

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable J. C. Buddy Nicholson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

HENRY JAMES FICKLING, JR.,

APPELLANT

APPELLATE CASE NO 2018-000515

FINAL 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

Whether the trial court erred in refusing appellant's requested jury instruction that he had no duty to retreat because appellant was inside his home when he was attacked by the decedent, a boarder in his house?

STATEMENT OF THE CASE

In February 2017, a Charleston County grand jury indicted appellant Henry James Fickling, Jr. for murder. R. 535 – 536. On March 12, 2018, appellant was tried before the Honorable J. C. Nicholson and a jury. R. 1. Richard Waring and David Osborne represented the State. R. 1. Jason King and Nicholas D'Angelo represented appellant. R. 1. The jury convicted appellant. R. 532, ll. 17 – 21. Judge Nicholson sentenced appellant to life imprisonment without the possibility of parole. R. 533, ll. 4 – 6. This appeal follows.

STANDARD OF REVIEW

“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.” State v. Day, 341 S.C. 410, 418, 535 S.E.2d 431, 435 (2000).

ARGUMENT

The trial court erred in refusing appellant's requested jury instruction that he had no duty to retreat because appellant was inside his home when he was attacked by the decedent, a boarder in his house.

The State charged appellant Henry Fickling ("Fickling") with the murder of Jeff Shiver ("Shiver"), a man who rented a room in Fickling's trailer. R. 388, l. 15 – 390, l. 9. The trailer had three bedrooms, one bathroom, and was in poor condition. R. 138, ll. 17 – 24. Fickling lived in the trailer with his girlfriend, Allura Boyd ("Boyd") and paid \$200.00 a month for what, from Fickling's testimony, was likely an owner-financed mortgage or bond for title. R. 385, l. 19 – 386, l. 3. Fickling rented one bedroom to Shiver and another to Jamie Lunney ("Lunney"). R. 386, ll. 4 – 25. R. 138, ll. 8 – 24.

Lunney was not home when Shiver died, but testified for the State and described the living arrangements in the trailer. R. 138, l. 21 – 139, l. 6. R. 145, ll. 1 – 17. Lunney answered an ad on Craigslist and did not know any of her roommates before she moved into the trailer. R. 137, l. 19 – 139, l. 5. Lunney testified that Boyd rarely left her room. R. 140, ll. 14 – 18. Boyd "didn't go out into the world a whole lot" and large groups of people made her "very anxious." R. 84, l. 2 – 85, l. 3.

It took Lunney over a week to meet Shiver because he "would hide in his room." R. 140, l. 24 – 141, l. 9. Shiver had a severe drinking problem. R. 141, ll. 5 – 11. Vodka was Shiver's drink of choice and Boyd believed that Shiver drank a gallon every day. R. 141, ll. 5 – 9. R. 88, l. 23 – 89, l. 4.

Shiver drank so much that he would not even leave his bedroom to urinate or vomit. R. 142, ll. 17 – 23. Lunney said Shiver's room was "a mess" and had "obviously the smell of urine

and vomit.” R. 160, ll. 5 – 12. Shiver had trouble walking and opening the refrigerator. R. 142, ll. 17 – 23. Lunney said, “I’ve never seen him walk in a normal way. He always seemed weak.” R. 152, ll. 6 – 10. Approximately one month before his death, Fickling and Boyd called EMS and Shiver was taken to the emergency room for seizures related to alcohol withdrawal. R. 362, l. 2 – 363, l. 20. R. 398, l. 15 – 401, l. 17. Fickling guessed they called EMS three separate times because of Shiver’s alcoholism. R. 402, ll. 4 – 10. Shiver also smoked crack, often with Fickling. R. 141, ll. 12 – 24. R. 393, l. 22 – 394, l. 18.

The State’s theory of the case was that Fickling killed Shiver because he had been stealing money from Shiver’s bank account using Shiver’s debit card. R. 8, ll. 3 – 21. The State called a banker who testified about withdrawals made during the time leading up to Shiver’s death. R. 287, l. 13 – 296, l. 16. The bank sent Shiver a letter about suspicious activity on his account dated September 11, 2016. R. 296, l. 18 – 297, l. 18. The police obtained surveillance video showing Fickling using Shiver’s debit card. R. 306, l. 13 – 314, l. 7. Boyd testified that Fickling took the money without Shiver’s permission and directed him to change the trailer’s wifi password so Shiver could not check his account balance. R. 66, l. 23 – 67, l. 14. R. 70, l. 21 – 71, l. 4. The pathologist testified that Shiver had multiple injuries resulting from blunt force trauma and died from wounds to the head and neck. R. 324, l. 16 – 327, l. 12.

Fickling testified in his own defense and denied stealing from Shiver. R. 396, l. 24 – 398, l. 14. Shiver gave Fickling the PIN for his debit card because Shiver was incapable of going out and running errands—especially for vodka—for himself. R. 396, l. 24 – 398, l. 14. Fickling said he “waited on [Shiver] hand and foot” and that Shiver bought him things in return. R. 393, ll. 10 – 21.

On the day of Shiver's death, Shiver called Fickling into his room and told him he need vodka. R. 410, ll. 3 – 6. Shiver also wanted to use the house phone and Fickling took it to him. R. 414, l. 19 – 418, l. 13. Shiver's hands were sticky from power drinks and he was getting the phone dirty, which led to Shiver and Fickling beginning to argue. R. 414, l. 19 – 418, l. 13. Fickling told Shiver "we ain't having no more parties" and that Shiver would have to stop drinking vodka in his room. R. 414, l. 19 – 418, l. 13. Fickling noticed that Shiver had been throwing up behind his and vomit was "all over the place." R. 414, l. 19 – 418, l. 13.

While Fickling was looking at the vomit, Shiver attacked him. R. 414, l. 19 – 418, l. 13. Shiver hit Fickling in the mouth, choked him, and kned him in the groin. R. 414, l. 19 – 418, l. 13. Fickling defended himself with a nail puller that he had in his pocket. R. 414, l. 19 – 418, l. 13. After defending himself, Fickling said he was horrified, shocked, and exhausted. R. 414, l. 19 – 418, l. 13.

Fickling admitted that he attempted to deceive the police after Shiver's death. R. 421, l. 21 – 422, l. 2. He was afraid of jail and losing his house and possessions. R. 421, l. 21 – 422, l. 2. Fickling had Boyd give the police an alibi which she ultimately recanted under intense questioning and threats by the police. R. 75, l. 18 – 78, l. 19. R. 120, l. 6 – 123, l. 17. Fickling called the police hours after Shiver's death and told them his roommate was not responsive and about Shiver's seizures. R. 20, l. 8 – 25, l. 11.

At the charge conference, Fickling asked the court to charge that he had "no duty to retreat inside his home." R. 469, l. 8 – 471, l. 5. Defense counsel cited State v. Osborne, 202 S.C. 473, 25 S.E.2d 561 (1943). Defense counsel recited the evidence that Shiver asked Fickling to come into his room and then he was attacked. R. 469, l. 8 – 471, l. 5. The trial judge said, "So to be perfectly honest with you, I don't know if he was an invited guest or trespasser, or licensee

or what.” R. 469, l. 8 – 471, l. 5. The trial judge then said, “I don’t view this as a stand your ground situation,” and declined to charge the jury appellant had no duty to retreat, but told defense counsel he could put his objections on the record after the charge. R. 469, l. 8 – 471, l. 5.

The court charged self-defense, but did not tell the jury appellant had no duty to retreat. R. 521, l. 7 – 524, l. 15. Judge Nicholson charged that the “final element of self-defense is that the defendant had no other probable way to avoid the danger of death or serious bodily injury than to act as the defendant did in this particular instance.” R. 523, ll. 18 – 22.

After the charge, defense counsel again asked for a charge that appellant had no duty to retreat if he was on his own premises or was an invited guest in Shiver’s room. R. 527, l. 6 – 528, l. 5. The court interrupted and said “the victim rented the room and it was his premises; even though he didn’t—it was his premises and the defendant had no right to enter that room without permission.” R. 469, l. 8 – 471, l. 5. Defense counsel pointed out Fickling’s testimony that Shiver invited him into the room and the judge again interrupted and told defense counsel to submit a charge in writing. R. 469, l. 8 – 471, l. 5.

Defense counsel submitted a written charge which was made Court’s Exhibit 5. The requested charge read, “If the defendant was on his own premises, the defendant had no duty to retreat before acting in self-defense.” R. 534. Appellant cited State v. Jackson, 227 S.C. 271, 87 S.E.2d 681 (1955). R. 534. Before the jury returned its verdict, Judge Nicholson asked whether the written charge had been submitted and defense counsel so informed the court. R. 530, l. 1 – 531, l. 6. Defense counsel told the court:

I abandoned the argument I was trying to make if like you’re a guest in somebody else’s home that you can still stand your ground but the more I read the case I don’t think that was correct. So I just submitted a duty to retreat if you are

on your own premises. So if you are right about the landlord with him renting a room that may not be an issue. So that's what I submitted.

R. 530, l. 25 – 531, l. 6. Without hearing further argument, the court received the verdict. R. 531, ll. 7 – 19.

The trial judge erred by refusing to charge that appellant had no duty to retreat because he was in his home. Defense counsel correctly cited this common law principle from State v. Jackson, 227 S.C. at 279, 87 S.E.2d at 685. Shiver's status as a tenant and the fight taking place in Shiver's room does not alter this legal principle. In State v. Gordon, the Court adopted the following rule:

Where a house, premises, or place of business is jointly occupied, used, and possessed by two persons, as by partners, joint tenants, or tenants in common, each joint occupant, being equally entitled to possession, need not retreat when attacked while in the building or premises by the other joint occupant.

128 S.C. 422, 122 S.E. 501, 502-03 (1924) quoting 30 C.J. 72 § 245. In Gordon, the defendant and his assailant were co-workers both at their place of employment and the Court held neither had the duty to retreat. Id.

The rule was restated in State v. Grantham, 224 S.C. 41, 77 S.E.2d 291 (1953) where a husband shot his wife in self-defense. The Grantham Court stated:

The rule is the same whether the attack proceeds from some other occupant or from an intruder. It was so adjudged in Jones v. State, 76 Ala. 8, 14. 'Why,' it was there inquired 'should one retreat from his own house, when assailed by a partner or cotenant, any more than when assailed by a stranger who is lawfully upon the premises? Whither shall he flee, and how far, and when may he be permitted to return?' We think that the conclusion there reached is sustained by principle, and we have not been referred to any decision to the contrary.

Grantham at 44-45, 77 S.E.2d at 292-93 quoting People v. Tomlins, 213 N.Y. 240 (1914).

The principle, "Whither shall he flee, and how far," applies to this case and shows the error committed by the trial judge. The judge erroneously reasoned that because the fight took

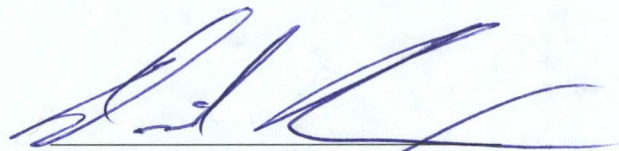
place inside the room rented by Shiver, Fickling was not on his “own premises” and therefore had the duty to retreat. This reasoning belongs to the sphere of real property and landlord-tenant law and is too fine a distinction for the law of self-defense. Under the court’s reasoning, Fickling was required to retreat perhaps two or three feet into the common area of his house while he was under attack. The law of self-defense recognizes these situations are fluid and happen quickly.

Fickling and Shiver both had access to the entire house. Depriving Fickling of the right to retreat in his own home merely because he stepped (at Shiver’s invitation) across the threshold of Shiver’s door to his bedroom adds needless complexity to self-defense. The Court should not draw lines between tenants, subtenants, roommates when all live under one roof. See State v. White, 819 N.W.2d 473, 480 (Neb. Ct. App. 2012). In White, the court ruled that cohabitants have no duty to retreat from each other in their own home. Id. The defendant in White stabbed his roommate. Id. at 475-75. The court reasoned, “Such a rule leads to more uniform application than a rule that requires distinctions about the lawful or unlawful status of an attacking occupant.” Id. at 480. See also Navarro v. State, 190 So.3d 212 (Fla Ct. App. 2016) (holding that roommates had no duty to retreat).

To hold otherwise would mean the law of self-defense would then depend on the circumstances of each living situation and such situations have become legion. The far better rule is leave the technicalities of landlord-tenant law to situations that do not involve roommates sharing a single residence. Here, Fickling and Shiver both lived under the same roof. Fickling had no duty to retreat and was entitled to such an instruction. The court erred in refusing this instruction and this added a burdensome element of self-defense to Fickling’s case that should properly have been eliminated. This Court should reverse.

CONCLUSION

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



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of March, 2019.

CERTIFICATE OF COUNSEL

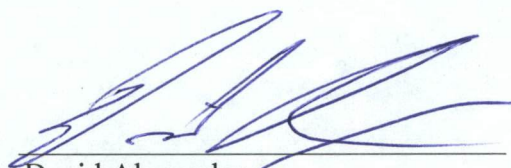
The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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David Alexander
Appellate Defender

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(803) 734-1330

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