,

Respondent.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the Reply to the Return to the Petition for Writ of Certiorari on Respondent by delivering two copies of the same addressed to his attorney of record, Wanda H. Carter, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, South Carolina 29211.

I further certify that all parties required by Rule to be served have been served.
This 15th day of March, 2019.



Anne A. Mueller
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March 15, 2019

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RECEIVED

MAR 15 2019

S.C. SUPREME COURT

RE: State v. David Alan White
Appellate Case No: 2019-000029

Dear Ms. Carter:

Enclosed please find two copies of my Petition to Relax Rule 208(a)(2) SCACR and 209(a) SCACR and Motion for Extension and two copies of the State's Reply to the Return to Petition for Writ of Certiorari in the above case.

Sincerely,

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

DS/aam
Enclosures

~~cc: Honorable Daniel E. Shearouse (with original and 6 of both motion and Reply enclosed)~~
Victim Advocacy Division