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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County
The Honorable J. Ernest Kinard, Jr., Circuit Court Judge

Appellate Case No. 2013-002526

THE STATE,

Respondent,

v.

CHARLES GREEN, JR.,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

The trial court correctly denied Appellant's request to charge the jury on self-defense where evidence failed to support such a charge.

STATEMENT OF THE CASE

Charles Green ("Appellant") was indicted for attempted murder, possession of a weapon during a violent crime, and unlawful possession of a weapon. (R. 174-79) He proceeded to a jury trial before the Honorable J. Ernest Kinard, Jr., on November 18, 2013. Appellant was convicted of the lesser offense of assault and battery of a high and aggravated nature ("ABHAN") and sentenced to fifteen years. (R. p. 175) He was also convicted of unlawful possession of a weapon and possession of a weapon during a violent crime, receiving sentences of two and five years respectively. (R. p. 175)

STATEMENT OF FACTS

On April 6, 2011, Clifton Henry ("Henry") suffered shotgun pellet wounds to his left hip, thigh, and arm. (R. pp. 15-18) Luckily, the wounds were superficial, not appearing to impact bones or vital organs. (R. pp. 15-18) The shooting occurred at "a small shopping complex," consisting of a Food Lion, a Chinese restaurant, and other stores. (R. p. 27) Shotgun wadding was recovered at the scene. (R. pp. 31-33)

In April 2011, Henry lived on Murray Drive in the Burton area of Beaufort County. On April 6, 2011, Henry went to his friend Channon Preston's ("Preston") house, also on Murray Drive. (R. p. 60) As Henry and Preston sat outside, Appellant, also a resident of Murray Drive, arrived with his girlfriend, Ashley Thomas ("Thomas") in a gray Grand Marquis. (R. pp. 60-61; pp. 85-86) The couple went inside the house then Appellant came back out. According to Preston:

> ...[Appellant] was telling me and Channon he had just spent $700. So Channon said, what did you spend it on? And he never said. Channon said, well, you better give us some of that money. [Appellant] throw [sic] two $20 bills on the table and said, you two n*****s take that.

(R. p. 60) Henry and Preston took the money and went to Food Lion. (R. p. 60) At Food Lion, Appellant encountered Appellant and Thomas again:

> And [Appellant] came up to us, he was – tears was coming out of his eye. [Appellant] say, I just been playing, man, let me get my money back. So we both [Preston and Henry] reach in our pocket and hand him $20 back. And [Appellant] walk off. And when [Appellant] walk off, he went to the car, sat in the car, and spin around with the gun and shot the gun. The pellets catch me in my quarters and my arm. And [Appellant] drove off, say, now y'all so-and-so laugh at that.

(R. pp. 62-64) Henry reported Appellant used a double-barrel sawed-off shotgun retrieved from the passenger side floorboard. (R. p. 65) Henry denied being armed at the

Food Lion or at Murray Drive. (R. p. 65) Henry also denied any altercation between himself and Appellant that day prior to the shooting. (R. p. 66) Henry identified Appellant as his assailant from a photo lineup and in court. (R. p. 68; pp. 86-88) Surveillance footage from the Chinese restaurant showed:

> ...[Appellant] get out of the passenger's side of the vehicle as [Victim and Preston] had described, walk over to where they were at, walk back – and what you are talking about is just a matter of a few feet. It's not a huge distance. It's very short distance. Go back to the vehicle, he turns around again, and then gets back in the vehicle and the vehicle flees... .

(R. pp. 91-92)

When officers took Appellant into custody, Thomas shouted, "He didn't start it, they shot at him first." (R. p. 93) Appellant was interviewed but maintained he knew nothing of the incident. (R. p. 94) Appellant did not testify at trial.

ARGUMENT

The trial court correctly denied Appellant's request to charge the jury on self-defense where such a charge is not supported by the evidence.

A trial court is required to charge the current and correct law of South Carolina. See State v. Rayfield, 369 S.C. 106, 119, 631 S.E.2d 244, 251 (2006). "The law to be charged must be determined from the evidence presented at trial." State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). "An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) (citing State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007)); Santiago v. State, 370 S.C. 153, 634 S.E.2d 23 (Ct. App. 2006). "To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." Mattison, 388 S.C. at 479, 697 S.E.2d at 58.

"A self-defense charge is not required unless it is supported by the evidence." State v. Light, 378 S.C. 641, 649, 664 S.E.2d 465, 469 (2008) (citing State v. Goodson, 312 S.C. 278, 440 S.E.2d 370 (1994)). "If there is any evidence in the record from which it could reasonably be inferred that the defendant acted in self-defense, the defendant is entitled to instructions on the defense, and the trial judge's refusal to do so is reversible error." Light, 378 S.C. at 650, 664 S.E.2d at 469 (citing State v. Slater, 373 S.C. 66, 644 S.E.2d 50 (2007)); State v. Frazier, 401 S.C. 224, 233, 736 S.E.2 d 301, 306 (Ct. App. 2013). A defendant must meet four prongs to justify using deadly force in self-defense:

> (1) The defendant was without fault in bringing on the difficulty;
>
> (2) The defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger;
>
> (3) If the defense is based upon the defendant's actual belief of imminent danger, a reasonable prudent man of ordinary firmness and courage would

> have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life; and
>
> (4) The defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

State v. Dickey, 394 S.C. 491, 716 S.E.2d 97, 101 (2011) (*citing* State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489, 493 [1998]). "[W]hen a defendant claims self-defense, the State is required to disprove the elements of self-defense beyond a reasonable doubt." Id.

The evidence in this case simply does not support a jury instruction on self-defense. Appellant fails to meet the first element of self-defense. By all accounts, Henry and Preston were going into the Food Lion grocery store when Appellant drove up alongside them with a shotgun in the passenger floorboard. It is uncontested that Appellant exited the car and approached Henry and Preston, demanding money back. It is uncontested that Appellant returned to his car, turned, retrieved a shotgun from the front passenger floorboard, exited the vehicle, and opened fire. See State v. Wigington, 375 S.C. 25, 649 S.E.2d 185 (Ct. App. 2007) (Where defendant injected himself into verbal argument, removed himself from the argument, then returned with a gun, he was not without fault in bringing on the difficulty). Henry testified that he was unarmed and that there was no altercation; he simply returned Appellant's money as requested. There is no evidence of any weapon other than a shotgun being present at the Food Lion. Because Appellant approached the unarmed Henry, Appellant was not without fault in bringing on the difficulty.

As for the second element, belief he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger, again there

is no evidence to support such a charge. The only evidence presented was that Appellant armed himself. The testimony established that Henry was actually attempting to hide behind the pillar when Appellant pulled the trigger. That Henry had time to assume a defensive position at such close range would in itself seem to negate Appellant's claim that Henry posed a threat. Henry testified that he was unarmed (R. p. 65), he had no prior conflicts with Appellant (R. p. 66), and he never threatened Appellant (R. p. 71). Similarly, absent evidence to support a belief of imminent danger, no evidence exists to support the third element of self-defense. Appellant's comment, "now y'all so-and-so laugh at that," as he drove away indicates that he was not in fear of his own life but rather enjoyed instilling fear in Henry.

As for the final element, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance, again no evidence exists. Appellant had time to return to his car, turn his back, and return to Henry before firing. He safely reached his vehicle and had time to safely retrieve a shotgun. Therefore, it stands to reason that he could have avoided any supposed danger by driving away. Further, Henry had time to hide.

Appellant attempts to construct a self-defense claim from hearsay evidence that his significant other, Thomas, exclaimed as he was arrested, "He didn't start it, they shot at him first." Even if accepted as evidence, this exclamation does not even identify who "they" are or what incident she is referring to.[1] Even if we assume she was referring to

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[1] In denying Appellant's request for a charge on self-defense, Judge Kinard stated:

> … there's no evidence, no direct testimony of it. And it's hearsay on hearsay. No bullet markings, he had no guns on him. They took him straight there. Forget it.

(R. p. 112) While it is the minority view, many states, including Georgia, find that, "[h]earsay evidence is without probative value and will not establish fact in issue even in the absence of a timely objection."

the incident at Food Lion, the argument still fails. It was Appellant who armed himself and sought Henry out, negating the possibility that Appellant was without fault in bringing on the confrontation. Moreover, as Appellant had time to safely return to his car and Henry had time to cringe behind a pillar, it would seem that even Ashley's hearsay statement would fail to meet the fourth element of self-defense.

Appellant cites to "facts" not in the record. There is no evidence that Henry "instigated a conflict at Food Lion." In fact, the only evidence in the record indicates that Appellant initiated the encounter when he pulled up, exited his car, and approached Henry and Preston. Further, the fact that Preston's mother had her gun stolen was in no way linked to this incident. Preston's mother did not know who had stolen the gun, and no time frame was given. (R. pp. 44-46) Appellant's girlfriend never "gave a statement" or testified. At best, there is hearsay evidence that she exclaimed as her significant other was arrested, "He didn't start it, they shot at him first." This exclamation does not even identify who "they" are or when this occurred. Nothing in Henry's story can support a self-defense charge. In fact, Henry's testimony leads to the opposite conclusion. According to Henry, he was unarmed, complied with Appellant's request to return the money, and had no altercations with Appellant prior to Appellant opening fire on him. Henry was hiding behind a pillar when Appellant opened fire, and this portion of Henry's story is corroborated by the minimal wounds he sustained. No evidence in the record supports Appellant's contention that Henry and Preston were "armed, antagonistic men" or that they were "ostensibly in possession of a gun."

Roney v. State, 192 Ga. App. 760, 761 386 S.E.2d 412, 414 (1989). South Carolina has not expressly ruled on this issue. The State submits it is not necessary to reach this question because even if Thomas' testimony was accepted, the evidence still would not support a self-defense charge.

In the absence of evidence, the trial court properly denied Appellant's request to charge self-defense.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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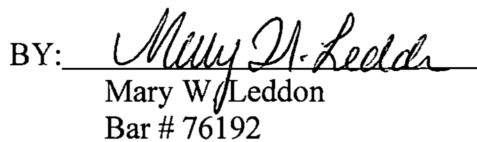
BY: 
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THE STATE,

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Benjamin John Tripp, Esquire
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I further certify that all parties required by Rule to be served have been served. This 8th day of April, 2015.

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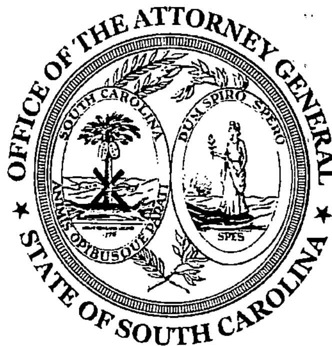

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RE: State v. Charles Green, Jr.
Appellate Case No. 2013-002526

Dear Mr. Tripp:

I am enclosing two (2) copies of the Final Brief of Respondent in the above-referenced case.

Sincerely,

Mary W. Leddon
Assistant Attorney General
Bar # 76192

MSW/am
Enclosures

cc: Honorable Jenny A. Kitchings (original and 9 enclosed)
Victim Services