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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Edward W. Miller, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

VERNON EVANS JORDAN,

APPELLANT.

APPELLATE CASE NO. 2021-000801

ANDERS BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in failing to instruct the jury on the defense of others where the trial judge refused to issue the instruction because there was not "enough" evidence to support the defense?

STATEMENT OF THE CASE

In a multi-count indictment, a Greenville County grand jury indicted Appellant for murder and possession of a weapon during the commission of a violent crime (2018-GS-23-6035). R. 338 (indictment). The state, represented by Jeff Weston and Alexis Kluska, called the case to trial before the Honorable Edward W. Miller and a jury on July 12-14, 2021. R. 1. Stuart Sarratt and Kaitlyn Diaz represented Appellant. R. 1. At the conclusion of the evidence, Judge Miller instructed the jury on the elements of murder and voluntary manslaughter, but he did not instruct the jury on any defenses. R. 304, l. 22 – R. 307, l. 7. While deliberating, the jury asked to watch the video from Appellant's arrest, to obtain a written copy of the jury instructions, and to obtain a copy of the testimony of Roman Cox, an alleged eyewitness. R. 311, l. 13 – R. 314, l. 17; R. 325 (Court's Exhibit #4); R. 326 (Court's Exhibit #5).

Thereafter, the jury acquitted Appellant of murder, but found him guilty of voluntary manslaughter and possession of a weapon during the commission of a violent crime. R. 315, ll. 9-16. During sentencing, trial counsel noted the state offered a negotiated sentence of twenty-five years if Appellant entered a guilty plea to voluntary manslaughter "just out of concession to avoid going to trial." R. 318, l. 22 – R. 319, l. 2. The state confirmed the plea offer was based upon avoidance of trial, and asked the judge to give "no credit for acceptance of responsibility" because Appellant exercised his right to a jury trial. R. 320, ll. 19-24. Judge Miller sentenced Appellant to thirty years imprisonment for voluntary manslaughter and five years imprisonment for the weapon. R. 321, l.1; R. 340 (sentence sheets). He ordered the sentences to be served concurrently. R. 321, l. 1; R. 340 (sentence sheets).

On July 23, 2021, Appellant served his notice of appeal. This brief follows.

STATEMENT OF FACTS

During the early morning hours of October 7, 2017, Ron Griggs and a young lady were drinking as they walked toward the QT convenience store. R. 91, ll. 5-18. The area behind the store was a vacant lot that was "frequented by a number of transient people from time to time." R. 100, ll. 2-14. Often, homeless individuals would "roost there and stay there overnight." R. 100, ll. 10-14. Some individuals described it as a "homeless camp." R. 107, ll. 9-11; R. 185, ll. 6-7. "There were cardboard boxes that were used as beds. Cut outs of carpet and just trash, beer cans, clothing, all spread out throughout the wood line." R. 185, ll. 7-10. One officer described the area as "very active ... for the homeless, for what [the police] call Beer grabs, or criminal activity around the supermarkets, the convenient stores and so forth. It has a very large homeless population." R. 121, l. 23 – R. 122, l. 3. The police were "very attuned" to the area. R. 122, ll. 3-4.

While in the area with the young lady, Griggs saw a dead body; therefore, he went into the QT to get help. R. 91, ll. 19-24. David Smith was working at the QT at the time. R. 98, l. 24 – R. 99, l. 13. Smith indicated that "two individuals" approached him, stating they had seen a dead body. R. 98, ll. 15-19; R. 99, ll. 17-18. Griggs and Smith walked to where the body was. R. 94, ll. 16-20. Griggs then left to "get [his] thoughts together." R. 95, ll. 9-12. He returned, however, and provided a statement to police when the police arrived. R. 95, ll. 12-14.

Upon seeing the body, Smith immediately called 911. R. 102, ll. 2-3. Emergency medical personnel declared the man on the ground was dead. R. 114, ll. 2-16.

Later, police officers canvassed the area and conducted field interviews in an effort to determine what happened to the deceased man. R. 122, ll. 21-24. Officer James Shelton met with a group of homeless individuals. R. 124, ll. 12-16. Out of a group of five, he knew four

individuals almost instantly. R. 124, ll. 17-21. One of these was Roman Cox, who would later be a key figure in the story. R. 135, ll. 11-14. When Shelton asked the fifth person for identification, the person indicated he did not have any. R. 127, ll. 1-4. This "raised [his] awareness." R. 127, ll. 3-4. The individual provided the name of Vernon Morton and gave a date of birth. R. 127, ll. 8-18. After running the name and date of birth through his system, Shelton determined it was a false name. R. 127, l. 12 – R. 128, l. 18.

Shelton claimed it was policy to ask anyone with whom he had an encounter if the person had a weapon. R. 128, ll. 19-23. The individual informed Shelton he had a knife.[1] R. 129, ll. 24-25. Police removed the knife from his pocket. R. 129, ll. 1-10. The knife was longer than what was allowed in the city limits. R. 129, ll. 6-10. Eventually, the man gave Shelton his real name and date of birth – Vernon Jordan. R. 131, ll. 1-13. The police ultimately arrested Appellant for giving false information and the unlawful weapon. R. 131, l. 18 – R. 132, l. 3.

Charles Pate worked at Trinity Church, which was near the QT. R. 197, ll. 20-24. Pate recalled learning that George Pegram had been found dead in the area. R. 199, ll. 13-23. Late one afternoon, Pate saw two individuals – a man and a woman – sitting on the church's porch going through a backpack. R. 201, ll. 7-13. The following day, while cleaning up the porch of the church, he noticed an identification card with a photograph of Pegram on it. R. 200, ll. 3-8. He alerted the police who seized the items. R. 200, ll. 15-25. A police officer presented Pate with a photographic line-up that included Appellant's photograph. Pate selected Appellant's photograph as the one that closest resembled the person he saw on the porch with the backpack. R. 204, l. 18 – R. 205, l. 25; R. 323 (State's Exhibit #34). Pate then identified Appellant in court

[1] The autopsy revealed the deceased died as a result of multiple stab wounds to the chest. R. 246, ll. 7-9. Further, forensic testing of the knife found in Appellant's pocket revealed no blood on the knife. R. 219, l. 10 – R. 220, ll. 9. However, Appellant's and the deceased's DNA was found on the knife. R. 228, l. 13 – R. 232, l. 9.

as the person he saw with the backpack. R. 208, ll. 13-18. However, Pate previously told the trial judge that he could not swear that Appellant was the person he saw on the porch. R. 81, ll. 6-10. He claimed his change in testimony was because he had time to reflect on his testimony. R. 210, ll. 6-20.

At the time of Pegram's death, Roman Cox was homeless. R. 168, ll. 16-20. Cox frequented the area where Pegram's body was found. R. 169, ll. 18-24. Investigator Brad Lusk interviewed Cox shortly after Pegram's death and almost immediately after Appellant's arrest for false information to police and the unlawful weapon. R. 261, ll. 1-5. In fact, Cox had been present for Appellant's arrest. R. 135, ll. 11-14. According to Lusk, Cox "seemed to be withholding some information" during this initial encounter. R. 261, ll. 4-5. Only after Lusk assured Cox he was not in trouble and that Cox was simply in the wrong place at the wrong time did Cox claim he had valuable information for police. R. 180, ll. 5 – R. 181, l. 7; R. 261, ll. 19-23; R. 262, ll. 5-10. Eventually, Cox would tell police that he saw Appellant stabbing Pegram on the morning of October 7, 2017. R. 170, ll. 4-25; R. 172, ll. 6-9. Using a photographic line-up prepared by Lusk, Cox identified a photograph of Appellant as the perpetrator. R. 175, ll. 9-25. Cox also identified Appellant in court as the person he saw stabbing the deceased. R. 176, ll. 11-20.

STANDARD OF REVIEW

Generally, the trial judge is required to charge only the current and correct law of South Carolina. State v. Burkhart, 350 S.C. 252, 261, 565 S.E.2d 298, 302 (2002). "The law to be charged is determined from the evidence presented at trial." Douglas v. State, 332 S.C. 67, 73, 504 S.E.2d 307, 310 (1998). "[I]n order for the trial court to give a defense of others charge, there must be some evidence adduced at trial that the defendant was indeed lawfully defending others." State v. Starnes, 340 S.C. 312, 323, 531 S.E.2d 907, 913 (2000). "To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." Burkhart, 350 S.C. at 261, 565 S.E.2d at 303. "An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010).

ARGUMENT

The trial judge erred in failing to instruct the jury on the defense of others where the trial judge refused to issue the instruction because there was not "enough" evidence to support the defense.

Relevant facts

In October 2017, Roman Cox was homeless. R. 168, ll. 16-20. He spent most of his time in the local men's home or the library. R. 168, ll. 23-24. Cox often visited a soup kitchen near the QT convenience store on Rutherford Road. R. 169, ll. 18-24. On the morning of October 7, 2017, Cox was walking to the QT to buy a drink. R. 170, ll. 4-13. Cox happened upon an "argument and stuff" involving Appellant, "the dude that got killed and the woman." R. 170, ll. 17-19. According to Cox, "the dude that got killed was the one laying or sleeping or whatever he was doing" and "he grabbed the woman." R. 170, ll. 19-21. In response, Appellant, who had been on a moped, "jumped on him." R. 170, ll. 21-25. Cox claimed Appellant "was on top swinging his hands like he was stabbing someone." R. 172, ll. 6-9.

Cox further claimed that he tried to intervene. R. 172, ll. 23-25. However, Cox simply walked away when Appellant "kind of faced toward [him] like he was going to do something to [him]." R. 173, ll. 1-14. According to Cox, Appellant said, "Get the fuck on." R. 173, ll. 3-4. Cox did not go to the store to buy his drink, but he did see Appellant walking after the conflict. R. 173, ll. 16-22.

During the charge conference, defense counsel requested the judge instruct the jury on defense of others. R. 268, ll. 5-7. Judge Miller indicated he "hadn't thought about that." R. 268, l. 8. He instructed the state to consider it overnight and provide their position the following day. R. 268, ll. 9-10. The next morning, the state did not object to the instruction; rather, the state

requested that if the judge provided the jury with the ability to consider defense of others, then the jury should be instructed on "the use of legal force - - deadly force versus non-deadly force." R. 270, l. 20 – R. 271, l. 2. The state noted the defendant allegedly used a knife to stab the deceased ten times, and there was no evidence the deceased had a weapon. R. 271, ll. 2-7.

The judge summarily denied trial counsel's request: "Alter ego defense does not apply. I don't think there's *enough* evidence to charge on that, defense of others. I would tell you the testimony of Mr. Cox was that what he saw was that [Appellant] and the unidentified female were together and the victim grabbed the female. I mean, *there's not a lot there*." R. 271, ll. 8-14 (emphasis added).

Discussion

"The law to be charged is determined from the evidence presented at trial." State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241, 241 (1996). "The office and purpose of instructions are to enlighten the jury and to aid them in arriving at a correct verdict." State v. Hewitt, 205 S.C. 207, 31 S.E.2d 257, 259 (1944). "If there is any evidence to support a jury charge, the trial judge should grant the requested charge. The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand is an error of law." State v. Santiago, 370 S.C. 153, 159, 634 S.E.2d 23, 26 (Ct. App. 2006). When a requested instruction is supported by the evidence and correctly states the applicable law, the judge is duty-bound to give it. Brown v. Smalls, 325 S.C. 547, 554-555, 481 S.E.2d 444, 448 (Ct. App. 1997) (citing Singletary v. South Carolina Dep't of Educ., 316 S.C. 153, 447 S.E.2d 231 (Ct. App. 1994)); see also State v. Peer, 320 S.C. 546, 553, 466 S.E.2d 375, 380 (1996). "Where a request to charge is timely made and involves a controlling legal principle, a refusal by the trial judge to charge the request constitutes reversible error." Id. at 555, 481 S.E.2d at 448; see also State v. Burris, 334 S.C. 256, 262, 513

S.E.2d 104, 108 (1999) (holding that a "trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence").

"Under the theory of defense of others, one is not guilty of taking the life of an assailant who assaults a friend, relative, or bystander if that friend, relative, or bystander would likewise have the right to take the life of the assailant in self-defense." State v. Long, 325 S.C. 59, 64, 480 S.E.2d 62, 64 (1997); see also Douglas v. State, 332 S.C. 67, 73, 504 S.E.2d 307, 310 (1998). When a person acts in defense of another, the person "is in the same situation and upon the same plane as those who act in defense of themselves." State v. Hewitt, 205 S.C. 207, 207, 31 S.E.2d 257, 258 (1944). Only those facts "which excuse the killing in defense of self likewise excuse a killing in defense of [another]." Id.; see also, State v. Harvey, 110 S.C. 274, 96 S.E. 399, 400 (1918) (noting that "[w]hile a man may take life in defense of himself or another, yet the slayer, or the person in whose behalf the slayer strikes, must not only be without fault in provoking the difficulty, but there must be a necessity to kill"); 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").

> The right of one to justify a slaying on the ground that it was necessary in defense of another person stands upon the same plane or footing as, and is coextensive with, the right of the person to whose aid he or she goes, under the existing circumstances of the particular occasion; or as is sometimes stated, the right to justify killing in defense of another depends upon the same conditions as would be necessary to excuse such other person under the plea of self-defense.

40 Am.Jr.2d Homicide § 168 (2014). In other words, "[t]he right is commensurate with self-defense, and every fact requisite to excuse a killing in the defense of self must be present in order to excuse a killing in defense of another." Id.

The defense of others imposes the "alter ego" rule, meaning "an intervenor who used deadly force to defend a person not entitled to use deadly force himself would be held criminally

liable." Marco F. Bendinelli, James T. Edsall, Defense of Others: Origins, Requirements, Limitations and Ramifications, 5 Regent U. L. Rev. 153, 153 (Spring 1995). "'[A] person is justified or excused in killing in defense of another person when, *and only when*, the circumstances are such that the latter would be justified or excused if *he* had committed the homicide in his own defense.'" Id. at 158 (quoting Lovejoy v. State, 15 So.2d 300, 301 (Ala. Ct. App. 1943)) (emphasis in the original). When a person interferes in a difficulty on behalf of another, "he may lawfully do in another's defense what such other might lawfully do in his own defense *but no more*; he ... is subject to the same conditions, limitations, and responsibilities as the person defended." Id. (quoting Lovejoy, 15 So.2d at 301) (emphasis in the original). South Carolina adopted the alter ego rule in 1906. State v. Cook, 78 S.C. 253, 59 S.E. 862 (1906).

To establish self-defense, four elements must be present: (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, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief, or if the defendant was actually in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life; 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 the particular instance. State v. Hendrix, 270 S.C. 653, 657-658, 244 S.E.2d 503, 505-506 (1978); see also State v. Davis, 282 SC. 45, 46, 317 S.E.2d 452, 453 (1984).

In State v. Sales, 285 S.C. 113, 328 S.E.2d 619 (1985), the South Carolina Supreme Court examined the defense of others instruction as it applied to the defendant in a criminal case. Sales' sister and her boyfriend were fighting in their shared home over the boyfriend's use of grocery money to buy liquor. The boyfriend hit the sister in the face with an iron poker. Sales' nieces ran to his home and begged him to help sister. Sales found sister at her home holding her face. When sister and boyfriend began to struggle over a heavy object, Sales separated the two. The boyfriend then swung the heavy object at Sales. A fight between Sales and the boyfriend ensued. The boyfriend died. The Court held the trial judge properly instructed the jury that, "under the law of self-defense, a person may not only take the life in his own defense but also in defense of a relative," and "that the right to intervene to protect the relative is subject to the same limitations as the right of self-defense." However, the judge instructed the jury on the duty to retreat, which the Court found to be in error. Instead, Sales had no duty to retreat because sister had no duty to retreat from her home and Sales assumed the rights and limitations of the person he acted to protect. Id. at 114-15, 328 S.E.2d at 619-620.

The state's star witness – Roman Cox – informed the jury that Appellant jumped on the deceased only after there had been a heated argument and the deceased "grabbed the woman" who was with Appellant. Cox's testimony showed that the woman, whom Appellant was defending, had the right to defend herself from the deceased. There was no evidence that she brought on the difficulty with the deceased. Additionally, there was evidence that she was in reasonable fear of imminent bodily injury based upon the deceased grabbing her late at night in a desolate area. Finally, she was unable to retreat as she was being grabbed by the deceased. Appellant sought to help her escape from the deceased. Therefore, the evidence supported a jury instruction on defense of others.

In fact, the trial judge expressed that there was some evidence to support the instruction when he ruled there was not "enough" evidence to charge defense of others and there was "not a lot there." As explained, the law requires a judge to instruct a jury on a sound principle of law if there is *any* evidence in the record to support the instruction. Here, the judge refused to issue the instruction on defense of others because he determined that some threshold quantity of evidence had not been met. This was error.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and remand for a new trial due to the circuit court's failure to instruct the jury on the defense of others.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of March, 2022.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Vernon Evans Jordan states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent Appellant.

2. She has reviewed the record of Appellant's trial before Judge Edward W. Miller, which was held on July 12-14, 2021, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. Pursuant to Anders v. California, 386 U.S. 738 (1967), she has briefed an arguable legal issue which arose during the course of the trial.

Wherefore, she asks the Court to relieve her as counsel for Vernon Evans Jordan.

Respectfully Submitted,

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

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DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) Trial transcript dated July 12-14, 2021;
(2) State's Exhibit #1;
(3) State's Exhibit #33;
(4) State's Exhibit #34;
(5) State's Exhibit #36;
(6) Court's Exhibit #4;
(7) Court's Exhibit #5;
(8) Court's Exhibit #6;
(9) True-billed indictments; and
(10) Sentence sheets.

I certify that this designation contains no matter which is irrelevant to this appeal.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of March, 2022.

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CERTIFICATE OF COUNSEL

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

Susan B. Hackett

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