STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED
APR 15 2019
SC Court of Appeals

Certiorari to Charleston County

Honorable Carmen T. Mullen, Circuit Court Judge

Opinion No. 2019-UP-034 (S.C. Ct. App. Filed January 23, 2019)

2014-GS-10-05892

THE STATE,

RESPONDENT,

V.

HERSHEL MARK JEFFERSON, JR.,

PETITIONER

APPELLATE CASE NO 2016-001799

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

WANDA H. CARTER
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

INDEX

INDEX i

CERTIFICATE OF COUNSEL 1

QUESTION PRESENTED 2

STATEMENT OF THE CASE 3

ARGUMENT

The Court of Appeals erred in dismissing as unpreserved the issue of the trial judge's error in allowing a police officer to invade the province of the jury by testifying on a fact question (identity of the aggressor in self-defense) when trial counsel's objection to the matter was contextually apparent under Rule 103, SCRE, which to the contrary preserved the issue for appellate review in the case. 4

CONCLUSION 10

CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that pursuant to the South Carolina Court of Appeals Opinion issued in this case on January 23, 2019, a Petition for Rehearing was filed on February 7, 2019, which was denied by the South Carolina Court of Appeals on March 29, 2019.

QUESTION PRESENTED

The Court of Appeals erred in dismissing as unpreserved the issue of the trial judge's error in allowing a police officer to invade the province of the jury by testifying on a fact question (identity of the aggressor in self-defense) when trial counsel's objection to the matter was contextually apparent under Rule 103, SCRE, which to the contrary preserved the issue for appellate review in the case.

STATEMENT OF THE CASE

Petitioner Hershel M. Jefferson Jr. was convicted of criminal domestic violence, third offense, during a trial held in his absence at the July 2016 term of the Charleston County General Sessions Court before Judge Carmen T. Mullen. A sealed sentence was imposed thereafter. The sentence was published to petitioner by Judge R. Markley Dennis during the August 2016 term of the Charleston County General Sessions Court. Petitioner was sentenced to five years imprisonment, suspended upon the service of three years and five years probation. Petitioner appealed his conviction and sentence.

On January 23, 2019, the South Carolina Court of Appeals affirmed petitioner's conviction and sentence. See State v. Jefferson, Unpublished Opinion No. 2019-UP-034 (S.C. Ct. App. filed on January 23, 2019). App. 1- 5. On February 7, 2019, petitioner filed a Petition for Rehearing in the case. App. 6- 12. On March 29, 2019, the South Carolina Court of Appeals denied the Petition for Rehearing. App. 13. This petition requesting a review of the Court of Appeals' decision in this appeal follows.

ARGUMENT

The Court of Appeals erred in dismissing as unpreserved the issue of the trial judge's error in allowing a police officer to invade the province of the jury by testifying on a fact question (identity of the aggressor in self-defense) when trial counsel's objection to this improper testimony was contextually apparent under Rule 103, SCRE, which to the contrary preserved the issue for appellate review in the case.

This case involved a fight between petitioner and his girlfriend Felicia Edwards. Petitioner was convicted of CDV. At trial, the judge charged self- defense. The state's case consisted of the testimony of only three witnesses at trial: petitioner's girlfriend Felicia Edwards, neighbor Amanda Powell, and police officer Michael Burton. Petitioner neither testified nor presented witnesses in his defense at trial. State's witness Felicia Edwards testified that she and petitioner 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 petitioner entered there, "punched her" in the face, and then placed her in a "headlock" and hit her again. Edwards admitted that she started hitting petitioner 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.

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 [petitioner] being the primary aggressor...would in the same vein I would argue that the State has not proven beyond a reasonable doubt that [petitioner] is not acting in self defense....[petitioner] defending himself causing scratches to her while she was attacking him with a broken piece of glass.
>
> Solicitor: [Petitioner] 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 mistrial motion was based on the argument that the police officer's testimony at trial addressed the factual question or whether petitioner was the aggressor. 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 petitioner, he made the decision that petitioner 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.

