STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Apr 23 2020
SC Court of Appeals

Appeal from Charleston County

Honorable R. Markley Dennis, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DERRICK LAMAR PORTER,

APPELLANT.

APPELLATE CASE NO. 2018-000770

BRIEF OF APPELLANT

DAVID ALEXANDER
Appellate Defender

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

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the circuit court err in denying Porter's request to give additional instructions on self-defense, including (1) "the right to act on appearances," (2) "the relevance of prior difficulties," and (3) "that a person does not have to wait before acting in self-defense?" State v. Nichols, 325 S.C. 111, 117, 481 S.E.2d 121 (1997).

STATEMENT OF THE CASE

In November 2016, a Charleston County grand jury indicted appellant for attempted murder and a weapons charge. R. 340 – 343. On April 11, 2018, appellant was tried before the Honorable R. Markley Dennis and a jury. R. 1. Benjamin Chad Simpson and Daniel Cooper represented the State and Grant Smalldone represented appellant. R. 1. The jury convicted appellant. R. 328, ll. 1 – 9. Judge Dennis sentenced appellant to consecutive terms of thirty years' imprisonment for attempted murder and five years' imprisonment on the weapons charge. R. 338, ll. 2 – 6. This appeal follows.

STANDARD OF REVIEW

"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 [circuit court's] refusal to do so is reversible error." State v. Williams, 400 S.C. 308, 314, 733 S.E.2d 605, 609 (Ct. App. 2012) (internal quotations omitted).

ARGUMENT

The circuit court erred in denying Porter's request to give additional instructions on self-defense, including (1) "the right to act on appearances," (2) "the relevance of prior difficulties," and (3) "that a person does not have to wait before acting in self-defense?" *State v. Nichols*, 325 S.C. 111, 117, 481 S.E.2d 121 (1997).

After turning himself in, appellant gave a video recorded statement to the police during which he described being forced to shoot Fritzgerald Byas ("Byas") in self-defense. R. 185, l. 6 – 197, l. 1. (Def's Ex. 1). Appellant believed that Byas and his family were involved in the death of appellant's cousin. (Def's Ex. 1). The detective in the interview described it as a "beef." (Def's Ex. 1).

The shooting was captured on two surveillance videos, but the angles of the videos do not capture Byas reaching for a gun because the view is obscured by Byas's car. (State's Ex. 16, 17). R. 185, l. 6 – 197, l. 1. (Def's Ex. 1). Appellant is outside of a convenience store in North Charleston. (State's Ex. 16, 17). Byas arrives in a red car. (State's Ex. 16, 17). Byas and Appellant greet each other with a hand gesture, seemingly friendly. (State's Ex. 16, 17).

Byas enters the store and appellant remained outside talking on the phone. (State's Ex. 16, 17). When Byas leaves the store, he and appellant begin talking. (State's Ex. 16, 17). Byas eventually gets into the driver's seat of his car with the door open. (State's Ex. 16, 17). Appellant leans on the door and they continue talking. (State's Ex. 16, 17). Appellant then suddenly draws a gun and shoots Byas in the head. (State's Ex. 16, 17). Appellant leaves the scene and bystanders call 911. (State's Ex. 16, 17). Byas survived the wound. R. 246, ll. 4 – 14.

In his recorded interview, appellant admitted shooting Byas, but only in response to Byas reaching for a gun. R. 185, l. 6 – 197, l. 1. (Def's Ex. 1). Byas was trying to pretend he was

playing with a cell phone. R. 185, l. 6 – 197, l. 1. (Def's Ex. 1). Appellant correctly identified the caliber and brand of Byas's gun. R. 185, l. 6 – 197, l. 1. (Def's Ex. 1).

The State attempted to show that appellant could not have seen the gun. R. 114, l. 13 – 123, l. 24. The EMT who treated Byas said he did not see a gun when he first arrived and examined Byas. R. 114, l. 13 – 123, l. 24. The EMT said he did not find the gun until he leaned into the passenger's side and grabbed Byas by the belt to move him. R. 114, l. 13 – 123, l. 24. He then felt a gun on Byas's posterior. R. 114, l. 13 – 123, l. 24. The EMT said he needed to pull up two shirts, a button-down and a t-shirt, that were tucked into Byas's pants to remove the gun. R. 118, l. 18 – 119, l. 7.

Problematically for the State, the surveillance video clearly shows Byas's attire and he is not wearing a button-down shirt, but an untucked t-shirt. (State's Ex. 16, 17). The EMT also said when he first looked into the car, Byas's hands were on his lap. R. 123, ll. 21 – 24. This testimony conflicted with that of a bystander who saw an alcoholic beverage in one of Byas's hands. R. 90, ll. 8 – 21.

At the charge conference, appellant requested a charge on prior difficulties in addition to the court's standard self-defense charge. R. 257, ll. 12 – 16. Defense counsel cited appellant's statements in the recorded video interview. R. 257, ll. 12 – 16. The trial judge refused to give the charge because any alleged prior difficulties were between family members and not directly between Byas and appellant. R. 257, l. 17 – 258, l. 25.

