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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 GEORGETOWN COUNTY
Court of General Sessions
Honorable Benjamin H. Culbertson, Circuit Court Judge

Unpublished Opinion No. 2021-UP-086 (S.C. Ct. App. Filed March 17, 2021)

Appellate Case No. 2018-001023

THE STATE, ...APPELLANT

v.

M'ANDRE COCHRAN, ...…RESPONDENT.

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Appellant,

v.

M'Andre Cochran, Respondent.

Appellate Case No. 2018-001023

Appeal From Georgetown County
Benjamin H. Culbertson, Circuit Court Judge

Unpublished Opinion No. 2021-UP-086
Submitted February 1, 2021 – Filed March 17, 2021

AFFIRMED

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, and Senior Assistant Attorney General W. Edgar Salter, III, all of Columbia; and Solicitor Jimmy A. Richardson, II, of Conway, all for Appellant.

Appellate Defender David Alexander, of Columbia, for Respondent.

PER CURIAM: The State appeals the trial court's grant of immunity to M'Andre Cochran under the Protection of Persons and Property Act (the Act)[1] for the fatal stabbing of Emmitt Kelly. The State argues the trial court abused its discretion by granting Cochran immunity because he could not establish a claim of self-defense. We affirm.

At the hearing, Cochran testified he arrived home around 5:00 a.m. from working an overnight shift and discovered an unknown vehicle parked at his house and the front door of his house ajar. Fearing the house had been burglarized, Cochran entered the house and armed himself with a knife. While inspecting the home, Cochran encountered an unknown man in his dark master bedroom. The man threw a punch at Cochran, and a fight ensued. During the fight, Cochran fatally stabbed the man. Unbeknownst to Cochran, his partner had invited the man to spend the night with her. The trial court did not abuse its discretion by granting Cochran immunity because evidence supports the three required elements of self-defense. Accordingly, we affirm pursuant to Rule 220(b), SCACR, and the following authorities: *State v. Curry*, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013) ("A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which this court reviews under an abuse of discretion standard of review."); *State v. Jones*, 416 S.C. 283, 290, 786 S.E.2d 132, 136 (2016) ("An abuse of discretion occurs when the [trial] court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support."); S.C. Code Ann. § 16-11-440(C) (2015) ("A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, . . . has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60."); *Curry*, 406 S.C. at 371, 752 S.E.2d at 266 ("Consistent with the Castle Doctrine and the text of the Act, a valid case of self-defense must exist, and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity."); *State v. Dickey*, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011) (stating the elements of self-defense are: "(1) The defendant was without fault in bringing on the difficulty; (2) The defendant . . . actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger; (3) If the defense is based upon the defendant's actual belief of imminent danger, a reasonable prudent man of ordinary firmness and courage would have entertained the same belief . . . ; and (4)

[1] S.C. Code Ann. §§ 16-11-410 to -450 (2015).

The defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance." ((omissions by court) quoting *State v. Wiggins*, 330 S.C. 538, 545, 500 S.E.2d 489, 493 (1998))); *Jones*, 416 S.C. at 291, 786 S.E.2d at 136 ("Under the Castle Doctrine, '[o]ne attacked, without fault on his part, on his own premises, has the right, in establishing his plea of self-defense, to claim immunity from the law of retreat, which ordinarily is an essential element of that defense.'" (quoting *State v. Gordon*, 128 S.C. 422, 425, 122 S.E. 501, 502 (1924))); *Curry*, 406 S.C. at 371, 752 S.E.2d at 266 (stating the fourth element of self-defense need not be shown when seeking immunity under the Act).

AFFIRMED.[2]

KONDUROS, GEATHERS, and MCDONALD, JJ., concur.

[2] We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Georgetown County
The Honorable Benjamin H. Culbertson, Circuit Court Judge
Appellate Case No. 2018-001023

THE STATE,

Appellant,

v.

M'ANDRE COCHRAN,

Respondent.

2021-UP-086

PETITION FOR REHEARING

On March 17, 2021, this Court filed an unpublished *per curiam* opinion affirming the trial judge's order granting Respondent Cochran immunity from prosecution for murder pursuant to the South Carolina Protection of Persons and Property Act, S.C. Code Ann. §§16-11-410, et seq. (Supp. 2018). The trial judge granted immunity even though Cochran repeatedly stabbed an unarmed man who was sleeping with Cochran's wife on the morning of the incident. *State v. M'Andre Cochran*, 2021-UP-086 (S.C. Ct.App., Mar. 17, 2021). Appellant (the State) respectfully asks this Court to grant a petition for rehearing pursuant to Rule 221, SCACR, based upon the following facts or points of law which this Court may have overlooked, misapprehended or misconstrued:

I.

The trial judge found that Cochran was "not entitled to the presumption of 'reasonable fear of imminent peril of death or great bodily injury' granted under [S.C. Code Ann. §16-11-440(A) (Supp. 2018)] since the victim was an invitee and, likewise, lawfully entitled to be in the defendant's residence." ***R. 121 n. 3***. See also §16-11-440(B)(1); *State v. Glenn*, 429 S.C. 108, 118, 838 S.E.2d 491, 496 (2019). Accordingly, any claim of immunity was under §16-11-440(C) and Cochran was not entitled to immunity unless he could satisfy the provisions of and all the elements of self-defense, except for the duty to the retreat. *See State v. Jones*, 416 S.C. 283, 300-01, 786 S.E.2d 132, 141-42 (2016) (recognizing "the defendant must demonstrate the elements of self-defense, save the duty to retreat, by a preponderance of the evidence" in order to establish entitlement to a grant of immunity pursuant to Section 16-11-440(C)).

As the Supreme Court recently explained in *State v. Scott*, 424 S.C. 463, 819 S.E.2d 116, 118 (2018), *reh'g denied* (Oct. 17, 2018):

> There are four elements that must be established to justify the use of deadly force as self-defense. *State v. Dickey*, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011). Scott bears the burden of proving these elements by the preponderance of the evidence. *State v. Duncan*, 392 S.C. 404, 411, 709 S.E.2d 662, 665 (2011). The elements are,
>
> > (1) The defendant was without fault in bringing on the difficulty; (2) The defendant ... actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger; (3) If the defense is based upon the defendant's actual belief of imminent danger, a reasonable prudent man of ordinary firmness and courage would have entertained the same belief ...; and (4) The defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.
>
> *Dickey*, 394 S.C. at 499, 716 S.E.2d at 101 (quoting *State v. Wiggins*, 330 S.C. 538, 545, 500 S.E.2d 489, 493 (1998)).

See also Curry, 406 S.C. at 371, n. 4, 752 S.E.2d at 266 n. 4; *State v. Davis*, 282 S.C. 45, 317 S.E.2d 452 (1984).

II.

Initially, the State respectfully submits that this Court may have overlooked that the trial judge erred by finding that Cochran had met his burden of establishing that he was entitled to act in self-defense. Specifically, the Court may have overlooked that the trial judge erred by finding that Cochran was not without fault in bringing on the difficulty.[1] *See Jones*, 416 S.C. at 291, 786 S.E.2d at 136 ("Under the Castle Doctrine, '[o]ne attacked, *without fault* on his part, on his own premises, has the right, in establishing his plea of self-defense, to claim immunity from the law of retreat, which ordinarily is an essential element of that defense'") (citation omitted and emphasis added).

The State does not assert that Cochran was at fault for entering his residence or perhaps in arming himself, after he discovered an unknown vehicle parked in his yard in the early morning hours and the front door of the trailer slightly ajar. However, his own account is that he thereafter stealthily crept through his house, without uttering a sound, until seconds before he entered the marital bedroom. He was thus aware that neither his three children nor anyone else was in any other room in the house. ***R. 22-25; 30; 41-43; 45***. He was further aware that he had not heard any sounds of a disturbance in the bedroom and that he should expect to find the children and Casandra in that bedroom, if he truly believed that they were at home.

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[1] On pp. 18-19 of the FBOA, the State asserted "Assuming but not conceding that he satisfied the requirement that he was not at fault in bringing on the difficulty," and it argued in footnote 8 why he was, at least arguably, not without fault.

Even though he knew that the bedroom would be dark because his wife had blackout curtains (***R. 89***), he entered without turning on any light and went up to the foot of the bed, where *he initiated a confrontation with the victim*, who jumped up out of bed where the victim had been sleeping or resting. He then inflicted a fatal knife wound after he and the victim exchanged vulgarities and the victim swung at him. Therefore, it is not clear that he was without fault, as found by the trial judge. *See State v. Jackson*, 384 S.C. 29, 36, 681 S.E.2d 17, 20-21 (Ct. App. 2009) ("An accused who provokes or initiates an assault cannot claim self-defense unless he both withdraws from the conflict and communicates his withdrawal by word or act to his adversary").

III.

