

REL: May 25, 2018

Notice: This unpublished memorandum should not be cited as precedent. See Rule 54, Ala.R.App.P. Rule 54(d), states, in part, that this memorandum "shall have no precedential value and shall not be cited in arguments or briefs and shall not be used by any court within this state, except for the purpose of establishing the application of the doctrine of law of the case, res judicata, collateral estoppel, double jeopardy, or procedural bar."

## Court of Criminal Appeals

State of Alabama  
Judicial Building, 300 Dexter Avenue  
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Montgomery, AL 36130-1555

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Presiding Judge  
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### MEMORANDUM

CR-17-0079

DeKalb Circuit Court CC-16-202

David Wooten v. State of Alabama

WINDOM, Presiding Judge.

David Wooten appeals his conviction for murder, a violation of § 13A-6-2, Ala. Code 1975, and his resulting sentence to life in prison.

On the morning of November 15, 2014, emergency dispatch in Fort Payne received a call from Daniel Taylor, Wooten's brother, who stated that his mother told him that Wooten may have killed someone the night before. Officer David Smith was dispatched to a local trailer park where Wooten lived.

fact, I'm a Jew." (R. 355-56.) Clark retorted, "Well, I'm just like Hitler." (R. 356.)

Wooten decided to leave Clark's camper. Clark grabbed Wooten from behind and said, "'If you come down here running your GD Jew mouth, I'll cut your guts out.'" (R. 356.) Clark then cut Wooten's face. Wooten fled Clark's trailer. Wooten testified that he looked back to see Clark chasing him and wielding a machete. Wooten made it inside his mobile home and grabbed a stick he kept on hand for self-defense. Wooten went back outside to confront Clark in Clark's front yard. Clark swung the machete at Wooten, and Wooten used his stick to defend himself. With his stick, Wooten forced Clark toward Clark's camper. After striking Clark on his head, Wooten was able to push Clark inside his camper. Clark dropped the machete, and Wooten followed Clark inside and put down his stick.

Wooten tried to talk to Clark, but Clark again attacked Wooten with the machete. Wooten grabbed Clark's wrist and slammed him into a cabinet until Clark dropped the weapon. Wooten threw Clark to the couch and picked up the machete. Wooten stated that he struck Clark across the back of the neck, but was unsure of how many times. Wooten then tossed the machete in Clark's lap, and Clark seized the weapon and attacked Wooten again, cutting Wooten's hand. Wooten grabbed the machete and struck Clark with it. Wooten testified that although he struck Clark many times, it was not his intent to mutilate Clark.

On appeal, Wooten argues that the circuit court erred: 1) by failing to give a requested jury instruction and 2) by admitting into evidence photographs that altered the appearance of the victim's injuries to make them appear more gruesome.

## I.

Wooten argues that the circuit court erred by failing to give a requested jury instruction. Specifically, Wooten sought a jury instruction on Alabama's stand-your-ground law.

"A trial court has broad discretion in formulating its jury instructions,

He was very persistent at trying to <sup>3</sup> kill me with the machete even after I disarmed him, tried to talk to him, struck him with it 4 or 5 times (he could have survived with stitches) I feared for my own life and ultimately had to use deadly force. I didn't have time to think, It all happened spuratically.

provided they are an accurate reflection of the law and facts of the case. United States v. Padilla-Martinez, 762 F.2d 942 (11th Cir. 1985). However, a "defendant is entitled to have the court instruct the jury on his defense theory, 'assuming that the theory has foundation in the evidence and legal support.' United States v. Conroy, 589 F.2d 1258, 1273 (5th Cir. 1979)." United States v. Terebecki, 692 F.2d 1345, 1351 (11th Cir. 1982). In order to determine whether the evidence is sufficient to necessitate an instruction and allow the jury to consider the defense, "we must accept the testimony most favorably to the defendant." (Citations omitted.) United States v. Lewis, 592 F.2d 1282, 1286 (5th Cir. 1979)."

"Coon v. State, 494 So. 2d 184, 186 (Ala. Crim. App. 1986)."

George v. State, 159 So. 3d 90, 93 (Ala. Crim. App. 2014).

Based on Wooten's testimony, the circuit court charged the jury on self-defense. It, however, denied Wooten's request for an instruction on the stand-your-ground law. Alabama's stand-your-ground law is found in § 13A-3-23(b), Ala. Code 1975, which states:

\* "A person who is justified ... in using physical force, including deadly physical force, and who is not engaged in an unlawful activity and is in any place where he or she has the right to be has no duty to retreat and has the right to stand his or her ground."

Wooten argued at trial that he was entitled to a jury instruction on the stand-your-ground law because he was invited into Clark's home and thus had a right to be in that place. However, even if Wooten was originally invited into Clark's camper, there was no evidence presented that Wooten was invited into Clark's camper at the time of the fatal encounter. Wooten testified that he fled Clark's camper after

\* He was chasing me back to my trailer. The shirt that I was wearing (presented as evidence) had cut marks. One on the back and one on the back of my arm.

being cut under his eye. Wooten was able to return to the safety of his own domicile. Wooten, though, armed himself and returned to engage Clark, who, by Wooten's own testimony, was still in his own yard. This encounter resulted in Clark's being forced back into his camper, where Wooten killed him. "[T]he defendant who is not required to retreat because of the location of the attack must not have brought on the difficulty, i.e., was the original aggressor." Commentary to § 13A-3-23, Ala. Code 1975.

Even accepting the testimony most favorable to Wooten, there was no evidence presented that he was lawfully in Clark's camper at the time Clark was killed. Further, Wooten was the aggressor in the fatal confrontation with Clark. As such, the circuit court did not abuse its discretion in denying Wooten's requested jury instruction on the stand-your-ground law.

## II.

Wooten argues that the circuit court erred by admitting into evidence photographs that altered the appearance of the victim's injuries to make them appear more gruesome. Wooten has identified on appeal State's Exhibits 96, 97, and 107, which are photographs taken during Clark's autopsy, as having been altered. Wooten asserts that Clark's "injuries were physically manipulated to make the injuries appear even more grotesque than they already were." (Wooten's brief, at 41.) Specifically, Wooten asserts that in State's Exhibits 96 and 97, Clark's fingers were being held to open his wounds, and in State's Exhibit 107, Clark's head "appears to have been leaned back so as to make his neck wound appear larger and more gaping than it would be if he were lying in a normal resting position." (Wooten's brief, at 42.)

Wooten filed a pretrial motion in limine regarding the State's use of autopsy photographs, which was denied by the circuit court. (C. 254, 256.)

"A party who suffers an adverse ruling on a motion in limine can preserve the ruling for post-judgment and appellate review only by objecting to the introduction of the proffered evidence and assigning specific grounds at the time of trial, unless he or

I told my trial lawyer that he<sup>5</sup> either contacted me on his cell phone, or I contacted him on his. It WAS either a call or a text. I can't remember, but I believe it WAS a text. This WAS never mentioned in court.

she obtains the express acquiescence of the trial judge that a subsequent objection and assignment of grounds are not necessary.' Parks v. State, 587 So. 2d 1012, 1015 (Ala. 1991)."

Davis v. State, 620 So. 2d 136, 137 (Ala. Crim. App. 1993). Wooten did not object to the photographs at the time they were admitted into evidence at trial, (R. 308), and there was no indication from the circuit court that a subsequent objection would be unnecessary. As such, this issue is not preserved for appellate review.<sup>1</sup>

Accordingly, the judgment of the circuit court is affirmed.

AFFIRMED.

Welch, Kellum, Burke, and Joiner, JJ., concur.

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<sup>1</sup>This Court also notes that the grounds raised on appeal are distinct from those raised below. In his motion in limine, Wooten argued generally that the autopsy photographs were gruesome and meant only to inflame the jury. Wooten clarified during a hearing on his motion that he believed the photographs were cumulative and that he sought only to limit the total number of autopsy photographs to 8 to 10. (Supp. R. 17.) Wooten did not raise below a claim that the victim's body had been manipulated in the photographs to make his injuries appear more gruesome. "'An issue raised for the first time on appeal is not subject to appellate review because it has not been properly preserved and presented.' Pate v. State, 601 So. 2d 210, 213 (Ala. Crim. App. 1992)."  
Ex parte Coulliette, 857 So. 2d 793, 794 (Ala. 2003).

**THE STATE OF ALABAMA -- JUDICIAL DEPARTMENT  
THE ALABAMA COURT OF CRIMINAL APPEALS**

**CR-17-0079**

David Wooten v. State of Alabama (Appeal from Dekalb Circuit Court: CC16-202)

**CERTIFICATE OF JUDGMENT**

WHEREAS, the appeal in the above referenced cause has been duly submitted and considered by the Court of Criminal Appeals; and

WHEREAS, the judgment indicated below was entered in this cause on May 25th 2018:

**Affirmed by Memorandum.**

NOW, THEREFORE, pursuant to Rule 41 of the Alabama Rules of Appellate Procedure, it is hereby certified that the aforesaid judgment is final.

Witness. D. Scott Mitchell, Clerk  
Court of Criminal Appeals, on this  
the 10th day of August, 2018.

D. Scott Mitchell

Clerk  
Court of Criminal Appeals  
State of Alabama

cc: Hon. Jeremy S. Taylor, Circuit Judge  
Hon. Palma B. Simpson, Circuit Clerk  
Angela Cochran Morgan, Attorney  
Madeline H. Lewis, Asst. Attorney General

# IN THE SUPREME COURT OF ALABAMA



August 10, 2018

1170962

Ex parte David Wooten. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: David Wooten v. State of Alabama) (DeKalb Circuit Court: CC-16-202; Criminal Appeals : CR-17-0079).

## CERTIFICATE OF JUDGMENT

WHEREAS, the petition for writ of certiorari in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on August 10, 2018:

**Writ Denied. No Opinion.** Shaw, J. - Stuart, C.J., and Bolin, Wise, and Sellers, JJ., concur.

NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., IT IS HEREBY ORDERED that this Court's judgment in this cause is certified on this date. IT IS FURTHER ORDERED that, unless otherwise ordered by this Court or agreed upon by the parties, the costs of this cause are hereby taxed as provided by Rule 35, Ala. R. App. P.

I, Julia J. Weller, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 10th day of August, 2018.

A handwritten signature in black ink, appearing to read "Julia Jordan Weller".

Clerk, Supreme Court of Alabama

**Additional material  
from this filing is  
available in the  
Clerk's Office.**