STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Sumter County

Honorable R. Ferrell Cothran, Circuit Court Judge

Opinion No. 2019-UP-169 (S.C. Ct. App. Filed May 8, 2019)
2015-GS-43-0710

THE STATE,

RESPONDENT,

V.

JERMAINE ANTONIO HODGE,

PETITIONER

APPELLATE CASE NO 2016-001175

APPENDIX

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THE STATE OF SOUTH CAROLINA
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The State, Respondent,

v.

Jermaine Antonio Hodge, Appellant.

Appellate Case No. 2016-001175

Appeal From Sumter County
R. Ferrell Cothran, Jr., Circuit Court Judge

Unpublished Opinion No. 2019-UP-169
Submitted April 1, 2019 – Filed May 8, 2019

AFFIRMED

Deputy Chief Appellate Defender Wanda H. Carter, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Senior Assistant Attorney General William M. Blitch, Jr., both of Columbia; and Solicitor Ernest Adolphus Finney, III, of Sumter, all for Respondent.

PER CURIAM: Jermaine Antonio Hodge appeals his conviction of assault and battery of a high and aggravated nature and possession of a weapon during the

commission of a violent crime, arguing the trial court erred in (1) denying his motion for immunity under the Protection of Persons and Property Act (the Act); (2) overruling his objection to evidence of the victim's stab wound under Rule 403, SCRE; and (3) overruling his objection to the State's closing argument that the jury should render a "symbolic verdict." We affirm[1] pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to whether the trial court erred in denying Hodge's motion for immunity under the Act: *State v. Manning*, 418 S.C. 38, 45, 791 S.E.2d 148, 151 (2016) ("[Appellate courts] review immunity determinations under an abuse of discretion standard."); *State v. Mitchell*, 382 S.C. 1, 4, 675 S.E.2d 435, 437 (2009) (providing appellate courts "do[] not re-evaluate the facts based on [their] own view of the preponderance of the evidence but simply determine[] whether the trial court's ruling is supported by any evidence"); S.C. Code Ann. § 16-11-440(C) (2015) ("A person who . . . is attacked in another place where he has a right to be . . . has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself . . . ."); *State v. Jones*, 416 S.C. 283, 301, 786 S.E.2d 132, 142 (2016) (providing a defendant's claim of immunity under the Act based upon a belief of fear of death or great bodily injury requires that "a reasonably prudent man of ordinary firmness and courage would have entertained the same belief" (quoting *State v. Curry* 406 S.C. 364, 371 n.4, 752 S.E.2d 263, 266 n.4 (2013))).

2. As to whether the trial court erred in overruling Hodge's Rule 403, SCRE, objection to evidence of the victim's stab wound: *State v. Jackson*, 364 S.C. 329, 334, 613 S.E.2d 374, 376 (2005) ("The State . . . has the right to prove every element of the crime charged . . . ."); S.C. Code Ann. § 16-3-600(B) (2015) ("A person commits the offense of assault and battery of a high and aggravated nature if the person unlawfully injures another person, and . . . great bodily injury to another person results . . . ."); S.C. Code Ann. § 16-3-600(A)(1) (2015) ("'Great bodily injury' means bodily injury which causes a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of a bodily member or organ."); *State v. Collins*, 409 S.C. 524, 535, 763 S.E.2d 22, 28 (2014) ("Even the most gruesome photographs may be admissible if they tend to shed light on any issue, to corroborate testimony, or if they are essential in proving a necessary element of a case . . . ." (quoting *Camargo v. State*, 940 S.W.2d 464, 467 (Ark. 1997))).

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[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

3. As to whether the trial court erred in overruling Hodge's objection to the State's closing argument that the jury should render a "symbolic verdict": *State v. Harris*, 382 S.C. 107, 120, 674 S.E.2d 532, 539 (Ct. App. 2009) ("This [c]ourt must review the argument in the context of the entire record."); *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002) ("A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony."); *Tappeiner v. State*, 416 S.C. 239, 251, 785 S.E.2d 471, 477 (2016) (providing appellate courts must determine whether the solicitor's statements "so infected the trial with unfairness as to make the resulting conviction a denial of due process" (quoting V*aughn v. State*, 362 S.C. 163, 170, 607 S.E.2d 72, 75 (2004))).

AFFIRMED.[1]

HUFF, THOMAS, and KONDUROS, JJ., concur.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

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JERMAINE ANTONIO HODGE,

APPELLANT

APPELLATE CASE NO 2016-001175

Appeal from Sumter County

Honorable R. Ferrell Cothran, Circuit Court Judge

Opinion No. 2019-UP-169

PETITION FOR REHEARING

Pursuant to Rules 221 and 240, SCACR, counsel for appellant would petition for rehearing on this Court's decision upholding the solicitor's symbolic verdict argument made during closing arguments, and this Court's ruling upholding the denial of relief under the Castle Doctrine because this Court might have overlooked the trial judge's abuse of discretion in judging appellant's arguments in both matters. The points in support of this petition follow.

1.) On appeal, the following question presented was the first issue raised in the case:

> I. The trial judge erred in denying appellant's pre-trial motion for a dismissal of the case via immunity under [the Castle Doctrine] because ... [appellant] established by a preponderance of the evidence that he was entitled to this immunity from prosecution.

2.) This Court ruled on the Castle Doctrine issue as follows:

As to whether the trial court erred in denying Hodge's motion for immunity under the Act: State v. Manning, 418 S.C. 38,45, 791 S.E.2d 148, 151 (2016) ("[Appellate courts] review immunity determinations under an abuse of discretion standard."); State v. Mitchell, 382 S.C. 1, 4, 675 S.E.2d 435,437 (2009) (providing appellate courts "do [] not re-evaluate the facts based on [their] own view of the preponderance of the evidence but simply determine [] whether the trial court's ruling is supported by any evidence"); S.C. Code Ann. § 16-11-440(C) (2015) ("A person who...is attacked in another place where he has a right to be...has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself..."); State v. Jones, 416 S.C. 283, 301, 786 S.E.2d 132, 142 (2016) (providing a defendant's claim of immunity under the Act based upon a belief of fear of death or great bodily injury requires that "a reasonably prudent man of ordinary firmness and courage would have entertained the same belief" (quoting State v. Curry, 406 S.C. 364, 371 n.4, 752 S.E.2d 263, 266 n.4 (2013))).

3.) The facts of the case were such that appellant established by a preponderance of the evidence proof for immunity under the Castle Doctrine. Appellant's case follows. At trial, Lyvonnia Copeland testified that she and petitioner, who was her live-in boyfriend, were arguing into the early morning hours of April 21, 2015, and that she called her cousin Lawrence Cooley to come over to her residence and talk to appellant. Copeland stated that when Cooley pulled into the driveway and got out of his vehicle, he (Cooley) began walking towards her, and that as soon as she approached and began her greetings, she realized that Cooley had been stabbed just that quickly. R. 107, l. 1 – R. 116, l. 16. Copeland stated that she did not witness the stabbing, but that Cooley didn't stab himself. R. 119, lines 1-3; R. 123, l. 25 – R. 124, l. 1.

Lawrence Cooley testified at trial and stated that when he stepped out of his vehicle and walked up to Lyvonnia Copeland, he noticed appellant walking from the back to the side of the house, and then he saw appellant just came up to him and stab him with a knife. R. 72, l. 23 – R. 88, l. 11.

Appellant testified at trial and explained that while he and Copeland argued on that night, she told him that she was calling Cooley to come over to beat him up. Appellant stated that

Cooley came over to their house immediately thereafter looking angry. Appellant explained that Cooley pushed him twice and that after he stumbled per Cooley's second push, he responded by stabbing Cooley. R. 196, l. 8 – R. 211, l. 18.

Prior to trial, defense counsel moved to have the case dismissed on the ground that appellant was immune from prosecution under the Castle Doctrine. R. 4, lines 18-25. An in camera pretrial hearing followed. Lyvonnia Copeland testified during the pre-trial hearing and admitted that appellant was living with her as a boyfriend then, and that they had been dating since 2013 (two years). Copeland testified that she did not witness the stabbing or any altercation between Cooley and appellant. R. 5, l. 14 – R. 17, l. 24.

Appellant testified at the pretrial hearing and stated that he had been living with Lyvonnia Copeland every night at Copeland's house as her boyfriend since 2013, and that they both paid bills at that residence. Appellant explained that as they argued during the early morning hours in question, Copeland hollered that she was calling Cooley to come over and "beat [his] ass." Therefore, when Cooley, who was bigger and taller (6'2" and 300 lbs), arrived looking unhappy and pushed him and said "what the f___ is going on," and then pushed him again (harder the second time) even after appellant asked that the pushing stop, then fear begin to set in. Appellant claimed that as he stumbled from the second hard shove from Cooley, he "fear[ed] for his life" and responded with the stabbing. R. 19, l. 5 – R. 38, l. 25. Appellant stated that he did not push or attack Cooley and was attempting to walk away. R. 19, l. 5 – R. 38, l. 25.

Lawrence Cooley did not testify during this pre-trial hearing.

The trial judge denied appellant's motion for immunity under the Protection Of Persons and Property Act. R. 46, l. 8- R. 48, l. 14. The trial judge's findings follow:

> 1.) That appellant and Cooley were both guests on Copeland's property;

2.) That appellant in effect was not acting in self defense; and
3.) That appellant in effect had a duty to retreat in this instance.
R. 46, l.8- R. 48, l. 5.

