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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Darlington County

Honorable Michael G. Nettles, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DABRY AUNTA JAMES,

APPELLANT.

APPELLATE CASE NO. 2022-000471

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by refusing to instruct the jury on voluntary manslaughter where there was evidence the decedent threatened appellant and started to retrieve a gun from his car when appellant shot him since this constituted "any evidence" of a shooting in a "heat of passion" upon a "sufficient legal provocation" that was necessary for a voluntary manslaughter charge?

STATEMENT OF THE CASE

Appellant was indicted at the June 2020 term of the Darlington County grand jury for the offenses of murder, grand larceny, unlawful possession of a weapon, and possession of a weapon during a violent crime. R. p. *. His case was called to trial on April 11, 2022, before the Honorable Michael G. Nettles and a jury. John M. Ervin III represented appellant. The assistant solicitors were G. Monty Bell and Patty Parker. Tr. 1.

At the conclusion of the trial on April 13, 2022, the jury found appellant guilty on all four counts. Tr. 273, l. 20-274, l. 13. Judge Nettles sentenced appellant to forty-years' imprisonment for murder, and he imposed concurrent sentences of five-years' imprisonment for grand larceny, five-years' imprisonment for possession of a weapon during a violent crime, and one-year imprisonment for unlawful possession of a weapon. Tr. 281, l. 18- 282, l. 12.

This appeal follows.

STANDARD OF REVIEW

"In criminal cases, appellate courts sit to review only errors of law." State v. Sams, 410 S.C. 303, 307, 764 S.E.2d 511, 513 (2014); see also State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (2006); State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001). An appellate court is bound by a trial court's factual findings unless they are clearly erroneous. Wilson, 345 S.C. at 6, 545 S.E.2d at 829. "The law to be charged to the jury is determined by the evidence presented at trial." State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). "The trial court is required to charge a jury on a lesser-included offense if there is evidence from which it could be inferred that the defendant committed the lesser, rather than the greater, offense." Sams, 410 S.C. at 308, 764 S.E.2d at 513; see also State v. Drafts, 288 S.C. 30, 340 S.E.2d 784 (1986); State v. Gourdine, 322 S.C. 396, 472 S.E.2d 241 (1996). "An appellate court will not reverse the trial [court]'s decision absent an abuse of discretion." State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 166 (2007). "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." Id. at 570, 647 S.E.2d at 166–67. "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." Id. at 570, 647 S.E.2d at 167. "In determining whether the evidence requires a charge on a lesser-included offense, the [appellate court] must view the facts in the light most favorable to the defendant." Sams, 410 S.C. at 308, 764 S.E.2d at 513 (citing State v. Cole, 338 S.C. 97, 525 S.E.2d 511 (2000)). "The charge request is properly rejected when *there is no evidence* tending to show the defendant was guilty of the lesser offense." Id. (citing State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996); State v. Cooney, 320 S.C. 107, 463 S.E.2d 597 (1995); State v. Gadsden, 314 S.C. 229, 442 S.E.2d 594 (1994)). (emphasis added).

ARGUMENT

The court erred by refusing to instruct the jury on voluntary manslaughter where there was evidence the decedent threatened appellant and started to retrieve a gun from his car when appellant shot him since this constituted "any evidence" of a shooting in a "heat of passion" upon a "sufficient legal provocation" that was necessary for a voluntary manslaughter charge.

Introduction

There was evidence that in December 2019, the eighteen-year-old appellant was shot by a shooter in another car while he was driving brother's Oldsmobile. After a short hospital stay, appellant was released. Appellant thought that the decedent was involved in his shooting because he saw him driving the car from which the shots emanated a little later. Then, while appellant was working at the Kentucky Fried Chicken in Darlington County, he was "jumped" and beaten by several men while he was taking out the garbage.

Relevant facts

Against this backdrop, on February 12, 2020, an incident occurred at the East Park Apartments at Lange Court in Hartsville, South Carolina. Hartsville police officer Michael Weatherford was dispatched to the scene at around two o'clock that afternoon, and he found the decedent's body laying on the ground in front of a set of apartments. Tr. 69, l. 19-71, l. 19.

Weatherford remembered "the name Dabry James had come up numerous times as being the individual involved..." Tr. 73, ll. 15-17. A photo lineup was put together. Dytashia Platt, who knew appellant from the housing complex, identified appellant as being the shooter. Tr. 73, l. 10-74, l. 15. Platt told investigators that the decedent approached appellant and confronted him shortly before appellant shot him. Tr. 79, l. 10-80, l. 15.

Platt remembered that the decedent drove up in his car and that appellant's mother told appellant to bring her keys and her cellphone to her. When the appellant retrieved these items, he was walking towards his mother and the decedent and appellant "exchanged some words." During this heated moment, appellant shot the decedent. Tr. 87, l. 21-88, l. 7. Platt claimed after appellant shot the decedent, he stood over him "and shot him in the head." Tr. 89, ll. 11-18.