Further, there is no evidence in the record to support the second or third elements of a claim of self-defense. Of specific importance, Cochran was required to prove that he "actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger." See *Dickey*, 394 S.C. at 499, 716 S.E.2d at 101. This Court may have overlooked that the record fails to support the trial judge's finding that Cochran's "fear of death or great bodily injury was reasonable and, as a matter of law, [Cochran] was entitled to 'stand his ground and meet force with force, including deadly force' to protect himself."

The trial judge the found that following facts supported this conclusion:

> 1) the defendant arrived at his residence at 5:30 a.m.; 2) a car the defendant did not recognize was at the residence; 3) the front door to the residence was open; 4) the defendant's children were not in their bedrooms; and, 4) immediately upon the defendant's entry into his bedroom, he was assaulted by the victim.

*See **R. 121-22**.*

However, these findings do not support the conclusion that the trial judge reached. Nor does any construction of the record, including Cochran's own version of the confrontation. Cochran testified that when he entered the marital bedroom, without turning on a light - in the room he knew would be dark - all he could see was that there were two people in the bed. When he reached the foot of the bed, he was confronted by the unknown victim. ***R. 25-28; 30-31; 43-44.***

Of importance, he testified that:

> And a dude jump up out the bed and say, "Who the fuck is you?" I like, "Who the fuck is me, who the fuck is you? This is my house," and then that when he swung at me, [that's] when I defended myself.

R. 28, lines 9-12. *See also* ***R. 44-45; 51-52.***

Although he was admittedly unable to determine whether the victim was armed because the bedroom was dark, he testified that the victim was taller than him. Asked how the "altercation" had ended, he replied, "I just remember him jumping out the window, and I dropped the knife on the carpet like." He denied remembering how many times or where he had stabbed the victim. ***R. 28-29; 45.***[2] He further testified that he was "pretty sure" the victim hit him and that he remained at the house until law enforcement arrived. ***R. 31; 45; 47.***

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[2] State's Ex.s 140-190, photographs admitted without objection for purposes of the immunity hearing, depicted suspected blood and a "small injury" on the victim's right inner arm; suspected blood on the inside of his left hand; an injury to the top, back side of his right hand; "a large wound" in the area of his right thumb; an injury to the back of his left hand near his wrist; "some smaller sharp instrument wounds on the outside areas of the pinky finger and on the ring finger" of his left hand; injuries to the inside of his right hand, near where his fingers connect to his palm; an injury to his left rib area; a larger wound to the left chest area; an injury on the right side of his chest;[2] an injury to his right elbow that appeared to be from a "sharp instrument," and suspected blood in the same area; an injury in the area of his scalp; and suspected blood on his legs. The two most significant injuries were those to the victim's chest and most of his injuries were to his hands. ***R. 59-65.*** In other words, the majority of the victim's wounds were defensive wounds.

Although he testified that this was when he defended himself, he did not claim that he thought that he was in "imminent danger of losing his life or sustaining serious bodily injury." Nor does the present record support a reasonable conclusion that "he actually was in such imminent danger." To the contrary, the victim had previously been in bed until Cochran initiated a confrontation. *See Jackson*, 384 S.C. at 36, 681 S.E.2d at 20-21. Also, there is no evidence, whatsoever, that the victim was armed at any point during the confrontation, or that the victim did anything other than swing at him. Importantly, Cochran could not positively say that the victim actually struck him. Even if the victim had struck Cochran, Cochran was aware that he was armed and in no danger of death or serious bodily harm. Accordingly, he was not acting in self-defense when he repeatedly stabbed the unarmed victim. *See, e.g., State v. Washington*, 424 S.C. 374, 413, 818 S.E.2d 459, 480 (Ct. App. 2018), *reh'g denied* (Sept. 20, 2018); *State v. Bruno*, 322 S.C. 534, 537, 473 S.E.2d 450, 452 (1996) ("Bruno was not entitled to a self-defense charge, because he presented no evidence that he believed he was in imminent danger of losing his life or sustaining serious bodily injury. On direct examination, his only testimony was that he felt Victim was coming at him with something. He testified, 'It happened so quick, you know. I didn't mean to kill him. I just wanted him to keep away from me'"); *State v. Goodson*, 312 S.C. 278, 280, 440 S.E.2d 370, 372 (1994) (finding defendant was not entitled to self-defense charge when he presented no evidence showing actual or perceived imminent danger). Likewise, a "reasonable prudent man of ordinary firmness and courage would not have entertained" the belief that Cochran was in danger of death or serious bodily injury, even under Cochran's version of the encounter, since the victim was unarmed.

