ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Edward W. Miller, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT MONDRIQUES JONES,

APPELLANT

APPELLATE CASE NO. 2011-186367

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial judge err in refusing to charge voluntary manslaughter when the appellant's girlfriend was the mother of three of the decedent's children, at the time of the fatal shooting the decedent refused to allow one of his children to leave with the mother and appellant, there was testimony that the decedent had inflicted physical violence upon the mother in the past, there was testimony of prior difficulties between the decedent and the appellant and talk of gunplay by the decedent, there was evidence that the decedent approached the appellant in a threatening manner and the appellant testified that the decedent pulled out a gun?

2. Did the trial judge err in refusing to charge the jury that unlawful possession of a weapon does not necessarily preclude a finding that appellant acted in self defense?

3. Did the trial judge err in allowing an expert to testify on behalf of the State in reply, generally about gangs when the crimes for which the appellant was on trial were not gang related and appellant admitted that he had formerly been involved in a gang, making the testimony irrelevant and highly prejudicial propensity evidence?

STATEMENT OF THE CASE

In February 2010, the Greenville County Grand Jury indicted appellant for murder, assault and battery with intent to kill, possession of a weapon during the commission of a violent crime and possession of a pistol by a person under eighteen years of age, indictments #2010-GS-23-692-695. On February 7, 2011, appellant proceeded to jury trial before the Honorable Edward W. Miller. Attorney Larry Cooke represented appellant at trial. The jury returned verdicts of guilty as charged. Judge Miller sentenced appellant to 40 years for murder, 20 years for assault and battery with intent to kill, and 5 years each for the weapon charges. A timely notice of intent to appeal was filed on February 15, 2011. This appeal follows.

STATEMENT OF FACTS

At 9:15 AM on March 25, 2009, the appellant, Robert Jones and his girlfriend, Crystal Stone, drove to Crystal's great aunt's[1] house to drop off Crystal's youngest daughter, Vianna, and pick up her older daughter, Alexia. The appellant was 17 years old. (R. p. 376, lines 22-25). The deceased, Vincent Campbell, was the father of Vianna, Alexia as well as Crystal's son, Dayquon. Vincent was five feet ten inches tall and weighed 260 pounds. (R. p. 98, lines 24-25). Shortly after appellant and Crystal arrived at the great aunt's house, Vincent and his brother Kevin Campbell arrived at the house. Inside the house an argument took place between the great aunt, Crystal and Vincent Campbell. Crystal testified, "Well when we got in the house Vincent was saying something about I couldn't take Alexia with me." (R. p. 313, lines 7-8). The brother, Kevin Campbell, testified that appellant and Vincent had words. Kevin testified that appellant asked, "Why can't she get her kids, she's got custody of them too." (R. p. 154, lines 12-13; p. 177, lines 24-25). According to Kevin, Vincent told appellant to mind his business and play his part. (R. p. 154, lines 15-16; p. 178, line 2).

Kevin testified that, after the exchange of words, the great aunt asked everyone to leave and the argument continued on the back porch. (R. p. 155, lines 3-21). Crystal testified that Vincent and Kevin cornered appellant on the back porch. (R. p. 314, lines 9 – 22). Appellant testified that Vincent and Kevin confronted him on the back porch about an earlier telephone argument appellant heard between Vincent and Crystal . (R. p. 395, lines 17 – p. 396, lines 1-5). In that argument, Vincent refused to buy diapers and shoes for the young daughter Vianna and appellant told Crystal to hang up the phone and not worry about

[1] Crystal refers to her great aunt, Sharon Hamby, as her grandmother.

it. (R. p. 390, lines 4-25). When Vincent heard the appellant in the background, he threatened the appellant, telling him he would "beat his ass." (R. p. 390, lines 21-25). Appellant also testified that during an earlier phone conversation, Vincent threatened gun play. (R. p. 392, lines 1-4).

Appellant testified that while they were on the porch, Vincent took off his shirt trying to fight. (R. p. 396, lines 6-10). Crystal confirmed that Vincent took off his shirt. (R. p. 316, lines 16-17). Appellant testified that Crystal pulled him off the porch and they were trying to leave. (R. p. 396, lines 6-10).

Crystal testified that once they were off of the porch and in the backyard appellant went to his car and Vincent and Kevin went to their car. (R. p. 315, lines 11 – p. 316, lines 1-12). Crystal testified that she and appellant were about to leave when Vincent "started at appellant." (R. p. 316, lines 19 – p. 317, lines 1-2). According to Kevin, Crystal put Vianna in the car and then walked around the car and stated that she was going to get her baby, referring to the other daughter Alexia. (R. p. 158, lines 23 – p. 159, lines 1-23). Kevin testified that his brother Vincent told Crystal she was not taking his baby to Belton where Crystal and the appellant were living. (R. p. 159, lines 1-2). Kevin testified that the environment was heated. (R. p. 159, lines 22-23).

