STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Allendale County

Honorable Brooks P. Goldsmith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TRAIVON DAYSHAD YOUNG,

APPELLANT.

APPELLATE CASE NO. 2019-001217

INITIAL BRIEF OF APPELLANT

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2.

Did the trial judge err by refusing to tailor the self-defense instruction to adequately reflect the facts and theories presented by Appellant, specifically that the "defendant is not required to wait until his adversary is on equal terms before he acts" when the charge was supported by the evidence and was crucial to the jury's understanding of the law on self-defense?

STATEMENT OF THE CASE

An Allendale County Grand Jury indicted Appellant on September 15, 2017 for murder and possession of a weapon during the commission of a violent crime. R. *. His case was called to trial on July 8, 2019 before the Honorable Brooks Goldsmith, and a jury. Tr. 1. Assistant Solicitors Reed Evans and Daniel Gurley represented the state. Tr. 2. Ian Deysach represented Appellant. Tr. 2.

On July 11, 2019, the jury found Appellant guilty as indicted. Tr. 650, ll. 4-16. He was sentenced to thirty-eight years for murder and five years concurrent for the weapons office. Tr. 662, l. 24 – 663, l. 6.

This appeal follows.

STATEMENT OF FACTS

On April 17, 2017, Appellant was at a cookout at Thomas Frederick's house. Nigel Walker, the decedent, was also present, along with Frederick's girlfriend, Sophie Hall, Janae Smalls, and several children. Tr. 520, l. 22 – 521, l. 14. After the cookout, Appellant went home. Tr. 521, l. 15 – 522, l. 1. He lived with his parents down the street from Frederick's house. Tr. 520, ll. 19-21; Tr. 522, ll. 2-3. About an hour later, Appellant drove his father's truck back to Frederick's house to use the internet on his phone. Tr. 521, l. 21 – 524, l. 1. After briefly going inside, Appellant sat on the tailgate of his truck, which was parked near the carport, and browsed Facebook. Tr. 523, l. 14 – 524, l. 1; Tr. 527, ll. 3-15. No one else was outside at the time. Tr. 524, ll. 2-4.

About thirty minutes later, Walker walked up. Tr. 524, ll. 5-17. He and Appellant, who were friends, shook hands. Tr. 524, ll. 18-25. Eventually, Walker started talking about "black magic" and threatened Appellant. He said he was going to "sacrifice" Appellant for someone else. Tr. 527, ll. 17-22. Walker had been making similar threats over the past two days. Tr. 527, l. 23 – 528, l. 2. While threatening that he was going to sacrifice Appellant, Walker pulled out a gun. Tr. 528, ll. 10-15. Appellant was scared. He had known Walker to be violent in the past and thought Walker was going to shoot him. Tr. 528, l. 16 – 529, l. 7. Appellant began walking backwards. He removed his gun from where it was stored on his hip and started running. As he was running, Appellant fired towards Walker multiple times. Tr. 529, ll. 8-19.

Appellant ran around his truck to the passenger side to avoid Walker. He jumped into the truck through the passenger door and drove away. Tr. 529, l. 24 – 530, l. 12. He went home and told his parents what happened. Appellant decided to turn himself in and his parents drove him to the Fairfax Police Department. Tr. 530, l. 13 – 531, l. 12. During his initial interview with

police, Appellant claimed he was not involved in the shooting. Tr. 336, l. 9 – 337, l. 3; See State's Exhibit No. 15 (DVD of Interview). Appellant admitted he lied because he was scared. Tr. 531, ll. 13-17. However, several hours later, after speaking with his parents, Appellant admitted shooting Walker in self-defense after Walker threatened him. Tr. 339, l. 19 – 340, l. 3; See State's Exhibit No. 14 (DVD of Interview).

Appellant explained during his testimony that he only shot Walker because he was afraid and "paranoid." Tr. 535, ll. 13-14. He was afraid of "dying" and "wanted to protect [his] life." Tr. 528, ll. 16-20; Tr. 530, ll. 19-20. Appellant thought that if he merely ran, Walker would have shot him in the back. Tr. 530, ll. 19-23.

Thomas Frederick, Sophie Hall, and Janae Smalls, who were all inside Frederick's house, saw the tail end of the shooting, but did not see what led up to it. All three claimed they heard the first shot, ran to the side door adjacent to the carport, and saw Appellant shoot Walker. Tr. 266, l. 5 – 268, l. 24; Tr. 296, l. 15 – 297, l. 4; Tr. 300, l. 3 – 301, l. 13; Tr. 314, l. 4 – 315, l. 23. Hall testified she opened the door to the carport and asked Appellant, "Why are you shooting him like that?" Tr. 267, ll. 4- 22; Tr. 268, ll. 15-16. She claimed Appellant looked at her, smirked, and shot Walker two more times before leaving in his truck. Tr. 267, ll. 23-25; Tr. 268, ll. 17-24. Smalls also claimed Appellant looked towards her, smiled, and fired at least two more times. Tr. 316, ll. 3-18. Frederick, on the other hand, testified that he saw Appellant shoot Walker four times. Tr. 300, l. 18 – 301, l. 8.

Law enforcement arrived about seven minutes after the shooting. Tr. 205, ll. 1-24. There were at least six or seven unidentified people in the yard. Tr. 205, ll. 18-25. While Walker's gun was never located, a seventeen round magazine with Walker's DNA on it was found near the carport. Tr. 211, ll. 3-10; Tr. 431, ll. 12-23; Tr. 437, ll. 2-25; Tr. 453, l. 8 – 455, l. 14.

Appellant suffers from post-traumatic stress disorder (PTSD). In 2014, when he was seventeen years old, Appellant was involved in a shooting which resulted in the death of his cousin and severe injuries to himself. Appellant was a passenger in a parked car when an assailant, who was never identified, fired multiple gunshots into the car. Tr. 517, l. 22 – 519, l. 16. Appellant's cousin was shot in the neck and head. Tr. 519, ll. 7-12. Appellant was shot three times and was hospitalized for weeks while he recovered from his injuries. He had surgery to remove his spleen and required over forty staples to his stomach. Tr. 519, l. 13 – 520, l. 6.

In February 2018, Appellant was evaluated by Dr. Sharisa Christopher with the Department of Mental Health for competency to stand trial after he was arrested for murder in this case. Despite finding Appellant competent to stand trial, Dr. Christopher, a clinical psychologist, diagnosed Appellant with PTSD and major depressive disorder. Tr. 502, ll. 11-19. After being qualified as an expert, she explained to the jury that the shooting Appellant experienced in 2014 was a "traumatic stressor" so severe that it resulted in "symptom impairment." Tr. 503, l. 5 – 504, l. 14.

Dr. Christopher asserted that Appellant met all four categories of symptoms seen in patients with PTSD. Tr. 504, ll. 21-25. The first category is "intrusive reminders." Appellant "described experiencing recurrent distressing memories" and nightmares. Tr. 505, ll. 1-24. These intrusive reminders are often marked by "physiological reactions," such as sweating, heart racing, and difficulty breathing. Appellant described experiencing some of these reactions when he was reminded of the shooting. Tr. 505, l. 25 – 506, l. 9.

The second category is "avoidance." Individuals who suffer from PTSD may avoid certain people or places that remind them of the traumatic event or avoid conversations about the event. Tr. 506, l. 14 – 507, l. 6. Appellant, for example, avoided talking about the shooting. Tr.

507, ll. 7-10. The third category is "negative alternations and cognitions." The traumatic stressor can change the way one sees themselves, the world around them, or other people. Tr. 507, l. 11 – 508, l. 4. It can also change one's interests. Tr. 508, ll. 5-11. Appellant described diminished interest in activities he used to enjoy. Tr. 508, ll. 12-14. He also described negative beliefs about himself. For example, Appellant experienced feelings of guilt that if he had done things differently on the day of the shooting he could have changed the outcome or prevented the trauma from occurring. Tr. 508, ll. 15-23.

The final category is "alternations in arousal." Tr. 508, l. 24. This includes "heightened startled response" or being startled more easily by loud noises and "hyper vigilance" or a "heightened sense of safety." Tr. 509, l. 24 – 509, l. 15. Appellant described difficulty concentrating and irritability. He was "more inclined to feel upset more quickly than he had previously." Tr. 509, ll. 16-20. Finally, Dr. Christopher explained that individuals with PTSD tend to respond to traumatic events with "fear, helplessness, and horror." Tr. 510, l. 9 – 512, l. 16.

The trial judge charged the jury on self-defense and the lesser included offense of voluntary manslaughter. Tr. 634, l. 11 – 639, l. 15. The jury ultimately found Appellant guilty of murder. Tr. 650, ll. 4-16.

ARGUMENT

1.

The trial judge abused his discretion by refusing to admit evidence that the decedent was a registered sex offender since such evidence constituted a "pertinent trait of character of the victim of the crime offered by the accused" and, therefore, admissible pursuant to Rule 404(a)(2), SCRE, where the decedent's character for violence and aggressiveness was relevant to Appellant's defense of self-defense and highly probative as to his state of mind during the shooting and whether his fear of imminent death or serious bodily injury was reasonable.

Relevant Facts

In 2001, the decedent was convicted of lewd act upon a child and, consequently, was required to register as a sex offender. At the time of his conviction, lewd act was not classified as a violent offense. However, the offense has since been recodified as third degree criminal sexual conduct with a minor, which is a violent offense. Tr. 161, ll. 10-19. At the time of his death, the decedent was also subject to lifetime electronic monitoring pursuant to S.C. Code Ann. § 23-3-540 and wore an ankle monitor.

The assistant solicitor moved pretrial to suppress evidence the decedent was a sex offender. He explained that during Appellant's first trial months earlier, which resulted in a mistrial, defense counsel asked several witnesses whether they knew the decedent was a sex offender. The solicitor admitted that some of the witnesses knew while others did not learn until after the decedent's death. Tr. 161, ll. 20-23. He acknowledged defense counsel sought to admit this evidence to suggest the decedent had a character for violence and that Appellant had a basis for believing his life was in mortal danger. However, the solicitor maintained that the nature of the offense for which the decedent was convicted is not violent "either in the statutory sense or in

the colloquial sense." Tr. 161, 23 – 162, l. 8. Consequently, he concluded the evidence was not relevant and was merely "designed to inflame the jury." Tr. 162, ll. 9-25.

The solicitor admitted Appellant could introduce evidence of the decedent's character for violence or reputation for violence in the community pursuant to Rule 404(a), SCRE, but maintained that any reference to the decedent's prior record would be improper. Tr. 162, l. 25 – 163, l. 4. According to the solicitor, the decedent's sex offender status was a reference to his prior criminal record. Tr. 165, ll. 12-19.

Defense counsel argued that evidence the decedent was a sex offender was admissible pursuant to Rule 404(a)(2), SCRE, as "evidence of a pertinent trait of character of the victim of the crime offered by the accused" as it demonstrates the decedent's character for violence or aggressiveness. Tr. 163, ll. 5-20. Counsel clarified that the decedent was originally arrested for first degree criminal sexual conduct with a minor under eleven years of age. He could "think of nothing more aggressive than" assaulting a child of such tender years. Tr. 163, ll. 9-20.

Counsel explained that during Appellant's first trial, he asked numerous witnesses whether they knew the decedent was a sex offender and "nobody denied it, nobody denied knowing it." Tr. 163, ll. 20-25. He argued the evidence was relevant and probative as to whether Appellant's fear was reasonable, which is an element of self-defense. Tr. 164, ll. 8-20. He asserted, "[W]hen you are being threatened by a sex offender it's more scary than when you are being threatened by someone who is not a sex offender. That is why we need this. It is not to bash Nigel [the decedent], it is a pertinent trait of aggressiveness, because he is a sex offender, everyone knows it, and when they threaten you it's more scary. That is why it's relevant. That is why the trait is pertinent. And that is why it's proper for the jury to hear it. And the rule seems to explicitly allow it." Tr. 164, ll. 11-20.

Citing to Rule 404(b), SCRE, defense counsel asserted he was not offering the evidence "to prove action in conformity therewith." Tr. 166, ll. 2-7. More specifically, he stated, "I'm not saying that he [the decedent] was aggressive towards Traivon [Appellant] because he is a sex offender, I'm saying Traivon is more scared of his behavior because he is a sex offender. So, it has nothing to do with Nigel's [the decedent's] behavior, it has to do with [Appellant's] state of mind" as it relates to the intent element of self-defense. Tr. 166, ll. 7-15. Defense counsel concluded, "Sex offenders put more fear in people than non-sex offenders. And that is why it's important." Tr. 166, ll. 15-17.

The judge asked counsel whether he was arguing that sex offenders are more dangerous than others. Tr. 166, ll. 20-21. Counsel acknowledged that was his argument. He asserted, "[S]ex offenders can offend against anybody." They are "aggressive." "It is not a crime of sex, it is a crime of violence." Tr. 167, ll. 3-6.

When asked how he planned to introduce the evidence during trial, counsel explained that during the previous trial, the eyewitnesses, the people who knew the decedent and knew he was a sex offender, testified as to his status. Tr. 165, ll. 20-25.

The judge took the motion under advisement. Tr. 168, ll. 4-7. However, he ultimately granted the state's motion to suppress any evidence that the decedent was a sex offender. Tr. 254, l. 25 – 255, l. 1. Reading from State v. McCray, 413 S.C. 76, 94, 773 S.E.2d 914, 923 (Ct. App. 2015), the judge asserted, "[E]vidence of other specific instances of violence on the part of the deceased are not admissible unless they were directed against the Defendant or[,] [if] directed against others[,] [were] so closely connected at the point of time or occasion with the homicide as to reasonably indicate the state of mind of the deceased at the time of the homicide." Tr. 255,

ll. 2-15. The judge concluded the decedent's status as a sex offender constituted a specific instance of violence or conduct as opposed to reputation. Tr. 258, ll.12-14.

Defense counsel distinguished this case from McCray. He asserted that in McCray, the defendant sought to admit evidence of the deceased's specific criminal convictions and his disciplinary records from the Department of Corrections. However, in this case, Appellant only sought to admit the decedent's status as a sex offender, which is a pertinent character trait. He did not intend to introduce evidence concerning the underlying conviction or facts surrounding the conviction. Tr. 256, l. 2 – 257, l. 10.

The judge maintained his position that the decedent's status as a sex offender was a specific instance of conduct and thus inadmissible pursuant to McCray.

Defense counsel later added to his argument by citing to S.C. Code Ann. § 23-3-400, which lists the purpose of the sex offender registry. The statute states in part, "Statistics show that sex offenders often pose a high risk of reoffending." Tr. 364, ll. 3-17. Counsel asserted, "Statistics show that a person doesn't just do this once and then change . . . And so, therefore, it's my argument that it's a character trait and not evidence of a specific instance of conduct." Tr. 364, l. 24 – 365, l. 6.

The assistant solicitor stood by his argument that the decedent's sex offender status is not a character trait but rather "a legal status imposed by a court following a conviction or a sexual crime." He maintained it was evidence of a prior bad act and inadmissible. Tr. 365, ll. 10-15. The trial judge refused to change his ruling. Tr. 365, ll. 21-24.

Standard of Review

"'The admission or exclusion of evidence is left to the sound discretion of the [circuit court], whose decision will not be reversed on appeal absent an abuse of discretion' or the

commission of a legal error resulting in prejudice to the defendant." State v. McCray, 413 S.C. 76, 92, 773 S.E.2d 914, 922 (Ct. App. 2015) (quoting State v. Martucci, 380 S.C. 232, 247, 669 S.E.2d 598, 606 (2008)) (alternation in original). "An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." Id. (quoting Martucci, 380 S.C. at 247, 669 S.E.2d at 606) (internal quotation marks omitted).

Discussion

The trial judge abused his discretion by refusing to admit evidence that the decedent was a registered sex offender since such evidence constituted a "pertinent trait of character of the victim of the crime offered by the accused" and, therefore, admissible pursuant to Rule 404(a)(2), SCRE. The evidence was relevant to Appellant's defense of self-defense and probative as to Appellant's state of mind during the shooting and whether his fear of imminent death or serious bodily injury was reasonable.

Evidence is relevant if it "ha[s] any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. All relevant evidence is admissible, unless constitutionally, statutorily, or otherwise provided. Rule 402, SCRE. Rule 404(a)(2), SCRE, provides, in relevant part, "Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except . . . [e]vidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same. . ."

Appellant sought to admit evidence that the decedent was a sex offender as evidence of his character for violence and aggression. This evidence was relevant because it made it more or less probable that Appellant's fear of imminent death or serious bodily injury was reasonable. It

was also relevant to Appellant's state of mind during the shooting. For these same reasons, evidence the decedent was a sex offender was highly probative. It supported Appellant's assertion that he acted in self-defense because he reasonably feared imminent death or serious bodily injury after the decedent brandished a gun and threatened to "sacrifice" Appellant. Consequently, this evidence should have been admitted pursuant to Rule 404(a)(2) as a pertinent character trait of the decedent.

In State v. McCray, which was relied on by the judge at trial, McCray sought to admit evidence from Lieutenant Frank Jackson that he investigated the deceased in a burglary and safecracking incident that occurred years before the shooting. According to Jackson, the deceased was convicted of burglary, second-degree burglary as a violent offense, and safecracking after he and two others took an ATM from a convenience store. McCray, 413 S.C. at 85, 773 S.E.2d at 919. McCray also sought to admit evidence from Lieutenant David Brabham that he arrested the deceased years earlier for driving under suspension, failure to stop for a blue light, and the unlawful carrying of a pistol. Id. at 85-86, 773 S.E.2d at 919.

In analyzing whether the circuit court abused its discretion in excluding this evidence, this Court stated, "The rule has long been established in this State that evidence of other specific instances of violence on the part of the deceased are not admissible unless they were directed against the defendant, or, if directed against others, were so closely connected in point of time or occasion with the homicide as reasonably to indicate the state of mind of the deceased at the time of the homicide . . ." Id. at 94, 773 S.E.2d at 923 (quoting State v. Amburgey, 206 S.C. 426, 429, 34 S.E.2d 779, 780 (1945)). This Court ultimately agreed with the circuit court's conclusion that Jackson and Brabham's testimonies were situation specific and unrelated to the deceased's state of mind at the time of the homicide. Id. at 94, 773 S.E.2d at 924.

McCray also sought to admit evidence that the deceased fired a gun the night before the shooting. In analyzing whether the circuit court abused its discretion in excluding this evidence, this Court stated, "In the murder prosecution of one pleading self-defense against an attack by the deceased, evidence of other specific instances of violence on the part of the deceased are not admissible unless they were directed against the defendant or, if directed against others, were so closely connected at the point of time or occasion with the homicide as to reasonably indicate the state of mind of the deceased at the time of the homicide, or to produce reasonable apprehension of great bodily harm." Id. at 94-95, 773 S.E.2d at 924 (citing State v. Day, 341 S.C. 410, 419–20, 535 S.E.2d 431, 436 (2000)).

The Court ultimately agreed with the state that evidence the deceased brandished and fired a gun the night before the incident was not so closely connected to the homicide to allow for its admission because, at the time of the homicide, no gun was found and no evidence was produced to show McCray was aware of the deceased's behavior the night before. Moreover, this Court found no evidence that McCray had a reasonable apprehension of great bodily harm based on the fact that the deceased fired a weapon the night before. Id. at 95, 773 S.E.2d at 924.

McCray is easily distinguishable from this case. McCray sought to admit specific instances of conduct by the deceased which were not connected to the homicide in any way. Appellant, on the other hand, sought to admit evidence of a pertinent trait of character of the decedent, specifically, his character for violence and aggression, through evidence that he was a registered sex offender. This evidence should have been admitted pursuant to Rule 404(a)(2), SCRE, as it was not a specific instance of conduct. Respectfully, this Court should hold the trial judge abused his discretion by excluding evidence the decedent was a sex offender, reverse Appellant's convictions, and remand for a new trial.

2.

The trial judge erred by refusing to tailor the self-defense instruction to adequately reflect the facts and theories presented by Appellant, specifically that the "defendant is not required to wait until his adversary is on equal terms before he acts" when the charge was supported by the evidence and was crucial to the jury's understanding of the law on self-defense.

Relevant Facts

The trial judge charged the jury on self-defense as follows:

> To establish self-defense, the following elements are required. First, the Defendant must be without fault in bringing on the difficulty. If the Defendant's conduct was the type that could be reasonably calculated to and did provoke, then the assault of the Defendant would be at fault in bringing on the difficulty, and would not be entitled to an acquittal based on self-defense [sic].
>
> The second element of self-defense is that Defendant was actually in imminent danger of death or serious bodily injury, or the Defendant actually believed he was in imminent danger of death or serious bodily injury.
>
> If the Defendant was actually in imminent danger, it must be shown that the circumstances would have warranted a person with ordinary firmness and courage to strike the fatal blow to prevent death or serious bodily injury.
>
> If the Defendant believed that he was in imminent danger of death or serious bodily injury, it must be shown that a reasonably prudent person of ordinary firmness and courage would have had the same belief.
>
> In deciding whether the Defendant actually was or believed he was in imminent danger of death or serious bodily injury, you should consider all of the facts and circumstances surrounding the incident including physical abuse, psychological condition, and characteristics of the Defendant and the deceased.
>
> The Defendant does not have to show that he was in actual danger. It's enough that the Defendant believed he was in imminent danger, and a reasonably prudent person of ordinary firmness and courage would have had the same belief.
>
> The Defendant has a right to act on appearances even though the Defendant's belief may have been mistaken. It is for you to decide whether the Defendant's fear of imminent danger or death or serious bodily injury was reasonable, and would have been felt by an ordinary person in the same situation,

> or is accompanied by hostile acts made, depending on the circumstances, to establish self-defense [sic].
>
> If there was some prior difficulties between the Defendant and the deceased may be considered in deciding whether the threat existed, whether the Defendant had a reason to believe that a threat existed, and how serious that threat was.
>
> The relative sizes, ages, and weights of the Defendant and the victim may also be considered in deciding whether the apparent or actual need for force in self-defense and the amount of force needed.
>
> Threats made by the deceased may be considered in determining whether the Defendant actually was, or believed he was, in imminent danger.
>
> And the final element is that the Defendant had no other probable way to avoid the danger of serious bodily injury other than to act as the Defendant did in this particular case.
>
> A person cannot be required to make an exact calculation as to the degree or amount of force which may be needed to avoid death or serious bodily harm, therefore, in self-defense the Defendant has a right to use the force needed to avoid death or serious bodily harm.
>
> Force used in self-defense does not have to be limited to the amount of force used by the deceased. The Defendant has the right to use so much force as appears to be necessary for complete self-protection, and of which a person of ordinary reason and firmness would have believed to be needed to prevent death or serious bodily harm.
>
> If the Defendant is justified in defending himself or others in firing the first shot, the Defendant is also justified in continually shooting until it is apparent that the danger of death or serious bodily injury has completely ended.

Tr. 636, l. 16 – 639, l. 15.

After the trial judge finished instructing the jury, he asked Appellant whether he had any exceptions to the charge. Tr. 641, l. 23. Defense counsel asserted the judge failed to charge the "wait until the assailant gets the drop on him" language. Tr. 641, l. 24 – 642, l. 1. More specifically, counsel emphasized that the judge did not charge the jury that the "defendant is not required to wait until his adversary is on equal terms until he fires or in order to act." Tr. 642, ll.

1-5. He clarified, "I saw the check next to it on your charge that you handed out and . . . I think you told us if it's in italics, or with X's next to it, and this is, I guess, in lower case instead of upper case, and so was that a failure of me to understand that that wasn't something you intended to charge?" Tr. 642, ll. 6-11.

The judge stated he did not intend to charge that specific language. Tr. 642, ll. 13-13. Defense counsel asserted, "I see that it was checked. I thought it was going to be charged. I would have asked for it if I had realized that it wasn't." Tr. 642, ll. 16-18. Counsel requested the judge charge the jury with such language since the instruction was supported by the evidence and essential to Appellant's defense. Specifically, he argued Appellant testified that the decedent presented a gun and, therefore, the charge was proper. Counsel admitted that it was unclear whether Appellant testified that the decedent was playing with a gun or pointing the gun, but either way, the requested charge was supported by the evidence. Tr. 642, l. 23 – 643, l. 14.

The trial judge emphasized that he charged the jury Appellant had the right to act on appearances. Tr. 643, ll. 15-16. He asserted, "I don't see the prejudice in not charging it. Therefore, denied." Tr. 643, ll. 18-19.

Standard of Review

"A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." State v. Williams, 400 S.C. 308, 314, 733 S.E.2d 605, 608 (Ct. App. 2012) (quoting State v. Mattison, 388 S.C. 469, 478, 697 S.E.2d 578, 583 (2010)) (internal quotation marks omitted). "The law to be charged must be determined from the evidence presented at trial." Id. (quoting State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 512 (2000)) (internal quotation marks omitted); See Mattison, 388 S.C. at 478, 697 S.E.2d at 583

(stating appellate courts should "consider the court's jury charge as a whole in light of the evidence and issues presented at trial").

"When reviewing the circuit court's refusal to deliver a requested jury instruction, appellate courts must consider the evidence in a light most favorable to the defendant." Id. at 314, 733 S.E.2d at 608-609 (citing Cole, 338 S.C. at 101, 525 S.E.2d at 512-513). "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." Id. at 314, 733 S.E.2d at 609 (quoting State v. Day, 341 S.C. 410, 416-417, 535 S.E.2d 431, 434 (2000)) (alteration in original).

Discussion

The trial judge erred by refusing to tailor the self-defense instruction to adequately reflect the facts and theories presented by Appellant, specifically that the "defendant is not required to wait until his adversary is on equal terms before he acts" when the charge was supported by the evidence and was crucial to the jury's understanding of the law on self-defense.

"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." State v. Day, 341 S.C. 410, 416-417, 535 S.E.2d 431, 434 (2000) (quoting State v. Muller, 282 S.C. 10, 316 S.E.2d 409 (1984)).

In State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984), our Supreme Court suggested a standard self-defense instruction. However, in State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989), the Court made clear that it did not intend Davis to be the exclusive self-defense charge. State v. Burkhart, 350 S.C. 252, 262, 565 S.E.2d 298, 303 (2002). Instead, "a trial judge should specifically tailor the self-defense instruction to adequately reflect the facts

and theories presented by the defendant." State v. Day, 341 S.C. 410, 418, 535 S.E.2d 431, 435 (2000) (citing Fuller, 297 S.C. 440, 377 S.E.2d 328). "A self-defense charge is erroneous where the trial court fails to charge on elements of the defense which were applicable to the issues raised by the defendant." Id. (citing Fuller, 297 S.C. 440, 377 S.E.2d 328).

In State v. Day, our Supreme Court held the trial judge's failure to charge the specific elements of self-defense that were applicable to Day's theory constituted reversible error. Day, 341 S.C. at 418, 535 S.E.2d at 435. The Court found the trial judge's instruction was incomplete because it failed to include a charge indicting: (1) Day had a right to judge the conduct of the decedent more harshly than otherwise because of the decedent's drug consumption, and (2) the jury could consider prior instances of violence or unprovoked aggression by the decedent in determining whether Day had a reasonable belief of imminent danger. Id. Part of Day's defense was his argument that the decedent had previously pulled a gun on him and that the decedent was in a "drug induced paranoia" the day of the incident. Id. Consequently, the Court held the jury charge, which only included the standard self-defense instruction as outlined by our Supreme Court in Davis along with the charge on the right to act on appearances, was incomplete because the trial judge failed to charge on the decedent's substance abuse or his prior acts of violence. Id. Ultimately, the Court reversed Day's convictions and remanded for a new trial.

In State v. Nichols, 325 S.C. 111, 116-117, 481 S.E.2d 118, 121 (1997), the defendant argued the circuit court's instructions on the law of self-defense were inadequate under State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989), where the court instructed the jury solely on the common law elements of self-defense. Nichols objected to the charge and requested additional instructions on: (1) the right to act on appearances; (2) relevance of prior difficulties; and (3) that a person does not have to wait before acting in self-defense. Id. at 117, 481 S.E.2d at 121.

Nichols contended the circuit court's refusal to give further instructions was reversible error. Our Supreme Court agreed. Id.

The Court emphasized that the charge suggested in Davis was not intended to be the exclusive charge for self-defense and that trial courts have been instructed to consider the facts and circumstances of the case at hand to fashion an appropriate charge. Id. (citing Fuller, 297 S.C. at 443, 377 S.E.2d at 330). The Court held Nichols was entitled to a charge on the right to act on appearances because Nichols testified he thought he had seen a shiny object in the deceased's hand. Id. (citing State v. Jackson, 227 S.C. 271, 87 S.E.2d 681 (1955)). The Court also found the evidence showed there had been prior difficulties between Nichols and the deceased including an instance where the deceased pointed a rifle at Nichols. Consequently, the Court concluded Nichols was entitled to a charge on the relevance of prior difficulties. Id. (citing State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978) (prior bad blood, intoxication, and prior threats by deceased were relevant to defendant's reasonable apprehension of bodily harm)). Further, the Court held Nichols was entitled to a charge that he did not have to wait before acting in self-defense since Nichols testified he thought he saw a gun in the deceased's hand and did not wait for the deceased to fire or aim at him. Id. (citing State v. Rash, 182 S.C. 42, 188 S.E. 435 (1936)). Accordingly, the Supreme Court reversed Nichols conviction and remanded for a new trial. Id. at 118, 481 S.E.2d at 122.

As in Day and Nichols, the trial judge erred by refusing to instruct the jury on a specific element of self-defense that was applicable to Appellant's account of what occurred. Appellant testified that the decedent threatened to "sacrifice" him and then brandished a gun. Before waiting for the decedent to aim or shoot at him, Appellant shot him in self-defense.

Consequently, there was evidence to support the requested instruction and it was reversible error for the judge to fail to charge the jury accordingly.

The judge's reasoning for failing to give the requested charge was also erroneous. The judge did not find that the charge was not supported by the evidence. Rather, he merely concluded Appellant was not prejudiced by the judge's failure to give the instruction. As our Supreme Court stated in Day, "A self-defense charge is erroneous where the trial court fails to charge on elements of the defense which were applicable to the issues raised by the defendant." 341 S.C. 410, 418, 535 S.E.2d 431, 435 (2000) (citing Fuller, 297 S.C. 440, 377 S.E.2d 328). Since the trial judge failed to charge an important element of self-defense relevant to Appellant's account of what occurred, respectfully, this Court should reverse Appellant's convictions and sentence and remand for a new trial.

CONCLUSION

Based on the foregoing argument, this Court should reverse Appellant's convictions and sentence and remand for a new trial.

Respectfully Submitted,

s/ Lara M. Caudy_____
Appellate Defender

ATTORNEY FOR APPELLANT

This 1st day of May, 2020.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
May 01 2020
SC Court of Appeals

Appeal from Allendale County

Honorable Brooks P. Goldsmith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TRAIVON DAYSHAD YOUNG,

APPELLANT.

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 Initial Brief of Appellant and Designation of Matter in the above-referenced case has been served upon Melody J. Brown, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and a copy of the Initial Brief of Appellant and Designation of Matter has been served upon Traivon Dayshad Young, #380721, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 1st day of May, 2020.

s/ Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT