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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
Appeal from Aiken County
Court of General Sessions
Honorable DeAndrea G. Benjamin, Circuit Court Judge

Appellate Case No. 2019-000467

THE STATE, ...RESPONDENT,

v.

ROBIN RENEE HERNDON,..... PETITIONER.

RESPONDENT'S PETITION FOR REHEARING

On July 1, 2020, this Court issued a published opinion in which it reversed Petitioner's conviction for voluntary manslaughter for the shooting death of Victim, her then-boyfriend, and remanded the case for a new trial. State v. Herndon, Op. No. 27986 (S.C. filed July 1, 2020) (Shearouse Adv. Sh. No. 26 at 11). In reversing Petitioner's conviction, this Court found the trial judge erred by refusing to issue the Logan charge requested by Petitioner. Pursuant to Rule 221(a), SCACR, Respondent, the State, respectfully petitions for rehearing because the State believes this Court's opinion is incorrect for two primary reasons: (1) this Court erred in finding the trial judge committed reversible error in issuing jury instructions which, the Court concedes, were an accurate statement of law over the Logan charge which this Court concedes contained improper language which "could be construed to invade the fact-finding role of the jury"; and (2)

this Court appears to have misapprehended (and improperly weighed) the facts of the case in concluding the trial judge's failure to issue the Logan charge was not harmless error.

The Grippon Charge

Initially, the State notes the following language, consistent with Grippon, was provided to the jury:

> Ladies and gentlemen of the jury, I submit to you that there are two types of evidence which are generally presented during a trial, direct evidence and circumstantial evidence.
>
> Direct evidence is the testimony of a person who claims to have actual knowledge of a fact, such as an eyewitness. It is evidence which immediately establishes a main fact to be proved.
>
> Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. It is evidence which immediately establishes collateral facts from which the main fact may be inferred. Circumstantial evidence is based on inference and not on personal knowledge or observation.
>
> The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence.
>
> You should weigh all of the evidence in the case. After weighing all of the evidence in the case, if you are not convinced of the guilt of [Petitioner] beyond a reasonable doubt, you must find [Petitioner] not guilty.
>
> . . . .
>
> What is reasonable doubt? A reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act. The State has the burden of proving [Petitioner] guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases where you were told that it is only necessary to prove that a fact is more likely true than not true, such as by the greater weight or preponderance of the evidence.
>
> In criminal cases, the State's proof must be more powerful than that. It must be beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of [Petitioner's] guilt. There are very few things in this world that we know with absolute certainty. And in criminal cases, the law does not require proof that overcomes every possible doubt.

> If, based on your consideration of the evidence, you are firmly convinced that [Petitioner] is guilty of the crime charged, you must find [Petitioner] guilty. If, on the other hand, you think there is a real possibility that [Petitioner] is not guilty, you must give [Petitioner] the benefit of the doubt and find her not guilty.

(R.p.1345, line 16–R.p.1346, line 15; R.p.1350, line 21–R.p.1351, line 20)

It is critical to note this charge is an accurate and correct statement of law; this Court has conceded as much in both its Logan opinion and in its opinion in the instant case. See Logan, 405 S.C. at 99, 745 S.E.2d at 452; Herndon, (Shearouse Adv. Sh. No. 26 at 15–16). Critically, the Logan court—reviewing its own facts—noted the trial court "did not err in providing a circumstantial evidence charge consistent with Grippon." Logan, 405 S.C. at 94, 747 S.E.2d at 449. Not only has the Grippon charge been recognized as appropriate by this Court in published opinions, but it has been included as a model charge on circumstantial evidence charge within the bench book provided to circuit court judges, at least at time of Petitioner's conviction. As noted by the trial judge, the bench book had been updated between the publication of the Logan opinion and Petitioner's 2016 trial, yet the Grippon charge remained within. Critically, this means that, absent a request for a Logan charge, a Grippon charge is considered an accurate and adequate charge on the law and not a basis for reversing convictions.

"Should," "Must," and the Refusal to Give the Logan Charge

Before continuing, the State would like to address this Court's assertion that the State conceded the trial judge erred in failing to issue the Logan charge to the jury. Up until the oral argument of this case before the Justices of this Court, it was indeed the State's belief the trial judge erred by failing to give the charge because Logan stated a trial judge "should" give the charge when requested. However, this concession was based on the confluence of three critical aspects of the Logan opinion: (1) the aforementioned use of the word "should"; (2) the Court's acknowledgment that the Grippon charge was still an accurate and appropriate charge in the law;

and (3) footnote eight of the opinion, which specifically stated that "any conceivable error" in failing to give Logan's requested charge was harmless because the trial judge "clearly instructed" the jury on reasonable doubt and, due to this instruction, the charge as a whole "properly conveyed the applicable law" to the jury.

These three factors are critical to the State's position in this case and are also ignored by this Court in its opinion. The Logan Court indicated circuit courts "should," not must, provide the language suggested. However, in its opinion for this case, this Court paraphrases this language from Logan by substituting "must" for "should." This is not a distinction without merit. "Must" is a term that demands compliance; "should" is a term which suggests or requests compliance. This "should" language, considered in conjunction with footnote eight of Logan, made it clear that the Grippon charge (which this Court does **not** dispute is an accurate charge on the law), paired with a proper instruction on reasonable doubt rendered "any conceivable error harmless beyond a reasonable doubt." Logan, 405 S.C. at 94, n.8, 747 S.E.2d at 449, n.8.

Accordingly, while the State conceded the trial judge's actions constituted error pursuant to Logan, it was with the understanding that Logan also explained such an error was, without question, harmless due to the proper instructions on reasonable doubt given to the jury. However, the State disagrees with the expansion and misapplication of Logan to the instant case.

This Court's Opinion Contradicts the Intent and Purpose of Logan

As justification for the new charge suggested in Logan, the Supreme Court explained "[t]rial courts should not be constrained from providing a jury charge encompassing determinations critical for analyzing circumstantial evidence as it appears in some cases." Logan, 405 S.C. at 99, 747 S.E.2d at 452. The Court instructed that this new charge should be provided "when so requested by a defendant[.]" Id. Thus, the Court modified its earlier

holdings in Grippon and Cherry to allow trial judges to instruct juries on circumstantial evidence using its proposed language if that language was requested by a defendant. Logan, 405 S.C. at 100, 747 S.E.2d at 453.

Ultimately, this Court's application of Logan to the instant case fails to recognize some of the principles of Logan itself. First, as noted above, "[t]rial courts should not be constrained from providing a jury charge encompassing the determinations critical for analyzing circumstantial evidence as it appears in some cases." Id. at 99, 747 S.E.2d at 452. Yet, this Court's application of the Logan charge does just that: if the Logan charge is requested, it "**must** be given in cases based in whole or part on circumstantial evidence." Herndon, (Shearouse Adv. Sh. No. 26 at 14)) (emphasis added). Even a slight deviation by a trial judge will place those instructions into a harmless error analysis. Not only is this interpretation inconsistent with the language used by the Logan court (which noted trial courts "**should**" provide the Logan charge when requested), it constrains the trial judge from providing a charge he or she believes to be adequate based on the facts of the case.

Most importantly, this Court's opinion found the trial judge erred in refusing to give a charge which it, in this very opinion, recognized as misleading. In footnote one, this Court modified the Logan charge to remove the words "all of" from remainder of the sentence reading "the circumstances must be consistent with each other." The State agrees with the Court that the original language was misleading and could be interpreted in a way invading the fact-finding role of the jury. However, this modification does not go far enough: even with the removal of the two words, the remaining language of the sentence is still misleading for the very same reasons it was misleading with the now-removed language.

The phrase, "all of the circumstances must be consistent with each other" communicates to jurors every bit of circumstantial evidence, regardless of the party presenting it, must be consistent with every other piece. Problematic for this Court's opinion is that the "all of" language is a pleonastic determiner for the sentence; in other words, removal of those words does not change its meaning. "The circumstances must be consistent with each other" is still a statement demanding (due to the use of "must" as the operating auxiliary verb) harmony among the pieces of circumstantial evidence presented at trial. [1] Notably, this statement is still an invasion of the fact-finding role of the jury and instructs the jury that all of the circumstantial evidence must be consistent, regardless of whether the State or the defense presented it at trial. This means that if the jury finds a single piece of circumstantial evidence presented by the defense disagrees with or is neutral to the State's theory of the case, the circumstantial evidence as a whole cannot be sufficient to convict that defendant at trial.

Consider the following example. In a murder case, a defendant's fingerprints, DNA, and drivers' license are found at the scene of a crime. However, there is also evidence at trial that at the same time the crime is committed, the defendant's credit card is used at a store on the other side of town. Although there could be a reasonable explanation for the credit card use, such as a pre-arranged alibi or a family member using it, this would be circumstantial evidence disagreeing

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[1] To further illustrate this point, consider the statements, "All of the citizens of South Carolina must obey state laws" and "All of the jurors must follow the trial court's instructions." These sentences plainly assert that all citizens of South Carolina must obey the law and all jurors must follow instructions. If you remove the words "all of" from the statements, they now read: "The citizens of South Carolina must obey state laws" and "The jurors must follow the trial court's instructions." Even without the "all of" language, the most direct interpretations of these modified statements are still that **all** South Carolina citizens must obey the law and **all** the jurors must follow the instructions of the trial court.

Accordingly, the State contends this language needs further modification to avoid the problems listed in footnote one of this Court's opinion.

with the State's case. Despite the strength of the evidence of the State's case, if the jury is instructed "the circumstances must be consistent with each other," it is entirely possible that the jury will believe—based on the plain language of the charge—it must acquit the defendant of murder because one piece of circumstantial evidence did not align with the rest of the circumstantial evidence at trial. Thus, the Logan charge, even if modified, has a clear potential to mislead the jury. Meanwhile, the Grippon charge avoids such improper confusion and simply informs the jury to weigh the evidence while holding the State to the correct and proper burden of proof.

This language also ignores situations in which circumstantial evidence is not connected to other circumstantial evidence to support the State's case, but when its sole purpose is to support the direct evidence at trial.[2] In such a situation, this charge is a complete mischaracterization of how the jury should consider that evidence.

Further, this concession by the Court cannot be rationally reconciled with the result of this opinion: this Court's conclusion is that the trial judge committed **reversible** error in refusing to give a jury charge which this Court explicitly acknowledged was misleading and constituted an "invas[ion] of the fact-finding role of the jury," particularly when the instructions provided by the trial judge were in the bench book and are still, to this day, recognized as an appropriate and accurate statement of the law.

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[2] During the oral argument on this case, the State proposed an example in which a witness, providing direct evidence at trial, describes the clothing worn by the person who committed a crime against him. When arrested, this hypothetical defendant was wearing five articles of clothing described by the witness. In such a situation, the clothing evidence may or may not have some relationship to other circumstantial evidence presented at trial, but its primary and most important relationship would be supporting the direct testimony of the eyewitness. The Logan charge fails to instruct the jury on such a situation, and risks misleading them by actively advising them to consider the clothing evidence only in conjunction with other circumstantial evidence.

Consequences of this Decision

The State believes this opinion will have two indirect consequences on South Carolina law which it believes this Court did not consider when issuing its opinion in this case. First, it has created a class of jury instructions which cannot be modified by the circuit court. Second, and perhaps most immediately impactful, is this Court has created a new cause for Post-Conviction Relief in this State. After this decision, PCR applicants who were convicted in a case involving any amount of circumstantial evidence may now assert a trial attorney was deficient for failing to request the Logan charge. Although a Grippon charge is a correct an accurate statement of the law when considered in tandem with an appropriate charge on reasonable doubt, defense attorneys will now have to defend against claims of ineffective assistance for not requesting the Logan charge. And, pursuant to this Court's opinion in the instant case, if the circumstantial evidence could have been interpreted in multiple ways, such an error merits a new trial. The State cannot begin to emphasize the enormous burden this will place upon the PCR system in South Carolina courts. The State urges this Court to consider this potential consequence before allowing this opinion to remain in place.

The Court's Opinion Misstated Key Facts of the Case

In addition to the problems with this Court's interpretation and application of Logan, this Court, in reviewing the State's asseverations of harmless error, misstated or omitted facts central to such an analysis. For example, this Court claims Dr. Ross testified the trajectory of the bullet was "equally consistent" with scenarios in which Petitioner shot Victim as he walked up the steps of the house and Petitioner shooting Victim as he charged towards her. However, this assertion was inappropriate. Dr. Ross testified the bullet which killed victim entered the middle-right of his neck, traveled downwards and right through his upper right chest, through the upper

lobe of his right lung. Stippling was found near the bullet wound, indicating Victim was shot point-blank, with the gun no more than one to two feet from him when it was fired. Dr. Ross agreed the bullet could be consistent with Petitioner shooting Victim if he were bent over; however, no such testimony is in the record. Petitioner testified Victim charged her and was standing next to her, point-blank, when the gun fired. Petitioner even testified Victim's hand coming down, making contact with the weapon, and pushing it down was the moment the gun fired. (R.p.827, line 14–R.p.924, line 25; R.p.876, line 4–R.p.879, line 9)

The height differences between Petitioner and Victim were significant: Petitioner admitted Victim was seven to eight inches taller than her. (R.p.877, line 20–Tr.p.878, line 24). By the time Victim would have been in point blank range, his neck was inches above her. Combined with the fact that Petitioner testified Victim was pushing the gun down when it was fired, her version of events is entirely inconsistent with the testimony provided by Dr. Ross. Even trial counsel is unable to challenge this inconsistency: despite critiquing nearly every witness and piece of evidence presented by the State, trial counsel was unable to argue that there was evidence Victim was bent over at the time of the shooting. In fact, the State did a physical demonstration of Petitioner's testimony at various distances, starting from two feet apart. The two solicitors, although only a difference of four inches in height (half of the difference between Petitioner and Victim), demonstrated the impossibility that Petitioner shot Victim as she testified and created the injuries highlighted by Dr. Ross.

Even on appeal, Petitioner failed to argue Dr. Ross's testimony was beneficial. In fact, Petitioner asserted this specific testimony was inherently prejudicial and required and merited reversal of her conviction. (Br. of App. to Ct. App., pp. 25–27)

Victim's Alleged Abuse of Petitioner

The most concerning part of this Court's analysis was its direct adoption of Petitioner's claims of prior abuse at the hands of Victim. In particular, the Court wrote the following:

> The victim was prone to severe mood swings, aggression, and uncontrolled anger, and he admitted to his physician he physically abused Petitioner.
>
> On the day of the incident, the victim was not taking his medication and was behaving in an aggressive manner, which led to the argument between Petitioner and the Victim.
>
> The record contains compelling evidence of the victim's physical abuse of Petitioner aside from his own admission. As a law enforcement officer, Petitioner worked in the domestic violence unit, dealing extensively with battered women. According to her testimony at trial, her work history caused her to become deeply ashamed when she became a domestic violence victim herself. As a result, despite the contemporaneous physical evidence of abuse that was apparent to others, Petitioner refused to confirm she was in an abusive relationship until after the victim's death.

(Shearouse Adv. Sh. No. 26 at 13–14)

This language goes beyond acknowledging the possibility of such abuse and instead adopted these claims as truth. The Court also accused the State of "denigrating"[3] Petitioner's claims of abuse. However, the evidence supporting this claim is questionable. Almost all of the evidence regarding Victim's alleged abuse originates from Petitioner's testimony. None of her

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[3] The use of "denigrating" is particularly troubling to the State. "Denigrate" is defined by Merriam-Websters as: (1) "to attack the reputation of: Defame"; and (2) "to deny the importance or validity of: Belittle." "Denigrate." *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/denigrate. Accessed 14 Jul. 2020.

It is the duty of the State to prosecute crimes in South Carolina, which necessarily involves the presentation of evidence unflattering to a criminal defendant. As noted by the State at trial and throughout the appellate process, Petitioner's claims of self-defense contradicted the testimony provided by witnesses of her and Victim's relationship and the events leading up to the shooting. Petitioner's testimony at trial even contradicted the statements she made to investigators immediately after the shooting. Presentation of this evidence was not an attempt to needlessly defame or belittle, but to help a jury ascertain whether Petitioner truly acted in self-defense when she shot and killed Victim.

coworkers, family, or friends ever noticed any physical signs of abuse. The only physical injury ever observed by anyone associated with Petitioner was a black eye which Petitioner claimed originated from a dispute with her daughter, not Victim. In fact, Petitioner's daughter, who lived with the couple approximately fifty percent of the time, never once observed Victim assault Petitioner; from what she observed, Victim, not Petitioner, would leave the room any time an argument escalated. She testified she was "completely shocked" when Petitioner claimed Victim had hit her previously.

Similarly, the defense's expert on domestic abuse, Dr. Veronen, based her conclusion that Petitioner "fit the definition of an abused intimate partner" based entirely on Petitioner's testimony. Dr. Veronen was never given any additional material, especially Petitioner's recorded interview with police after the shooting. Dr. Veronen also met with Petitioner only three weeks before trial, when she was contacted by the defense while they attempted to build their case. Dr. Veronen could not definitively say Petitioner was abused.

The sole evidence outside of Petitioner's abuse outside of her own testimony or statements to others was a single statement by Victim to Dr. Cummings in which he, discussing his later-diagnosed bipolar disorder, said that on one occasion he was "physically aggressive" with Petitioner; Victim never claimed he actually hit Petitioner. (R.p.1086). Further, this statement applied to a single incident and was not a confession to a long history of physical abuse.

Overlooked by this Court were the numerous pieces of evidence which contradicted Petitioner's claims of abuse and self-defense. Notably, Petitioner's testimony at trial was undermined by the State's witness and even her own prior statements. Petitioner's trial testimony was almost entirely inconsistent with the recorded statements she made to police after

the shooting, with the former adding the accusations of punching and hitting which were not found in the latter. Months prior to the trial, Petitioner informed a co-worker that if she ever found out Victim was cheating on her, she would kill him and that she knew how to get away with it due to her law enforcement background. Disinterested eyewitness to the outdoor portions of the outdoor confrontations between Petitioner and Victim all observed Petitioner, not Victim, was the aggressive party who continued the conflict while Victim smoked outside and attempted to disengage from the conflict. None of those witnesses observed physical contact between the parties. Further, their testimony, if believed, eliminated the possibility that there was any time for Petitioner and Victim to have struggled in the house before the shooting. The physical evidence similarly contradicted Petitioner's version of events. In addition to the earlier-discussed evidence regarding the path of the bullet, Victim was found on the porch of the home holding his lighter and other personal effects in his hand. No bruising was ever found on Petitioner's head after the shooting, despite her testimony that Petitioner repeatedly punched her face and head while she lay on the floor.

The Court also found it "significant to note" the trial court found Petitioner was eligible for early parole pursuant to S.C. Code Ann. § 16-25-90, based on a finding of past abuse of domestic violence. However, such a finding is not inconsistent with the jury's verdict. First, even if Petitioner was previously abused, she could still be found criminally liable for Victim's death on the day in question. Notably, § 16-25-90 is not a defense nor does it discount a defendant's liability for a committed crime; it merely provides special parole eligibility guidelines for those who may have suffered from abuse. Second, any amount of "credible evidence" can justify sentencing under this statute; there is no specific burden a defendant must meet. Accordingly, it is improper to use the trial court's decision to sentence under this

provision as evidence that the jury's verdict was somehow inconsistent with the evidence presented at trial.

Reasonable Doubt and Harmless Error

Ultimately, the jury—the designated fact-finders—heard the very same evidence presented to the trial judge and considered it when reaching their verdict. The jury was accurately informed about direct evidence, circumstantial evidence, and the differences between them. They were instructed to weigh all the evidence in the case, and that the State had the burden of proving Petitioner guilty beyond a reasonable doubt. They were correctly informed of what proof beyond a reasonable doubt meant, and that to reach such a conclusion they had to weigh all the evidence presented at trial. The twelve jurors then, pursuant to their instructions, considered all of the evidence in the case, including Petitioner's claims of abuse, and found her guilty of voluntary manslaughter, a lesser-included offense of murder, her original charge; proof positive they weighed the evidence and critically considered the evidence provided by both parties.

Had a Logan charge not been requested, there would be no basis for claiming error by the trial court. The Grippon language and reasonable doubt instruction provided by the trial court would be deemed an accurate and proper charge to the jury; even Logan itself concedes as much. Further, as noted above, this Court's opinion on this very case admits the Logan charge, as requested by Petitioner, was misleading and "invade[d] the fact-finding role of the jury." For this Court to find a trial court erred in failing to give a misleading charge over one deemed appropriate and accurate is improper.

Conclusion

For the reasons stated above, Respondent petitions for rehearing pursuant to Rule 221(a), SCACR, and requests this Court reinstate Petitioner's conviction for voluntary manslaughter.

Respectfully submitted,

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