The court erred in so narrowly construing the prior difficulties charge. The law to be charged is determined from the evidence presented at trial. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). Reversible error is committed if the trial court fails to give a requested charge on an issue raised by the evidence. State v. Hill, 315 S.C. 260, 262, 433 S.E.2d

848, 849 (1993). Moreover, when determining whether the evidence requires a charge on a lesser included offense, the court views the facts in the light most favorable to the defendant. See Knoten, 347 S.C. at 302, 555 S.E.2d at 394 (requiring the trial court to view facts in the light most favorable to a defendant when determining whether to charge involuntary manslaughter).

Furthermore, a trial judge has the responsibility to craft a self-defense charge tailored to the facts of a case. State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011); State v. Fuller, 297 S.C. 440, 444-45, 377 S.E.2d 328, 331 (1989). As recognized in Fuller, there is a "body of common law self-defense" and trial judges must "consider the facts and circumstances of the case at bar in order to fashion an appropriate charge." Fuller at 443, 377 S.E.2d at 330.

A deep understanding of Fuller demonstrates the trial court's error. In Fuller, the defendant was black. Id. at 441, 377 S.E.2d at 329. He solicited a white prostitute. Id. The prostitute took him to her trailer for sex, but the trailer was occupied and the defendant left. Id.

The defendant later returned to the prostitute's trailer and a car driven by a white woman was blocking the road. Id. The defendant asked her to move her car. Id. At this point, two men approached the defendant's car and asked him "what he was 'trying to do to that white lady.'" Id. One of the men used a racial slur and grabbed the defendant by the throat. Id. at 441, 377 S.E.2d at 329-30.

The defendant fired a warning shot which temporarily allowed him to drive away, but the street was a dead end. Id. at 442, 377 S.E.2d at 330. The two assailants tried to block the defendant's car from leaving and the defendant ultimately crashed and pinned his car against a steel rail. Id. The two men yelled, "'we're going to take care of you.'" Id. The defendant thought he saw something shiny in one of the men's hands and fired four shots at them, killing them both. Id. No gun was found on the assailants. Id.

Relying on State v. Davis, 282 S.C. 45, 317 S.E.2d 452 (1984), the trial judge in Fuller only instructed the jury on the basic elements of self-defense. Id. This Court held it was error to only give the general charge from Davis when the defendant "repeatedly requested additional charges." Id. at 443, 377 S.E.2d at 330. The trial judge erred by not giving three specific charges on self-defense that further explained the principles in the general charge. First, the trial judge failed to charge the jury that a defendant has the right to act on appearances from State v. Jackson, 277 S.C. 271, 87 S.E.2d 681 (1955). Id. at 443-44, 377 S.E.2d at 330-31. Second, the trial judge failed to charge the jury that "words accompanied by hostile acts, may, depending on the circumstances, establish a plea of self-defense" from State v. Harvey, 220 S.C. 506, 68 S.E.2d 409 (1951). Id. Finally, the trial judge failed to charge that an individual has no duty to retreat "if by doing so he would increase his danger of being killed or suffering serious bodily injury" from State v. Hardin, 114 S.C. 280, 103 S.E. 557 (1920). Id. For each of these charges, this Court explained the specific facts necessitating the additional, illuminating instruction.

Here, appellant requested a charge on prior difficulties to which he was entitled under Fuller. See State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997). Had the jury received the prior difficulties charge, they would have been able to apply the legal principle of self-defense that appellant was entitled to judge Byas's conduct "more harshly" because of the "prior bad blood between the two men." State v. Hendrix, 270 S.C. 653, 661, 244 S.E.2d 503, 507 (1978). Self-defense and appellant's perception of Byas reaching for a gun were the critical issues in the case.

This Court should also reverse because of the trial judge's error in refusing to give a full and complete self-defense charge as required by Fuller. While the trial court gave an abbreviated charge on the right to act on appearances, it did not give the full explanation as required by Fuller and State v. Jackson, 227 S.C. 271, 278, 87 S.E.2d 681, 684 (1955). A full explanation

would have included that a defendant does not have to wait for an assailant to attack before acting in self-defense. State v. Nichols, 325 S.C. 111, 117, 481 S.E.2d 118, 121 (1997). The court was required to tell the jury that a defendant does not have to wait until his attacker "gets the drop on him." State v. Rash, 182 S.C. 42, 188 S.E. 435, 438 (1936). Had the trial judge given a complete charge on self-defense, the outcome of the trial would have been different. This Court should reverse.

CONCLUSION

For the foregoing reasons, this Court should reverse and remand for a new trial.

This 23rd day of April, 2020.

s/David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Brief of Appellant 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."

April 23, 2020.

s/David Alexander
Appellate Defender

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CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Brief of Appellant in the above-referenced case has been served upon William Blitch, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and a copy of the Brief of Appellant have been served on Derrick Lamar Porter, 376002, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 23rd day of April, 2020.

s/David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT