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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Williamsburg County
Honorable R. Ferrell Cothran, Circuit Court Judge

THE STATE,

Respondent,

vs.

RONALD BROWN,

Appellant.

Appellate Case No. 2019-001784

INITIAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF THE CASE

The trial court erred where it refused to charge the jury on defense of others, where Appellant Brown testified he returned fire to prevent the decedent from shooting towards Appellant's children, since the court must give a defense of others charge where there is evidence adduced at trial that the defendant was acting in defense of others.

RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

The trial court did not err in declining to instruct the jury on defense of others because no evidence was presented that victim's alleged attack was directed at the third party (Appellant's children) rather than Appellant; and because the third party would not have any greater right to act in self-defense than Appellant, Appellant was not prejudiced by the lack of an instruction on defense of others as the jury necessarily determined that Appellant, and not victim, was the aggressor in order to reach its verdict.

STATEMENT OF THE CASE

The Williamsburg County grand jury indicted Appellant Brown for murder and possession of a weapon. Following trial on September 30-October 3, 2019, the jury convicted Brown of voluntary manslaughter and the weapons charge. The Honorable R. Ferrell Cothran, Jr., sentenced Brown to eighteen years' imprisonment for voluntary manslaughter and a consecutive five years' imprisonment for the weapons charge.

STATEMENT OF FACTS

Deputies responded to a call at 4:05 p.m. and arrived at the scene to find Anne McCormick standing over Matthews Cooper, the victim (Victim), lying face down on the ground. Victim was not breathing, and blood drained underneath him. Tr. pp. 60-61. Investigators Juan Ballard and Archie Kennedy both arrived later, but assisted in turning Vicitm's body over from his stomach onto his back. Victim was already deceased when Investigator Ballard arrived. Investigator Ballard observed a hole in the sweater showing the location of the entry wound. In addition to the blood underneath him, there was also a revolver. Inside the revolver were three spent and three unspent casings. Tr. pp. 74-76; p. 80; pp. 218-20. Investigator Ballard processed Victim's wallet – there was no money inside. Four casings were found in the driveway and roadway. These casings were .40 caliber casings and the gun found underneath Victim was a .22 caliber revolver. Tr. pp. 85-88. Investigator Ballard testified that although there were three spent rounds in the revolver, he did not know if the revolver was recently fired or fired weeks prior to that day. Tr. pp. 103-04; p. 108.

Deputy Robert Lee, then an officer with the Kingstree Police Department found four casings in the driveway of the residence. They were about fifty to a hundred yards from where Victim's body lay. Tr. pp. 203-07.

Investigator Pamela Wrenn testified GSR testing on Victim's hands was collected about two hours after law enforcement arrived at the scene. No .40 caliber weapon was found at the scene. Tr. pp. 235-37. Appellant Brown's vehicle was subsequently found on October 23 in Lake City and law enforcement executed a search warrant on the vehicle. Appellant Brown (Brown) turned himself in on October 22, two days after the shooting. Tr. p. 239-43.

Lieutenant Jennifer Nates, a trace evidence analyst, examined the GSR kit and detected no GSR primer collected from Victim. Tr. p. 274. She agreed with defense counsel that blood could dissolve GSR. Tr. p. 284. Dr. Cynthia Schandl performed the autopsy on Victim on October 21. The entrance wound was on the right side of the body. The bullet travelled through the liver and the front of the sack to the heart. The bullet came to rest within the heartsack. Victim suffered severe bleeding and likely died in minutes of suffering the bullet wound. Based on the entrance size of the bullet wound, the bullet was from .38 to .40 caliber ammunition. Tr. pp. 295-97. Michelle Eichenmiller from SLED was qualified as an expert in firearms identification. She determined all four of the .40 caliber casings submitted were fired by the same weapon. Tr. pp. 308-09.

Ann McCormack knew Brown as "Junior." She bought charcoal and clothes from Brown in the past. She knew Victim as "Tweety." That day, she bought four bags of charcoal from Brown for $16 and also bought a case of pampers from him for $7. One of Ann's daughter's, who lived next to Freddie Williams' house, arranged the transaction and Brown arrived at Freddie Williams' house, bringing the charcoal. Testimony during trial established Freddie Williams' house was something of a meeting place in the community. Tr. pp. 114-19; see pp. 149-50. Ann testified Brown arrived with his wife and two children in a white BMW. She later observed Brown and Victim fussing, Brown had a tree branch in his hand. While they were fussing, a third person, allegedly named "Neil," was trying to separate them. Tr. pp. 121-24. Meanwhile, Brown's wife yelled to take the children away from the fracas, so one of Ann's daughters took the children next door. Tr. p. 126.

Brown shook Neil's hand before Brown and his wife left in the BMW. Ann went to Freddie Williams' house to check on him and in a short amount of time, the BMW returned. Brown exited

the vehicle brandishing a silver gun. Tr. pp. 126-29. On redirect, Ann explained Neil was gone by the time Brown returned. Tr. p. 148. She then saw Brown "just strutt'in alone," and "when he raised his hand up I closed my eyes and the shots rang out." Tr. p. 132, lines 5-7. She testified she first heard six shots, then Brown fired four more times. Ann saw Victim head towards the back field before falling over. Ann tended to Victim, who lay gasping for air, and she stayed with him until he died. Tr. pp. 132-35.

Ann testified that after the shooting, her daughter still had Brown's children in the next house, Brown and his wife left without them. Brown's sister and another lady came for them later. Tr. p. 136. Ann testified she never saw Victim with a gun. Tr. p. 144.

Investigator Wrenn explained that despite getting a few addresses, law enforcement was never able to locate "Neil." She noted according to witnesses, before Brown left the first time, he shook hands with Neil and "everything was fine." Tr. pp. 250-51.

Osborn McFadden was at Freddie Williams' house on October 20, 2017. That is a spot where people hang out. McFadden explained Williams had "a little business going on there" and had a business liscence. Williams passed away of natural causes prior to trial. McFadden knew Victim, Brown, and McCormack. Tr. pp. 149-52. McFadden testified that while inside Williams' house, he heard an argument outside between Victim and Brown over Brown owing Victim money. Tr. p. 153. Stepping outside, McFadden saw a confrontation between Victim, Brown, and another guy. The other guy took a swing at Brown. Brown picked up a tree branch in response. However, the three seemed to reach some kind of agreement and Brown left in his car. Tr. p. 158. McFadden testified Brown's wife told Ann's daughter, Quamella McCormick, to keep my kids until she got back. Tr.

pp. 156-58.

After Brown left, McFadden sat down next to Victim by the road and told Victim he should leave because he thought Brown was going to come back since Brown and his wife left their kids behind. McFadden told Victim he did not think it was a good idea for Victim to be out in the open. Tr. pp. 160-61. Sure enough, Brown came back in the white BMW. When he got out of the BMW, he was holding a firearm. Brown yelled [in Victim's direction], "Okay now, what's up now." Tr. p. 164. Victim yelled back, "Well, what's up." Tr. p. 164.

At that point, sensing trouble, McFadden and another person who was sitting nearby left for cover on the side of the house. As they ran, they heard shots fired. Tr. pp. 165. McFadden saw Brown "coming from this side here" and he still had a gun. When McFadden saw Victim coming around the side into the open, McFadden yelled at him to turn around because he was exposing himself. McFadden testified he did not see a gun on Victim. Tr. p. 167. After hearing more shots, McFadden saw Victim fall. At that point in time, McFadden could no longer see Brown who was on the side of the house. Tr. pp. 167-69. As McFadden and McCormack tended to Victim, Victim gasped for air. McFadden picked Victim up enough to see the bullet wound. Tr. pp. 178-79.

Quamella McCormick, Ann's daughter, lived in the White Oak community where William's house was located. The McCormick's were having a family get-together, and Brown sold Ann charcoal while Quamella played with Brown's baby. Tr. pp. 182-83. Afterwards, a dispute broke out between Brown and Victim. Quamella testified Brown told his wife to "get my shit" while his wife rummaged through the trunk of the BMW. Quamella testified Brown's wife looked scared. Tr. pp. 185-87.

Quamella still had the baby she was playing with and during the argument between Brown and Victim, Brown's wife grabbed the second child, a toddler, from out of the back of the BMW. She gave the toddler to Quamella and told her to take her "over there." Quamella took the children over to her sister's house next door. Tr. p. 187. Brown and his wife left in the car, but returned while Quamella and her sister was standing outside the front door of her sister's house. Brown's wife parked the BMW in front of the mailbox to her sister's house, and Brown exited the car holding a gun. Quamella and her sister ran inside the house and "not even five seconds later" they heard shots outside. Tr. p. 188.

Importantly, Quamella testified that "after the shots was fired I wanted to go back outside and my sister said, don't go out there. I said you've got to remember my mama is next door and I heard her scream. So when I opened the door back he was getting the car and she looked at me and said keep my kids and they pulled off." Tr. p. 188, line 22 – p. 189, line 2. Neither Brown nor his wife ever came back for the kids. Brown's sister and aunt later came to collect the children. Tr. p. 188.

Brown was the only defense witness. He testified he dropped off charcoal for Ann's daughter, Yvette, at Freddie Williams' house with his wife and children. Ann was going to pick the charcoal up. Tr. pp. 317-18. Victim and another guy arrived in a car and blocked his car in. They both got out of the car. Brown would find out the other guy's name was Neil. Victim took off his jewelry and gave it to Neil, and was ready to fight Brown over a debt – Brown owed Victim $10 for marijuana from a transaction a week earlier. Tr. pp. 322-24.

Brown testified when Neil tried to hit him, Brown knocked him to the ground. Then Victim rushed Brown, but Brown pinned him. Neil fetched a gun and everyone in the vicinity scattered.

Brown claimed they robbed him: he gave up $190 to them, which was all his money. Tr. p. 326. Brown jumped in the BMW as his wife pulled up and she drove away. According to Brown, when he realized the children were left behind, Brown told his wife drive back. Brown claimed the only reason he was going back was for the children, testifying, "I gots to go get my children because they might kill my children. That's the only thing [that's] on my mind." Tr. pp. 327-29 (direct quote, p. 328, lines 13-19).

When Brown and his wife returned, the car Neil and Victim arrived in was gone, so Brown thought they were both gone too. Brown sent his wife to the house next to Williams' to fetch the children. Brown decided to get a couple of loose cigarettes from Williams. Tr. p. 331. Brown claimed that Victim "shot up" like a "jack-o-lantern" and fired a bullet past Brown's face. Tr. p. 332. Brown claimed he was worried the gunfire could have hit his children. Brown returned gunfire, shooting about four times. He then just left with his wife, leaving the children behind. Tr. p. 332; p. 335-38. Brown claimed he did not know at the time he left that he had shot Victim. Tr. p. 342.

ARGUMENT

The trial court did not err in declining to instruct the jury on defense of others because no evidence was presented that victim's alleged attack was directed at the third party rather than Appellant; and because the third party would not have any greater right to act in self-defense than Appellant, Appellant was not prejudiced by the lack of an instruction on defense of others as the jury necessarily determined that Appellant, and not victim, was the aggressor in order to reach its verdict.

Brown argues the trial court erred when it declined to instruct the jury on defense of others. However, the evidence fails to support the instruction. The evidence at trial was victim's conflict was with Brown and no evidence indicates victim threatened or directed his alleged attack at Brown's children. Further, while Brown testified one of his children could have been shot if they were walking faster, Brown's testimony did not establish the children were ever in immediate danger. Moreover, Brown's right to defend the third party, his children, would be concomitant with the children's right to act in self-defense: because the children's right to act in self-defense was no greater than Brown's right to defend himself, Brown was not prejudiced by the lack of a defense of others instruction. Quite simply, if the jury believed Victim fired the first shot and it went past Brown's face, as Brown testified, the jury would have acquitted on self-defense.

Brown's testimony at trial

The only conceivable evidence to support a defense of others instruction comes from Brown's testimony at trial. Brown testified that when he returned to Freddie Williams' house – Brown called it the Sugar Shack – the car Victim and Neil arrived in was now gone, so Brown concluded they were also both gone. He sent his wife to McCormick's residence to fetch the children, and he walked towards Freddie's to get a couple of cigarettes. Brown described what

happened next as follows:

> So while I'm proceeding through here and turn this bush there, all of a sudden someone, he pops up like a jack-o-lantern and fires on me. Pow! Bullet flies past my face. I knelts down behind the little bush tree, if you want – I can show you where I ducks down then I just reach in my pocket and came back out and fired back. Cuz, at the time before – at the time when that happened, the girl was walking my child back, when we first come up to – towards my child – my little child, she – the other sister was walking my child up that way when he fired and my child could've got hit at the time, you know what I mean?

Tr. p. 332, lines 2-14. Brown testified that before Victim shot **at him**, Victim said, "Yeah, what's up now?" Tr. p. 333, lines 16-19. Brown subsequently explained further:

> Yes, he shot at me first. I didn't see it coming. He could've hit, he could've hit my child actually because the way he was standing and the way I'm walking to the driveway and my child is coming from straight ahead and they got my child in her hand, in they hand and they walking straight ahead. If I would've – **if they would've been walking faster** he definitely would got hit, somebody would've got hit. She would've got hit or my child, one of the two. Someone would've got hit right there.

Tr. p. 335, lines 7-15. Brown testified that after Victim shot at him, "that's when I reached in my pocket, jumped up, trying to look over that bush to tried to get him away, tried to get him away from, um, from where my children – shooting that way where my children out." Tr. p. 335, lines 20-23. Brown testified when he shot back, Victim began running away and "shot back." Brown moved over to a tree and shot two more times. Tr. p. 336, lines 6-10.

Brown testified he did not think anybody was shot at all, explaining, "He **missed me**. I missed him. And it shouldn't even never went that far anyway." Tr. p. 336, lines 17-18.

Jury instructions

The trial court instructed the jury on the element of criminal intent including the admonishment that criminal intent must be proved beyond a reasonable doubt. Part of this instruction was the directive: "[I]t is up to you to determine what the defendant had in mind based on the circumstances shown to [have] existed and I tell you the State must prove criminal intent like every other element beyond a reasonable doubt." Tr. p. 418, lines 5-23.

This immediately preceded the instruction on self-defense which included the admonishment that the prosecution bore the burden of disproving self-defense beyond a reasonable doubt. The trial court instructed the jury of the four elements of self-defense. Tr. pp. 420-22. Moreover, the trial court advised the jury that threats made by the victim may be considered in deciding if the defendant's fear of death or bodily injury was also reasonable. Tr. p. 421, lines 8-13.

The trial court would later provide in its malice instruction that, "[M]alice must exist in the mind of the defendant just before and at the time that the act is committed." Tr. p. 423, lines 2-4.

While instructing the jury of the duty to retreat, the trial court admonished the jury, "Now the defendant would have no duty to retreat, if by doing so, the danger of being killed or suffering serious bodily injury would have increased. You have a duty to retreat unless you own your own property or business. But if the situation is such that retreating would increase the danger of being killed or seriously bodily injury [sic], you don't have a duty to retreat under those circumstances." Tr. p. 421, line 19 – p. 422, line 1. The trial court proceeded to instruct the jury about how a person cannot be required to make an exact calculation of the degree of force "which may be needed to avoid death or serious bodily injury." Tr. p. 422, lines 2-4.