Petitioner 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.

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.").

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 petitioner claimed self-defense, and where an element of self-defense is the absence of aggression in to the extent that petitioner must have been without fault in bringing on the difficulty.

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.

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 petitioner 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 petitioner was guilty of criminal domestic violence or whether petitioner 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 petitioner 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.

Self-defense[1] was charged in the case. R. 90, l. 19 – R. 92, l.8. Also, the trial judge charged the jury on the law on criminal domestic violence as follows:

> Now, the Defendant is charged with criminal domestic violence and the State must prove beyond a reasonable doubt that the Defendant caused physical harm or injury to a member of the Defendant's own household or the Defendant offered or attempted to cause physical harm of injury to a member of the Defendant's own household with the apparent present ability to cause harm or injury under circumstances reasonable creating a fear of imminent danger. R. 90, lines 3 -12.

Since self-defense was an issue in the case, the identity of the aggressor became a pivotal factual question at trial. Self-defense is defined as follows:

a.) The defendant must be without fault in bringing on the difficulty;
b.) 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;
c.) A reasonable prudent man of ordinary firmness and courage would have entertained the same belief;
d.) The defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury that to act as he did in this particular instance. State v. Fuller, 279 S.C. 440, 377 S.E.2d 328 (1989).

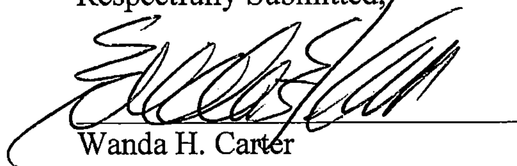
The Court of Appeals erred in dismissing as unpreserved the issue of the trial judge's error in allowing a police officer to invade the province of the jury by testifying on a fact question (identity of the aggressor in self-defense) when trial counsel's objection to the matter was contextually apparent under Rule 103, SCRE, which thereby preserved the issue for appellate review

[1] Defense counsel requested a self-defense charge. R. 63, l. 22-24; R. 65, lines 15-24; R. 66, l. 25 – R. 67, l. 3. The trial judge granted the request for a self-defense charge. R. 67, l. 3 – R. 68, l. 25.

CONCLUSION

Based on the foregoing argument, counsel for petitioner would request that this Court grant this petition and allow full briefing on the above raised issue.

Respectfully Submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of April, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
APR 15 2019
SC Court of Appeals

Certiorari to Charleston County
Honorable Carmen T. Mullen, Circuit Court Judge

Opinion No. 2019-UP-034 (S.C. Ct. App. filed 1/23/2019)
2014-GS-10-05892

THE STATE,

RESPONDENT,

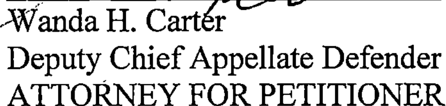
v.

HERSHEL MARK JEFFERSON, JR.,

PETITIONER

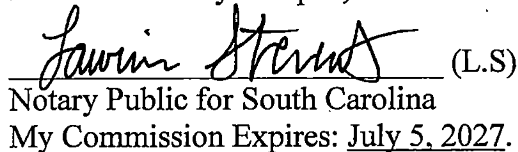
CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on Ranee Saunders, 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 15th day of April, 2019.



Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 15th day of April, 2019.


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

SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

April 15, 2019

COPY

RECEIVED
APR 15 2019
SC Court of Appeals

Ranee Saunders, Esquire
Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211

Re: The State v. Hershell Mark Jefferson, Jr.

Dear Ms. Saunders

Enclosed are two copies of the Petition for Writ of Certiorari and the Appendix in the above case that I have filed with the South Carolina Supreme Court today.

If you have any questions concerning this matter, please contact me.

Sincerely,

Wanda H. Carter
Deputy Chief Appellate Defender

WHC/ls

Enclosures

cc: Court of Appeals