A.) Appellant and Cooley were not guests in Copeland's home.

Section (A) of the Protection of Persons and Property Act reads as follows:

> (A) A person is presumed to have a reasonable dear of imminent peril of death or great bodily injury to himself or another person using deadly force that is intending or likely to cause death or great bodily injury to another person if the person:
>
> (1.) Against whom the deadly force is used is in the process of unlawfully and forcefully entering of has unlawfully and forcibly entered a dwelling, residence...or if he removes or is attempting to remove another person against his will from the dwelling/residence and
>
> (2.) Who uses deadly force knows or has reason to believe that an unlawful and forcibly entry or unlawful and forcible act is occurring or has occurred.

Appellant was not a guest in Copeland's home. Appellant lived in the home with Copeland. In State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013), the Court held that since the defendant and Collins were both social guests in the defendant's mother's apartment when they fought, then Collins (deceased victim) had an equal right to be in the dwelling, and therefore the defendant could not use immunity under 16-11-440(A), **but** that he could default into using immunity under 16-11-440(C), which carries no presumption like section (A), but still offered immunity if the one who used force was attacked in a place where he had a right to be. Specifically, under 16-11-440 (C) the Act provides that one is justified in using deadly force if:

> A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly

> force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person...

Additionally, compare also the relevant case of State v. Jones, 416 S.C. 283, 786 S.E.2d 132 (2016), where the Court held that "another place" under § 16-14-440 (C) encompassed a residence and that there is immunity for use of deadly force by a person within the residence who is not engaged in an unlawful activity and who is attacked in this "another place," i.e., a residence where he or she has a right to be present. In Jones, there was a domestic dispute between a man and a woman (Jones) who lived together inside a particular residence. The woman, i.e., Jones, who killed the man, was acting in self-defense and rightfully in another place where she had a right to be, and as a result was granted immunity for her acts under the Castle Doctrine. In Jones, both Jones and her live-in male friend were lawful residents together, and therefore her claim under 16-11-440(A) was properly and successfully moved to a claim under 16-11-440(C).

This case is similar to Jones to the extent that Copeland and appellant both lived together in the same residence, and both had a right to be there, and therefore appellant was not a guest. Therefore, since appellant lived at the residence with Copeland where Cooley arrived, and since appellant paid bills at that residence, and cohabitated with Copeland there, then appellant was not a guest, but rather present in another place where he had a right to be under 16-11-440 (C), and thus had a right to claim immunity from his acts under the Castle Doctrine. Although 16-11-440 (C) does not contain the presumption of subsection (A), nonetheless it allows one the privilege of claiming the immunity from prosecution of using deadly force by a person who is not engaged in an unlawful activity and is attacked in another place where he has a right to be present. See also State v. Douglas, 411 S.C. 307, 768 S.E.2d 232 (Ct. App. 2015), where it was held that another

place would include a place where attackers who are invited into one's home later place the homeowner in reasonable fear of death or great bodily harm.

B.) .Self Defense Was Supported By the Evidence and Given as a Jury Charge

Consistent with the Castle Doctrine and the text of the Act, "a valid case of self-defense must exist" in order to successfully claim the immunity. In Curry, the Court held that the self-defense elements were non-existent in the case. Appellant acted in self-defense in this case. Note that the trial judge charged the jury on the law of self-defense. Tr. 334, l. 25 – p. 338, l. 2. In Jones, the Court held that one who uses deadly force in response to an attack in his or her own home by a cohabitant can seek immunity from prosecution under that provision under 16-11-440(C) as long as the person can establish his reasonable fear of the attacker and there is evidence supporting a self-defense claim. In Jones, the Court held as follows:

> "Consistent with the Castle Doctrine and the text of the Act, a valid case of self-defense must exist, and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity." State v. Curry. 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013). Therefore, the defendant must demonstrate the elements of self-defense, save the duty to retreat, by a preponderance of the evidence. Id. However, if section 16-11-440 (A) applies, there is not requirement that the defendant prove he believed he was in imminent danger of losing his life or sustaining serious bodily injury given the presumption of reasonable fear of imminent peril of death or great bodily injury is included in subsection (A).

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 he had no other means of avoiding the danger. State v. Davis, 282 S.C. 45, 317 S.E.2d 452 (1984). Also, depending on the circumstances, words accompanied by hostile acts may establish self-defense and

one has a right to act on appearances. State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989). Moreover, when a 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 4 89 (1998); State v. Williams, 400 S.C. 308, 733 S.E.2d 605 (2012).

Clearly, appellant acted in self-defense in the case. For example, Copeland asked Cooley to come to their residence for the express purpose of fighting appellant; and true to his mission, Cooley came there and got out his truck with an angry demeanor and immediately pushed appellant, who was near enough to do so, and asked appellant what was going on. Appellant was not the aggressor during this incident. To the contrary, Cooley was the aggressor. Then, despite appellant's request that the shoving and pushing stop, Cooley shoved appellant again, and this second act of aggression made appellant stumble and almost fall. Keeping in mind that since Cooley was a big guy and appellant was much smaller, and that Cooley was the aggressor and his (Cooley's) aggression was escalating, and also that appellant had a reason to be fearful for his life against the attacker, then the knifing of Cooley was appellant's act in self-defense. Hence the elements of self-defense were met here.

C.) No Duty to Retreat

Appellant had no duty to retreat as he was at his home. The Castle Doctrine did not require appellant to retreat in the case. State v. Curry, supra; State v. Jones, supra.

4.) The Standard of Review for the Castle Doctrine follows:

"A Claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which this court reviews under an abuse of discretion standard of review." State v. Curry, 406 S.C. 364, 370 752 S.E.2d 263, 266 (2013); State v. Duncan, 392 S.C. 404, 411, 709 S.E.2d 662, 665 (2011) (recognizing that the proper standard for the circuit court to use in determining immunity under the Act is a preponderance of the evidence). An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007).

5.) A defendant claiming immunity under the Castle Doctrine must show by a preponderance of the evidence that he was not engaged in an unlawful activity, and was in a place where he had a right to be, and was attacked there, and used deadly force via self-defense to protect himself, and had no duty to retreat. Appellant established this by a preponderance of the evidence. Thus, this Court overlooked the trial judge's error in denying appellant's pretrial motion for immunity from prosecution in this case.

6.) The last issue presented on direct appeal follows:

> The lower court erred in overruling an objection to the solicitor's closing argument imploring the jury to convict appellant on the charge as a "symbolic verdict" because the jurors' oath required a verdict issued upon the evidence presented at trial only.

7.) This Court ruled as follows:

> As to whether the trial court erred in overruling Hodge's objection to the State's closing argument that the jury should render a "symbolic Verdict": State v. Harris, 382 S.C. 107, 120, 674 S.E.2d 532, 539 (Ct. App. 2009) ("This [c]ourt must review the argument in the context of the entire record."); Humphries v. State, 351 S.C. 362, 373, 570S.E.2d 160, 166 (2002) ("A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony."); Tappeiner v. State, 416 S.C. 239, 251, 785 S.E.2d 471, 477 (2016) (providing appellate courts must determine whether the solicitor's statements "so infected the trial with unfairness as to make the resulting conviction a denial of due process" (quoting Vaughn v. State, 362 S.C. 163, 170, 607 S.E.2d 72, 75 (2004))).

8.) However, to the contrary, the argument was unconstitutional and led to a conviction that was given in violation of due process.

9.) Pertinent sections of the solicitor's closing remarks regarding this issue follow:

> Solicitor: When you come back in with that verdict, bring the shirt in symbolically. Bring it in symbolically because the only innocent person in this room is Lawrence Cooley. And with your verdict symbolically give him that shirt, that cloak and let it keep him warm. Thank you.
>
> Defense Counsel: Your Honor, I'm going to object that he asked the jury to decide this case on a basis other than the law and evidence provided.

Solicitor: I certainly did not, Judge.

Defense Counsel: As a symbolic gesture restore the victim, the alleged victim. R. 265, lines 12 – 22.

A true verdict is required by the jury according to the oath taken prior to trial as they fulfill their duty to carefully deliberate on the matters at issue. State v. Ballen, 333 S.C. 378, 510 S.E.2d 226 (1998). Any verdict issued symbolically cannot pass constitutional standards. This Court might have overlooked merit regarding the objection here by upholding the trial judge's ruling that no error occurred with respect to this issue.

WHEREFORE, based on the foregoing points, counsel for appellant would request a rehearing on the two issues raised above regarding this Court's opinion in this appeal.

Respectfully Submitted,

WANDA H. CARTER
Deputy Chief Appellate Defender

This 23rd day of May, 2019.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Sumter County

Honorable R. Ferrell Cothran, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JERMAINE ANTONIO HODGE,

APPELLANT

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 M. Blitch, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Jermaine Antonio Hodge, #273774, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 23rd day of May, 2019.

Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE ME this 23rd day of May, 2019.

(L.S)
Notary Public for South Carolina
My Commission Expires: September 27, 2028.

The South Carolina Court of Appeals

The State, Respondent,

v.

Jermaine Antonio Hodge, Appellant.

Appellate Case No. 2016-001175

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas C. Young J.

Paula C. Thomas J.

J.

Columbia, South Carolina

cc:
Alan McCrory Wilson, Esquire
Wanda H. Carter, Esquire
William M. Blitch, Jr., Esquire
Ernest Adolphus Finney, III, Esquire

FILED
August 08, 2019