Crystal testified that Vincent opened his car door and reached down but she didn't see anything. (R. p. 317, lines 3-9). Crystal testified that Vincent approached appellant in a threatening manner. (R. p. 317, lines 10 – 25). According to Crystal, she was between Vincent and appellant attempting to prevent them from fighting when shots were fired. (R. p. 318, lines 1-15).

Appellant testified that when Vincent went to his car he said something about getting a gun. (R. p. 396, lines 12-16). Appellant testified that Vincent reached under the seat of his car, pulled out a gun and walked over to Crystal. (R. p. 396, lines 21-25). Appellant testified he was scared and shot first. (R. p. 396, line 25 – p. 397, lines 1-5). The appellant had taken the gun he used from his grandfather's closet because of the prior threats by Vincent and the fact that in a telephone conversation Vincent had used the words "gun play." (R. p. 391, lines 17 – p. 392, lines 1-4). Appellant testified that after he shot at Vincent, he believed Kevin was also reaching for a weapon so he shot. (R. p. 397, lines 6-25). The police were unable to locate any guns.

Crystal testified that appellant was aware that Vincent had pointed a gun at her in the past. (R. p. 328, lines 3- 24). The appellant testified that Crystal came to live with him because Vincent was beating her and threatening her and he had seen injuries to Crystal. (R. p. 388, lines 3-10). Crystal testified that the appellant had seen her with a black eye. (R. p. 355, lines 18 – p. 356, lines 1-9). Crystal showed appellant a video on My Space of Vincent and his brother Kevin rapping and handling a gun. (R. pp. 321 – 324).

ARGUMENTS

1. The trial judge err in refusing to charge voluntary manslaughter when the appellant's girlfriend was the mother of three of the decedent's children, at the time of the fatal shooting the decedent refused to allow one of his children to leave with the mother and appellant, there was testimony that the decedent had inflicted physical violence upon the mother in the past, there was testimony of prior difficulties between the decedent and the appellant and talk of gunplay by the decedent, there was evidence that the decedent approached the appellant in a threatening manner and the appellant testified that the deceased pulled out a gun

Counsel for appellant requested the judge to charge the jury with the lesser included offense of voluntary manslaughter. (R. pp. 508 – 51). The judge initially indicated that, "While I think it was extremely weak, I'll charge voluntary manslaughter." (R. p. 513, lines 8-9). After hearing argument from the State, the judge changed his mind and refused to charge voluntary manslaughter. (R. p. 522, lines 24 – p. 523, line 1). At the close of the charge to the jury, counsel again objected to the judge's refusal to charge voluntary manslaughter. (R. p. 566, lines 12-15). The judge again refused to charge voluntary manslaughter. The judge erred.

In State v. Smith, 391 S.C. 408, 413, 706 S.E.2d 12, 15 (2011) the South Carolina Supreme Court wrote, "For a defendant to be entitled to a voluntary manslaughter charge, there must be evidence of both sufficient legal provocation and heat of passion at the time of the killing. See State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000) ('Both heat of passion and sufficient legal provocation must be present at the time of the killing.')." In the present case, there was evidence of both sufficient legal provocation and heat of passion.

In State v. Pittman, 373 S.C. 527, 572-573, 647 S.E.2d 144, 168 (2007) the South Carolina Supreme Court wrote, "'To warrant the court in eliminating the offense of manslaughter it should very clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter.' Burriss, 334 S.C. at 264, 513 S.E.2d at 109. In determining whether the evidence requires a charge of voluntary manslaughter, the Court views the facts in a light most favorable to the defendant. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001)." Viewing the evidence in the light most favorable to the appellant, the evidence required a charge on voluntary manslaughter.

In regard to what constitutes sufficient legal provocation, "This Court has previously held that an overt, threatening act or a physical encounter may constitute sufficient legal provocation." State v. Gardner, 219 S.C. 97, 105, 64 S.E.2d 130, 134 (1951). Appellant testified that Vincent reached under the seat of his car, pulled out a gun and walked over to Crystal. (R. p. 396, lines 21-25). Crystal testified that Vincent approached appellant in a threatening manner. (R. p. 317, lines 10 – 25). Vincent's acts of pulling the gun and approaching in a threatening manner constitute legal provocation.

In regard to what constitutes heat of passion , the South Carolina Supreme Court has held, "The sudden heat of passion, upon sufficient legal provocation, which mitigates a felonious killing to manslaughter, while it need not dethrone reason entirely, or shut out knowledge and volition, must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence." Knoten, 347 S.C. at 303, 555 S.E.2d at 395.

In Smith, 391 S.C. at 413, 706 S.E.2d at 15 (2011) the Court wrote, "In determining whether the act which caused death was impelled by heat of passion or by malice, all the surrounding circumstances and conditions are to be taken into consideration, including previous relations and conditions connected with the tragedy, as well as those existing at the time of the killing. State v. Norris, 253 S.C. 31, 35 168 S.E.2d 564, 566 (1969); State v. Gardner, 219 S.C. 97, 105, 64 S.E.2d 130, 134 (1951)."

The appellant shot the Campbell brothers during the course of a heated argument in which Vincent refused to allow Crystal to take their daughter to Belton where she lived with the appellant. Vincent had inflicted violence on Crystal in the past, had threatened to "beat appellant's ass" and threatened gun play. These are precisely the types of circumstances that produce the uncontrollable impulse to do violence required for voluntary manslaughter. The shooting was done in the heat of passion and not with malice.

Viewing the evidence in the light most favorable to appellant, there is evidence of both sufficient legal provocation and heat of passion. The trial judge erred in refusing to charge voluntary manslaughter. The error is not harmless. In State v. Lowry, 315 S.C. 396, 400, 434, S.E.2d 272, 274 (1993), the Court wrote, "Even though the jury was not convinced that Lowry acted in self-defense, the jury could have discerned, consistent with the evidence, that there was sufficient legal provocation and heat of passion to find Lowry guilty of voluntary manslaughter. See State v. Gilliam, 296 S.C. 395, 397, 373 S.E.2d 596, 597 (1988)." Just as in Lowry, the fact that the jury was not convinced that appellant acted in self-defense,[2] the jury could have discerned, consistent with the

[2] The inadequate charge on self defense is discussed below in issue two.

evidence, that there was sufficient legal provocation and heat of passion to find appellant guilty of voluntary manslaughter rather than murder.

2. The trial judge erred in refusing to charge the jury that unlawful possession of a weapon does not necessarily preclude a finding that appellant acted in self defense.

The judge instructed the jury on the law of self defense and defense of another. (R. pp. 558-562). At the close of the judge's charge to the jury, counsel for appellant, citing State v. Slater, 373 S.C. 66, 644 S.E.2d 50 (2007), asked the judge to charge the jury that the unlawful weapon charge does not bar self –defense. (R. p. 566, lines 19-25). The judge refused the requested charge noting that in the Slater case the judge failed to charge self defense where as in this case he charged self defense. The judge erred.

In Slater the Court held that the defendant was not entitled to a charge on self defense because the defendant was not without fault in bringing on the difficulty where he brought a loaded weapon to an altercation in progress. The Court wrote, "Although we agree that 'the mere unlawful possession of a firearm, with nothing more, does not automatically bar a self-defense charge,' we reject the position that the unlawful possession of a weapon could never constitute an unlawful activity which would preclude the assertion of self-defense." Slater, 373 S.C. at 70-71, 644 S.E.2d at 52-53.

The Court in Slater then clarified State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999), writing:

> Burriss, which deals with the defense of accident, is instructive in the instant case. In Burriss, this Court discussed the use of an accident defense where the defendant unlawfully possessed a gun. Burriss maintained that he was lawfully armed in self-defense when the gun accidentally fired. Id. at 259, 513 S.E.2d at 106. Because a defendant must be acting lawfully to use the defense of accident, we discussed whether a person in unlawful possession of a weapon may lawfully

> arm himself in self-defense. Id. at 262, 513 S.E.2d at 108. Clarifying an ambiguity in this Court's prior case law, we noted that where the defendant's unlawful possession of a weapon is merely incidental to the defendant's lawful act of arming himself in self-defense, the unlawful possession of the weapon will not prevent the use of an accident defense. Id. at 262 n. 5, 513 S.E.2d at 108 n. 5. We further explained, however, that the unlawful possession of a firearm can, under some circumstances, constitute an unlawful activity so as to preclude an accident defense if the weapon is the proximate cause of the killing. Id. Although Burriss takes the additional step of applying the rule in the context of accident, the analysis is equally applicable in determining if a defendant in unlawful possession of a weapon is entitled to a charge on self-defense.
>
> Slater, 373 S.C. at 71, 644 S.E.2d at 53.

The trial judge correctly noted that the issue in Slater involved whether a self defense charge was warranted. In the present case the self defense charge given was warranted but under the facts of the case and extending the ruling in Slater and Burris, the jury should have been instructed that the mere unlawful possession of a weapon does not preclude a finding of self defense.