Importantly, the trial court concluded the instruction on the degree of force with the admonishment, "If a defendant is justified in defending himself **or others** and in firing the first shot, then the defendant is also justified in continuing to shoot until it is apparent that the danger of death or serious bodily injury has completely ended." Tr. p. 422, lines 12-16.

The jury went into deliberations and requested to hear instructions on the "four parts" of self-defense and the instruction on voluntary manslaughter. In response the trial court provided the jury with a shortened instruction on the elements of self-defense and also provided an instruction on voluntary manslaughter again. Tr. pp. 429-32.

Standard of review/jury instructions

The law to be charged must be determined from the evidence presented at trial. State v. Gaines, 380 S.C. 23, 667 S.E.2d 728 (2008); State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). A jury instruction is sufficient if, when considered as a whole, it covers the law applicable to the case. State v. Burton, 302 S.C. 494, 397 S.E.2d 90 (1990). State v. Smith, 315 S.C. 547, 554, 446 S.E.2d 411, 415 (1994) (noting the substance of the law, not any particular verbiage, must be charged to the jury); State v. Hoffman, 312 S.C. 386, 440 S.E.2d 869 (1994) (finding reversal is not warranted where the charge given is substantially correct and covers the applicable law).

A jury instruction must be viewed in the context of the overall charge. See State v. Hicks, 330 S.C. 207, 218, 499 S.E.2d 209, 215 (1998). While a court is not required to give any particular verbiage, instructions may not confuse or mislead the jury. State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). Indeed, the purpose of the instructions is to enlighten the jury and to aid it

in arriving at a correct verdict. Id.

If the instructions given to the jury afford the proper test for determining the issues, the failure to give one side's requested instructions is not prejudicial. State v. Hughey, 339 S.C. 439, 452, 529 S.E.2d 721, 728 (2000) *overruled on other grounds by* Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009). To warrant reversal, a trial court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant. State v. Burkhart, 350 S.C. 252, 565 S.E.2d 298 (2002).

"Generally, an alleged error in a portion of a charge must be considered in light of the whole charge and must be prejudicial to the appellant to warrant a new trial." Priest v. Scott, 266 S.C. 321, 324, 223 S.E.2d 36, 38 (1976). The appellant's case must have been prejudiced in order to reverse an appellant's verdict on the basis of an erroneous jury charge. State v. Lee-Grigg, 374 S.C. 388, 415, 649 S.E.2d 41, 55 (Ct. App. 2007); Brown v. Pearson, 326 S.C. 409, 417, 483 S.E.2d 477, 481 (Ct. App. 1997) (holding "[a]n error not shown to be prejudicial does not constitute grounds for reversal").

Evidence failed to support a defense of others justification for a homicide

To be entitled to a charge on defense of others, the record must contain evidence that (1) defendant was lawfully defending a friend, relative, or bystander, and (2) the friend, relative, or bystander would likewise have the right to take the life of the assailant in self-defense. State v. Starnes, 340 S.C. 312, 322-23, 531 S.E.2d 907, 913 (2000). In order for a defendant to be entitled to a jury instruction on self-defense, evidence of the following four elements must be presented:

> (1) The defendant must be without fault in bringing on the difficulty;
> (2) the defendant must have been in actual imminent danger of losing

> his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, defendant must show that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that he was in actually in imminent danger and that the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or the loss of his life; and (4) the defendant had no other probable means of avoiding the danger.

State v. Day, 341 S.C. 410, 416, 535 S.E.2d 431, 434 (2000).

The defendant's right to act in defense of a third party is coextensive with the right of the third party to act in self-defense. For instance, in State v. Sales, 285 S.C. 113, 328 S.E.2d 619 (1985), evidence was presented that the defendant defended his sister when she was attacked by the victim in her own home. The Supreme Court found that the trial court erred in refusing to instruct the jury that a person attacked in their own home has no duty to retreat. In reaching this conclusion, the Supreme Court observed:

> The judge properly charged the jury that, under the law of self-defense, a person may not only take life in his own defense but also in defense of a relative. . . . He also correctly stated that the right to intervene to protect the relative is subject to the same limitations as the right of self-defense. He then charged the jury the four elements of self-defense . . . .

Id. at 114, 328 S.E.2d at 620. Observing a person attacked in their own premises without fault does not have a duty to retreat, the Supreme Court then concluded, "Therefore, the [defendant's] sister had no duty to retreat. The intervenor assumes the rights and limitations of the person he acts to protect." Id. (citing 40 C.J.S. Homicide § 108 (1944)).

Therefore, the justification of defense of others mirrors self-defense. See Commonwealth v.

Arias, 997 N.E.2d 1200, 1209 (Mass. App. Ct. 2013) (finding jury instructions on defense of others that included trial judge's comments that "defense of another 'mirrors' self-defense" was a correct statement of law). This holds true even though the third parties were Brown's children. See State v. Rodriguez, 822 So.2d 121, 138 (La. Ct. App. 2002) (The defendant argued the instruction that it must reasonably appear to the defendant that the other person could justifiably act in self-defense was erroneous because an infant could not be expected to pull out a gun and defend his life. The appellate court found the disputed portion of the charge was neither erroneous nor prejudicial).

First, there is no evidence Brown's child had no other probable means of avoiding the danger. The evidence at trial fails to suggest the child and attending adult could not have easily back-tracked to the house. As Brown testified, they would have been hit only if they had proceeded faster. It is unreasonable to believe that the attending adult would have hurried the children into the line of fire upon the outbreak of gunfire. Therefore, the danger to the children was not immediate. Tr. p. 335, lines 7-15. They did not proceed faster and the attack was not directed at them. Accordingly, the evidence fails to support that the third party had no other probable means of avoiding the danger, therefore, Brown could not stand in their shoes and assume the right to self-defense. The only evidence is that the right to defend was only for himself. If evidence is lacking supporting a single element of self-defense for the third party, then a defendant is not entitled to an instruction on defense of others. See State v. Lockamy, 369 S.C. 378, 631 S.E.2d 555 (Ct. App. 2006) (noting all four elements must exist for a defendant to be entitled to a self-defense instruction and concluding appellant was not entitled to an instruction on self-defense because the evidence failed to show the appellant did not have any other means to avoid the danger). In the instant case, Brown fails to offer

evidence that the children and attending adults had no other means to avoid the danger, so the defense of others instruction is not warranted.

Moreover, Brown stated several times that Victim was shooting at him, but he never said Victim was shooting at his children. Because the only evidence is the attack was directed at Brown, and not his children, Brown is not entitled to an instruction on defense of others. In Bozeman v. State, 307 S.C. 172, 176, 414 S.E.2d 144, 146 (1992), the Supreme Court reviewed the denial of an ineffective assistance claim that counsel was ineffective for failing to request an instruction on defense of others. The Supreme Court found the instruction was not warranted because both the petitioner and his brother testified at trial that the victim swung his knife at petitioner and not petitioner's brother. In the instant case, the only evidence was Victim's alleged attack was directed at Brown – Brown testified the shots flew past his head.

For sure, the threat of harm to the third party must be immediate. Therefore, Brown's expressed concern for his children as a basis for returning to Freddie Williams' house does not present any evidence supporting defense of others. Their distant proximity to the shooing also fails to support a defense of others charge. In Commonwealth v. Okoro, 26 N.E.3d 1092, 1106 (Mass. 2015), Okoro claimed the trial court erred in failing to instruct the jury on defense of others, alleging there was evidence he was defending his sister, Strickland. The appellate court noted there was evidence that victim and victim's friend inflicted violence on Strickland on previous occasions and Okoro was aware of these incidents. Further, at the time a fight broke out between Okoro and the victim, Strickland was standing near him. The appellate court observed:

> Considering this evidence in the light most favorable to the defendant, the jury could have reasonably concluded that the

> defendant was concerned for his sister's safety that evening, and that there was a general atmosphere of animosity and fear present. However, despite this atmosphere of animosity and the presence of the victim, [victim's friend], and Strickland, there was no evidence presented that suggested the victim or [victim's friend] directed any immediate, physical threat toward Strickland that night during or prior to the fight between the defendant and the victim. None of the witnesses, including those favorable to the defendant, testified that the victim or anyone else appeared to be on the verge of striking or otherwise harming Strickland at the moment that the defendant and the victim began fighting.

Id. at 1106. See also Muschette v. United States, 936 A.2d 791, 799 (D.C. Ct. App. 2007) (finding defense of others instruction was not warranted because third party was not by defendant and victim when the shooting began, it was only when the defendant fled toward the third party that the third party felt he was in danger and fired his own gun. It was defendant who placed the third party at risk by running toward him and directing gunfire in his direction).

As in Okoro, it is perhaps understandable Brown was generally apprehensive about his children being left behind and generally concerned that gunfire presented a potentially unsafe situation. However, this concern was not immediate for Brown to justify his return to Freddie Williams' house and his return to the difficulty. Further, there is no testimony, as in Okoro, that the threat of harm to the children was immediate because the children, based on even Brown's own testimony, had not reached the line of fire when gunfire broke out – they did not walk fast enough by Brown's own admission.

Therefore, the trial court did not err in declining to instruct the jury on defense of others because Brown's testimony failed to present evidence that his children were ever the target of Victim's alleged attack and could have acted in self-defense of themselves. The danger to the

children was never immediate and they could have avoided the difficulty by returning to the neighbor's house.

Brown was not prejudiced by the lack of an instruction on defense of others because the evidence showed his right to self-defense was coextensive, if not greater, than the third party's right to act in self-defense.

Further, Brown was not prejudiced by the lack of an instruction on defense of others. The ultimate question was whether Victim fired the first shot and Brown repeated several times that Victim fired at him and missed him, not his children. Either the jury believed Victim fired the first shot and Brown otherwise satisfied the elements of self-defense, or the jury believed Brown was the aggressor. Their verdict following the trial court's instructions on self-defense indicated the jury did not believe Brown. Brown therefore was not prejudiced by the lack of a defense of others instruction.

In Commonwealth v. Green, 770 N.E.2d 995, 997-98 (Mass. App. Ct. 2002), the victim, who the defendant alleged was the aggressor, approached defendant's house when Burton was on the front steps and defendant was by the front door. Defendant and victim exchanged fire while Burton scurried inside the house. The trial judge provided an instruction on self-defense, but denied the request for an instruction on defense of others. The Massachusetts Court of Appeals found error, noting the jury could conclude Burton "was in a more exposed position than the defendant when the shooting began . . . ." Id. at 999. However, the appellate court found the defendant was not prejudiced by the lack of an instruction on defense of others, noting the following:

> In light of the jury's rejection of the defendant's self-defense argument, it is highly unlikely that they would have concluded that he

> was acting in defense of Burton even if they had been instructed on defense of another. As the jury failed to view the defendant's actions as justifiable for his own defense, there is no basis to conclude that the jury would have considered those same actions justified when undertaken for the defense of another in the same circumstances.

Id. at 999-1000.

In the instant case, the jury did not view Brown's actions justifiable in his own defense; therefore, it is improbable the jury would believe that Brown's actions would be justifiable in his children's defense when the children were not even in the line of fire.

Hill v. State, 160 S.W.3d 855 (Mo. Ct. App. 2005) offers a helpful analysis. In that case, all the evidence indicated that the victim fired the first shot and Hill alleged he acted in self-defense. The events started when Hill and his three companions threw a gun and marijuana while followed by a police cruiser. They were able to go on their way after they were stopped and the officer checked the driver's license. Thereafter, they returned to the area where they previously dumped their contraband. Hill exited the vehicle while the others remained in the vehicle, and after victim approached, they exchanged gunfire. Hill's defense attorney requested an instruction on self-defense, but not defense of others. Hill contended that because his companions were behind Hill and exposed to gunfire, counsel was ineffective for not requesting an instruction for defense of others. The Missouri Court of Appeals concluded defense counsel was not ineffective for failing to request defense of others based on prejudice analysis.

In reaching this result, the Hill court examined State v. Jones, 627 S.W.2d 322 (Mo. Ct. App. 1982). In that case, a fight broke out between numerous relatives. Victim knocked defendant's sister to the ground and victim's wife attacked the sister with a wine bottle when the defendant fired

a shot that killed victim. In Jones, it was reversible error for the trial court to decline a defense of others instruction because it was agreed victim was bent over the sister when defendant entered the room and defendant yelled for them to stop, victim started for defendant. The court concluded, "If defendant's evidence and that of his supporting witnesses were believed, the events occurred in rapid succession with little to differentiate [the victim's] assault upon [the sister] from his transfer of attention to [the defendant]. Intervention by [the defendant] in the former brawl immediately provoked the latter, both being closely intertwined in time and situs. [The defendant] was entitled to the additional instruction on defense of another person *enabling the jury to consider both possibilities as justification for the use of deadly force.*" Hill, 160 S.W.2d at 861 (quoting Jones, 627 S.W.2d at 323-24) (emphasis supplied in Hill).

The Hill court then examined the facts of its own case and distinguished Jones as follows:

> Unlike the Jones case where there were separate justification possibilities for the jury to consider, that situation is absent here. This follows because [Hill] and his companions were in the same line of fire. As such, [Hill's] return of fire would have been in defense of both his companions and himself.
>
> Under the circumstances, the jury's answer to one question fully settled the justification issue, namely, was [Hill] the aggressor or was Victim the aggressor? This question was posed to the jury via the self-defense instruction which answered it adversely to [Hill] by convicting him. In contrast to the record in Jones, the record here contains no facts to support the notion that the jury's resolution of the justification issue might have been different if the defense of others instruction had also been given.

Id. at 861-62.

In the instant case, if making the assumption the children were in the line of fire (despite the evidence), then Brown's return of fire at Victim was in defense of himself and not just the children.

Therefore, as in Hill, no facts support the notion that the jury's resolution of the justification issue would be different with an additional instruction on defense of others. Brown was not prejudiced by the lack of an instruction on defense of others and Brown's conviction and sentence should be affirmed. Accordingly, any error was harmless beyond a reasonable doubt. State v. Middleton, 407 S.C. 312, 319, 755 S.E.2d 432, 436 (2014) (finding error in failing to charge a lesser included offense was harmless beyond a reasonable doubt).

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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December 9, 2020

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
Dec 09 2020
SC Court of Appeals

Appeal From Williamsburg County
Honorable R. Ferrell Cothran, Circuit Court Judge

Appellate Case No: 2019-001784

THE STATE,

Respondent,

v.

RONALD BROWN,

Appellant,

PROOF OF SERVICE

I, Shana Montgomery, certify that I have served the within Initial Brief of Respondent along with Designation of Matter on Appellant via electronic mail to the address listed by counsel in AIS, Joanna K. Delany, Esquire. S.C. Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589.

I further certify that all parties required by Rule to be served have been served.
This 9th day of December, 2020.

Shana Montgomery

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Shana Montgomery

From: Shana Montgomery
Sent: Wednesday, December 9, 2020 9:29 AM
To: Delany, Joanna; Kasperski, Katriel
Cc: Shana Montgomery; David Spencer
Subject: State V. Ronald Brown; Appellate Case No. 2019-001784 ; IBOR
Attachments: 02444151.PDF

Good Morning,

Attached please find a copy of the Initial Brief of Respondent and Designation of Matter along with the proof of service for State v. Ronald Brown (2019-001784). Please confirm receipt. This Initial Brief will be submitted to the South Carolina Court of Appeals today via the AIS One Drive System. Please don't hesitate to contact our office should you have any questions or concerns.

Thank You.

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Dec 09 2020
SC Court of Appeals

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