STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

Mar 02 2022

S.C. SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Horry County
Steven H. John, Circuit Court Judge

Opinion No. 2021-UP-384 (S.C. Ct. App. filed November 3, 2021)

THE STATE,

RESPONDENT,

V.

ROGER D. GRATE

PETITIONER

APPELLATE CASE NO. 2022-000055

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

INDEX

ARGUMENT IN REPLY

The trial judge's error in allowing the state to call a witness to testify that approximately one year prior to the shooting for which Petitioner stood trial, Petitioner was angry at another individual with whom he was playing cards and as a result of that anger, Petitioner drew his gun and pointed it at the individual affected the jury's verdict.

In its return, Respondent repeatedly misconstrued the record. According to Respondent, "Petitioner initially claimed to police 'he didn't know what happened[.]'" Ret. at 2. Respondent provided no context or explanation for this claim. Had Respondent done so, the misinterpretation of the record would be evident. The first responding officer testified that when he arrived at the scene, he approached Petitioner asking what he saw or heard. R. 30, ll. 1-14. According to the officer, Petitioner was responsive to his questioning. R. 30, ll. 18-20. Thereafter, the testimony continued as follows:

> Q: And what was his response?
>
> A: He informed me at that time that he didn't know what happened and that he was the one who shot the victim that was on the ---

R. 30, ll. 21-24. Thus, Petitioner immediately informed the police that he shot the deceased. There was no attempt to deceive as Respondent claimed.

Respondent again misinterpreted the record by suggesting Petitioner's testimony that he believed the deceased was mumbling was somehow undermined when Petitioner "confirmed that he could not hear what he was saying." Ret. at 4. From this, Respondent concluded that Petitioner's statement that he believed the deceased "was drunk and slurring" was not explainable because Petitioner indicated "he could not hear *what* [the deceased] was saying." Ret. at 4 (emphasis added). For these propositions, Respondent cited to the testimony of the lead detective regarding Petitioner's statement to police and to Petitioner's testimony.

The record belies Respondent's contentions. Specifically, the lead detective testified as follows:

> Q: Okay. And did [Petitioner] tell you that [the deceased] was mumbling some other things?
>
> A: Yes, he was mumbling something, he didn't know what he was saying.
>
> Q. Right. He couldn't recall the content, correct?
>
> A: Yes ma'am.

R. 114, ll. 5-10. When Petitioner testified, he confirmed that he told police that he "couldn't understand what [the deceased] was saying." R. 269, ll. 2-4. Later in his testimony, Petitioner again explained the deceased was "mumbling" when he was aggressively approaching him. R. 276, ll. 1-3. Petitioner was unable to understand what the deceased was saying. R. 276, ll. 4-5. Petitioner believed the deceased was intoxicated resulting in his speech being unintelligible and unclear. R. 276, ll. 6-18. Thus, the record demonstrated not that Petitioner could not *hear* the deceased, as Respondent argued, but that Petitioner could not *understand* the content of the deceased's words because he was mumbling.

Respondent's argument that the erroneous admission of prior bad act evidence under the guise of evidence of habit relies primarily upon Petitioner calling Kentrez Hilton as a witness to refute Terri Doctor's testimony. Ret. at 10. According to Respondent, the impact of Terri's testimony "would have been drastically reduced due to the conflicting recollections of competing witnesses ... especially [] considering one such witness is the supposed victim of the altercation in question." Ret. at 10. Respondent also argued that Hilton's testimony "essentially nullified" Terri's testimony. Ret. at 11. Generally, Respondent's contention would be correct. However, here, the state used Hilton's testimony to bolster its own case against Petitioner. In closing, the state argued Terri's version "either happened or it didn't. It can't be both ways. Either Mr.

Hilton is lying or Terri is lying." R. 298, ll. 18-20. After explaining that the state "contend[ed] it happened," the state asked why Hilton would lie. R. 298, l. 22. With no evidence to support his contention, the state told the jurors that Hilton lied because he feared Petitioner: "He's proven that he's willing to shoot somebody. We know he is; that's undisputed. Why would Mr. Hilton lie? Because he's afraid of him, and rightfully so." R. 298, ll. 22-25. Later, the state returned to this theme. R. 302, ll. 3-7. Thus, the state used the evidence Petitioner was forced to present to combat the erroneously admitted evidence to continue to argue Petitioner was a dangerous man, even arguing he had threatened a witness in the case. Consequently, any sting Hilton's testimony may have taken from Terri's testimony was drastically reduced by the state's improper use of the evidence during its closing argument.

As a secondary argument that the erroneous admission of Terri's testimony was harmless, Respondent argued "the evidence at trial provides only one conclusion: Petitioner shot an unarmed individual who had made no threats, declarations, or suggestions of violence against Petitioner." Ret. at 10. Similarly, Respondent argued "there [was] no factual basis to demonstrate that the [deceased] provoked any need for violence or self-defense." Ret. at 11. To the contrary, Petitioner testified the deceased approached him aggressively and placed his hand in his pocket, leading Petitioner to believe he was armed. See R. 228, ll. 1-25; R. 251, l. 21; R. 252, l. 20 – R. 254, l. 14; R. 256, ll. 5-6. In order to exercise one's right to self-defense, one need not wait for the adversary to declare violence against him. In fact, once the right to fire in self-defense arises, a defendant is not required to wait until his adversary is on equal terms or until he has fired or aimed his weapon in order to act." State v. Starnes, 340 S.C. 312, 322, 531 S.E.2d 907, 913 (2000) (citing State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978)). "Similarly, the accused doesn't have to wait until his assailant gets the drop on him, he has the

right to act under the law of self-preservation and prevent his assailant [from] getting the drop on him." Id. (citing State v. Rash, 182 S.C. 42, 50, 188 S.E. 435, 438 (1936)). "[I]f it is apparent, or reasonably apparent his assailant is taking steps to get the drop on him, he must take steps first to prevent such assailant from getting the drop on him." Rash, 182 S.C. at 42, 188 S.E. at 438. Furthermore, an individual has the right to act on appearances. State v. Starnes, 340 S.C. 312, 531 S.E.2d 907 (2000); see also State v. Jackson, 277 S.C. 271, 87 S.E.2d 681 (1955).

Respondent's reliance on the testimony from two witnesses to support its claim that the erroneous admission of character evidence was harmless is misplaced. Although the state's witnesses presented damning testimony, it was far from overwhelming. See Smalls v. State, 422 S.C. 174, 191, 810 S.E.2d 836, 845 (2018) (explaining that "for the evidence to be 'overwhelming' such that it categorically precludes a finding of prejudice ... the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong" there is no reasonable probability that a factfinder would have a reasonable doubt). Here, there was no conclusive evidence establishing whether Petitioner shot the deceased with malice or in self-defense or by accident. Furthermore, the state's case was not an "open and shut" case. Not only did the judge instruct the jury on murder, voluntary manslaughter, involuntary manslaughter, self-defense, and accident, as required by the evidence presented, the jury requested the judge "define murder v. voluntary manslaughter" during their deliberations. R. 355; see also R. 348, l. 14-17. The jury then requested to be re-instructed as to involuntary manslaughter as well. R. 350, ll. 17-21.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of March, 2022.