In charging self defense, the judge correctly instructed the jury, "First, the Defendant must be without fault in bringing on the difficulty. If the Defendant's conduct was the type which was reasonably calculated to and did provoke a deadly assault, the Defendant would be at fault in bringing on the difficulty and would not be entitled to an acquittal based on self-defense." (R. p. 558, lines 20 – p. 559, line 1). In closing the State argued:

> Let me tell you why this theory of self-defense doesn't apply. There's five elements of self-defense and the State has to disprove. He has, he the defendant, has offered, he's attempted to offer some of these into evidence. I submit to you that he doesn't get past any of them. The Defendant is without fault. The Defendant came to Greenville with a loaded .38. The Defendant told you on the stand that he told Vincent if he had something to say, he was going to say it. He's not this innocent angel they try to paint him out to be. Doesn't work.

(R. p. 545- lines 20 – p. 546, lines 1-4).

Appellant's mere act of unlawfully possessing the weapon and bringing it with him to Greenville does not bar self defense. Unlike Slater, appellant was not bringing the weapon to an altercation in progress. The unlawful possession was not the proximate cause of the shooting. The shooting took place after appellant was entitled to arm himself in self defense. The error in refusing to charge that the mere unlawful possession of a weapon does not bar self defense was not harmless. The incomplete charge and the State's closing argument precluded the jury from finding that appellant acted in self defense.

> 3. The trial judge erred in allowing an expert to testify on behalf of the State in reply, generally about gangs when the crimes for which the appellant was on trial were not gang related and appellant admitted that he had formerly been involved in a gang, making the testimony irrelevant and highly prejudicial propensity evidence.

During cross examination the State asked appellant about some gang graffiti found inside a storage room at appellant's house[3]. (R. pp. 428 – 438). The State continued to ask about gang involvement and appellant admitted that he had formerly been involved with a gang but was no longer. (R. p. 435, lines 5-13). At the close of the Defense case, the State, in reply, offered the testimony of Brandon Brown as an expert in gangs. (R. p. 462, lines 23 – p. 463, lines 1-4). Counsel for appellant objected to the testimony. (R. p. 473, lines 25 – p. 474, lines 1-8). Counsel argued:

> Just I object judge, that it's totally irrelevant. It has nothing to do with this case. All the stuff I heard is all speculative stuff, had nothing to do with my client, the facts of this case or anything. All it does is muddy the water. And quite honestly, Judge, highly prejudicial to let something like that in. Why we want to junk up the case that there's no – it's obviously no gangs been mentioned in this case.

[3] It is unclear how the gang line of questioning was relevant but there was not a timely objection. This issue may need to be raised in post conviction relief.

> Not from the get go. Not until just a few minutes ago. I mean, nobody said anything about gangs.

(R. p. 376, lines 13-22). The judge overruled the objection finding the testimony was proper as impeachment of appellant's testimony that he was no longer in a gang. (R. p. 478, lines 6-12). The witness went on to testify extensively about gangs. (R. pp. 491-502). The judge erred in allowing the gang testimony.

In closing argument the State argued:

> Ladies and gentlemen, I did not bring this gang expert to insinuate or put anything out there that this was a gang related shooting. I did that to show you that this man has not been honest with you. He told you that he wasn't in a gang anymore. That's not how gangs work. You don't come and go as you please. He's still got the flags they use. He had these five underneath his mattress, right next to the bullets. He also had one in the car. Again, I'm not saying this is gang related. Because there's absolutely no evidence, no testimony in the record that Vincent or Kevin is a gang member.

(Rr. p. 539, lines 11-21).

The State is correct. The shooting was not gang related. The entire line of questioning in regard to gang activity and the reply testimony from the expert witness in regard to gang activity was irrelevant as to the guilt or innocence of the defendant and was highly prejudicial as it amounted to improper propensity evidence. See State v. Bailey, 279 S.C. 437, 308 S.E.2d 795 (1983).

If the Court finds the evidence from the gang witness is proper reply testimony in response to the appellant stating that he was no longer involved with a gang, the prejudicial impact of the testimony far outweighs any purported probative value. "The admission of evidence is within the circuit court's discretion and will not be reversed on appeal absent an abuse of that discretion." State v. Dickerson, 395 S.C. 101, 116, 716 S.E.2d 895, 903 (2011). Rule 403, SCRE provides that, "[a]lthough relevant, evidence

may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." The admission of the gang expert testimony constitutes an abuse of discretion requiring reversal.

CONCLUSION

Based on the above arguments, appellant's convictions and sentences should be reversed and the case remanded for a new trial.

Respectfully submitted,

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of March, 2013.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

March 4, 2013

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Brendan J. McDonald, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 4th day of March, 2013.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 4th day of March, 2013.

(L.S.)
Notary Public for South Carolina

My Commission Expires: July 24, 2022.