Platt admitted she initially lied to the police. Tr. 93, ll. 14-18. However, at trial she acknowledged the decedent was walking towards his car immediately after this heated exchange, and she did not know what the decedent had inside his car. Appellant later testified that the decedent had a .9 mm Ruger on the floorboard in his car. Tr. 95, ll. 8-17.

The pathologist, Dr. Kelly Rose, testified that the decedent died of a gunshot wound to the head. The decedent had five entrance wounds and one exit wound on his body. He was shot at an intermediate range. Tr. 162, l. 11-165, l. 22; Tr. 168, ll. 5-15.

Appellant's mother, Portia Tedder, testified appellant was only eighteen-years-old at the time of the shooting. Portia said that the decedent was "harassing" her son at the time of the fatal shooting. Tr. 190, ll. 1-6. Tr. 177, ll. 19-25.

Portia explained that appellant had been shot a couple of months before this fatal incident, and he had also been "jumped" and beaten at the Kentucky Fried Chicken where he worked a couple of months before this shooting. Portia explained that "bad people" were also watching their apartment. All of this forced Portia to become a patient at the Pee Dee Mental Health clinic due to her anxiety problems from all of this occurring. Tr. 183, l. 4-186, l. 24.

SLED toxicologist Tracy McKinnon testified that the decedent was "heavily impaired" from the ingestion of marijuana at the time of his death. McKinnon explained that THC at the

level found in the decedent's bloodstream could cause "psychosis" or "confusion." Tr. 152, ll. 7-21.

Appellant took the stand in his own defense, and he testified that a couple months before the fatal shooting, he was driving his brother's Oldsmobile when a car began following him. Someone from inside that car shot him. As seen, appellant later saw the decedent driving that same car from which the bullets were fired at him. Tr. 197, l. 21-200, l. 18. In addition, appellant was beaten while taking out the garbage at the Kentucky Fried Chicken that same month. Tr. 202, l. 6-203, l. 25. Appellant was able to identify a couple of the men involved in the beating incident, but he did not know if the police ever arrested any of them. Tr. 203, ll. 19-25

Appellant testified that there had been a number of shootings and murders in Hartsville around this time. Appellant's friend, Decaprio, was murdered in an infamous bar shooting at "The Max," where three men apparently were killed in a fatal shooting there. Appellant said he was very paranoid at this time, and he always carried a gun to protect himself. Tr. 210, l. 11-213, l. 5.

Appellant explained that he was afraid the decedent was going to retrieve a gun from his nearby car after the decedent threatened him. After the shooting, appellant went to the decedent's car where he found a .9 mm Ruger on the floorboard inside the car. Appellant got in the decedent's car and drove away from the apartment complex after the shooting. He threw the gun into the woods along the road as he drove away. Tr. 208, l. 5-210, l. 4.

Charge conference

Defense counsel requested a jury instruction on voluntary manslaughter. Defense counsel Ervin noted the prior difficulties between the two men that continued on the day of the

fatal shooting. Tr. 224, l. 14-233, l. 8. Defense counsel told the judge that there was evidence appellant was afraid of the decedent, and he was correctly worried the decedent was going to shoot him at the time of their heated confrontation. The decedent indeed had a gun in his car at the time appellant shot him as he went towards his car. Given this evidence, and appellant's "state of mind" at the time, a voluntary manslaughter instruction was warranted.

The attorneys and the trial judge discussed Cook v. State, 415 S.C. 551, 784 S.E.2d. 665 (2015), during this charge conference. On the particular facts of Cook v. State, the Supreme Court found that the trial judge erred in charging the jury on voluntary manslaughter where there was evidence the defendant was walking away from the victim and *talking softly with him* prior to the shooting. The Supreme Court found this constituted insufficient evidence of the "heat of passion" necessary for voluntary manslaughter.

Defense counsel Ervin argued that there was conversely a heated confrontation just prior to the shooting, and that appellant was justifiably afraid for his life. Appellant correctly thought the decedent was retrieving a deadly weapon from his car when appellant shot him. The judge did not charge the jury on voluntary manslaughter.

Discussion

Voluntary manslaughter is the unlawful killing of another human being in a sudden heat of passion upon a sufficient legal provocation. State v. Walker, 324 S.C. 257, 260, 478 S.E.2d. 280, 281 (1996). In State v. Starnes, 388 S.C. 590, 698 S.E.2d. 604 (2010), the Supreme Court noted it had held in State v. Wiggins, 330 S.C. 538, 549, 500 S.E.2d. 489, 495 (1998), that "fear can constitute a basis for voluntary manslaughter." However, that fear to constitute a sudden heat of passion upon a sufficient legal provocation must involve an act or event that would naturally disturb and sway the ability of a person to reason normally. It renders the mind of an

ordinary person incapable of cool reflection and produces "an uncontrollable impulse to do violence." State v. Pittman, 373 S.C. 527, 572, 647 S.E.2d. 147, 167 (2007).

In this case, the trial judge was very concerned with a "cooling off" period. Respectfully, that was a jury issue in this case. In State v. Knoten, 347 S.C. 296, 555 S.E.2d. 391 (2001), the Supreme Court found that the defendant was entitled to a voluntary manslaughter instruction where there was evidence the victim cut the defendant with a knife. The defendant then walked to his car in the parking lot, and he retrieved a bar and walked back into the victim's apartment killed her when she reinstituted the aggression. Any time for cool reflection in this case was less than that in Knoten where the Court found a voluntary manslaughter instruction was required.

Further, this case is distinguishable from Cook v. State, 415 S.C. 551, 784 S.E.2d. 665 (2016), where there was evidence Cook was calm before he fired the fatal shot. The Court noted the evidence of one eyewitness, Bridges, who stated the defendant and the victim were talking "real softly" and that he could not really tell that there was really a dispute.

Conversely, in this case, there was evidence of a heated exchange between two men with prior difficulties. Appellant here thought the decedent had shot him on a prior occasion, and appellant shot the decedent because he was afraid the decedent was going to retrieve his gun from his nearby car and kill him.

In State v. Cottrell, 376 S.C. 260, 657 S.E.2d 451 (2008) the Supreme Court reversed Cottrell's conviction in a death penalty case because a voluntary manslaughter instruction should have been given based on the evidence in that case. In Cottrell, the Court agreed that the jury could have found a police officer acted in an impermissibly aggressive manner and physically assaulted and then shot Cottrell as Cottrell was exercising his constitutional right to walk away. As in this case, the evidence could lead to different inferences being drawn from it, and one of

those reasonable inferences was that appellant was acting in a heat of passion upon a sufficient legal provocation. Where the evidence is susceptible to more than one reasonable inference, the defendant should be given the benefit of the doubt when one of those inferences supports an instruction on a lesser-included offense. See State v. Linder, 276 S.C. 304, 278 S.E.2d. 335 (1981).

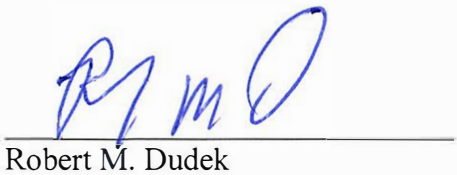
Here, there was evidence the decedent threatened appellant in the parking lot of the apartment complex where appellant lived with his mother. Appellant testified that he was afraid and that he thought the decedent was retrieving a gun from his car when appellant shot him. Appellant was also not obligated to wait until the decedent got the gun from his car and put his own life in even greater danger. In short, appellant did not have to wait for the decedent to "get the drop on him" before he shot the decedent, where he correctly reasoned the decedent was going to his car to get a gun to kill him. See State v. Rash, 182 S.C. 42, 50, 188 S.E.2d. 435, 438 (1936).

While Rash usually is raised in the context of self-defense, it is equally applicable to voluntary manslaughter in this situation where the issues are whether the defendant acted in a "heat of passion" upon a "sufficient legal provocation" and whether a sufficient "cooling off" period existed before the fatal shots were fired.

Defense counsel correctly argued, under the unusual facts of this case, a voluntary manslaughter instruction was warranted. Since the instruction on the lesser-included offense of voluntary manslaughter was required to be charged given the evidence, appellant should be granted a new trial because of the refusal of charge it.

CONCLUSION

By reason of the foregoing arguments, appellant's convictions should be reversed, and this case remanded to the Darlington County Court of General Sessions for a new trial.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of April, 2023.

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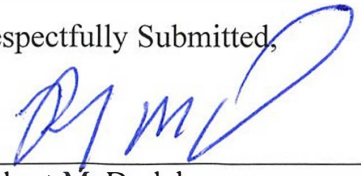
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Dabry Aunta James states:

1. He is Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge Michael G. Nettles, which was held on April 11 - 13, 2022, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

Wherefore, he asks the Court to relieve him as counsel for Dabry Aunta James.

Respectfully Submitted,



Robert M. Dudek
Chief 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) True-billed indictment(s):
(2) Trial Transcript dated April 11-14, 2022
(3) State's Exhibit #3 (Written Statement)
(4) State's Exhibit #2 (Video Statement)

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

Robert M. Dudek
Chief Appellate Defender

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PO Box 11589
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(803) 734-1330

ATTORNEY FOR APPELLANT

This 5th day of April, 2023.

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."

Robert M. Dudek
Chief Appellate Defender

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CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Anders Brief of Appellant and Designation of Matter in the above-referenced case has been served upon Melody J. Brown, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Dabry Aunta James, #387682, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 5th day of April, 2023.

Robert M. Dudek
Chief Appellate Defender

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