In *State v. Cervantes-Pavon*, 426 S.C. 442, 451, 827 S.E.2d 564, 568 (2019), reh'g denied (May 30, 2019), the Supreme Court explained that "while the fact a victim is unarmed is a relevant consideration under the Act, it does not automatically prohibit immunity, as the State contends." Yet, *State v. Cervantes-Pavon* does not support the trial judge's ruling because it is readily distinguishable. First, the Court found that "the record contains no evidence that Cervantes-Pavon initiated the fight." *Id.* at 452, 827 S.E.2d at 569. On the other hand, there is at least some evidence that Cochran was at fault in bringing on the difficulty. Second, the victim in *Cervantes-Pavon* had attempted to goad the defendant into a fight on the day before the fatal incident and several times on the day of the confrontation. *Id.* at 446-47, 827 S.E.2d at 566. There was no such evidence here.

Third, the defendant in *Cervantes-Pavon* alleged the victim was trying to strangle him and both the victim and the defendant in that case "were armed with metal pipes at the outset of the fight that ultimately resulted in the stabbing." *Id.* at 451, 827 S.E.2d at 568. Here, the victim had done nothing to bring about the confrontation other than be where he had a lawful right to be. See *State v. Osborne*, 202 S.C. 473, 478, 25 S.E.2d 561, 563 (1943) ("The defense of self-defense is based upon necessity"); *State v. Harvey*, 110 S.C. 274, 277, 96 S.E. 399, 400 (1918) (instructing a person may not employ deadly force in self-defense unless there is a reasonable necessity to kill even if the other elements of self-defense are present). *See also Dickey*, 394 S.C. at 499, 716 S.E.2d at 101 ("If the defense is based upon the defendant's actual belief of imminent danger, a reasonable[,] prudent man of ordinary firmness and courage would have entertained the same belief ...[.]") (quoting *Wiggins*, 330 S.C. at 545, 500 S.E.2d at 493). *See also Douglas*, 411 S.C. at 320 n. 7, 768 S.E.2d at 239 n. 7 ("[T]he standard for evaluating whether an accused had a reasonable belief that deadly force was necessary to prevent great bodily harm to himself is

objective, rather than subjective"); *United States v. Black*, 692 F.2d 314, 318 (4th Cir. 1982) ("[T]he quantum of force which one may use in self-defense is proportional to the threat which he reasonably apprehends"); *cf. State v. Norris*, 253 S.C. 31, 38, 168 S.E.2d 564, 567 (1969) (holding "[t]he right of the father to defend his daughter is coextensive with the right of the daughter to defend herself"); *State v. Jackson*, 227 S.C. 271, 277, 87 S.E.2d 681, 684 (1955) ("Appellant in defending his person from an unlawful arrest had the right to use so much force as was apparently necessary to accomplish his deliverance and no more"). While this may have supported a jury instruction on the law of voluntary manslaughter, see *State v. Cooley,* 342 S.C. 63, 68, 536 S.E.2d 666, 668 (2000) ("In general, South Carolina has allowed marital infidelity to support a charge of marital voluntary manslaughter only when the killer finds the other spouse and paramour in a guilty embrace or flagrantly suggestive situation"), it does not support a claim of self-defense.

CONCLUSION

Based upon the foregoing, Appellant (the State) would ask the Court to grant the Petition for Rehearing, pursuant to Rule 221, SCACR.

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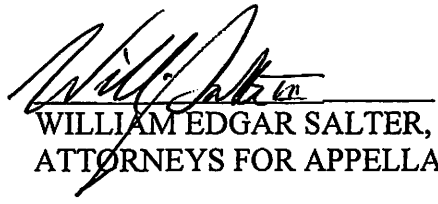

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STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Georgetown County
The Honorable Benjamin H. Culberston, Circuit Court Judge

THE STATE,

Appellant,

v.

M'ANDRE COCHRAN,

Respondent.

Appellate Case No. 2018-001023

PROOF OF SERVICE

I, William Edgar Salter, III, counsel for the Appellant, certify that I have served the within Petition for Rehearing by depositing two (2) copies of the same in the United States mail, addressed to his attorney of record: David Alexander, S.C. Commission on Indigent Defense, Division of Appellate Defense, P. O. Box 11589, Columbia, South Carolina 29211.

I further certify that all parties required by Rule to be served have been served.

This 1st day of April 2021.

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The South Carolina Court of Appeals

The State, Appellant,

v.

M'Andre Cochran, Respondent.

Appellate Case No. 2018-001023

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_____ J.

_____ J.

_____ J.

Columbia, South Carolina

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FILED
Jun 15 2021