

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

John C. Hayes, III, Circuit Court Judge

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SC COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

BRAQUETTE WYKINA WALTON,

APPELLANT

APPELLATE CASE NO. 2012-213552

ANDERS BRIEF OF APPELLANT

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS1

TABLE OF AUTHORITIES.....2

STATEMENT OF ISSUE ON APPEAL.....3

STATEMENT OF THE CASE4

ARGUMENT6

CONCLUSION.....11

PETITION TO BE RELIEVED AS COUNSEL12

TABLE OF AUTHORITIES

Cases

Casey v. State, 305 S.C. 445, 409 S.E.2d 391 (1991) 9

State v. Cooley, 342 S.C. 63, 536 S.E.2d 666 (2000)..... 9

State v. Gadsden, 314 S.C. 229, 442 S.E.2d 594 (1994) 9

State v. Geiger, 370 S.C. 600, 635 S.E.2d 669 (Ct. App. 2006)..... 8

State v. Gourdine, 322 S.C. 396, 472 S.E.2d 241 (1996)..... 8

State v. Kornahrens, 290 S.C. 281, 350 S.E.2d 180 (1986)..... 9

State v. Lowry, 315 S.C. 396, 434 S.E.2d 272 (1993) 10

State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999)..... 8

State v. Starnes, 388 S.C. 590, 698 S.E.2d 604 (2010)..... 9, 10

State v. Watson, 349 S.C. 372, 563 S.E.2d 336 (2002) 8

State v. Wharton, 381 S.C. 209, 672 S.E.2d 786 (2009) 9

State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489 (1998) 10

Statutes

S.C. Code Ann § 16-3-50..... 9

STATEMENT OF ISSUE ON APPEAL

The trial judge erred in failing to instruct the jury as to voluntary manslaughter, a lesser included offense of murder, because Appellant's conduct was precipitated by the deceased angrily hitting Appellant with a telephone and pulling Appellant's hair, which provided evidence that Appellant acted during the sudden heat of passion based upon sufficient legal provocation.

STATEMENT OF THE CASE

On February 16, 2012, a York County grand jury indicted Appellant for murder (2012 – GS – 46 – 865), exploitation of a vulnerable adult (2012 – GS – 46 – 866), four counts of forgery and uttering (2012 – GS – 46 – 868, – 869, – 870, – 871), and abuse or neglect of a vulnerable adult resulting in death (2012 – GS – 46 – 883). On August 16, 2012, the grand jury indicted Appellant for four additional counts of forgery and uttering (2012 – GS – 46 – 867, – 3016, – 3017, – 3018) and burglary in the first degree (2012 GS – 46 – 3015). R.1019.

The state represented by Kevin Brackett and Willy Thompson called the case for trial on October 29, 2012 before the Honorable John C. Hayes, III and a jury. Phil Smith and Ashley Anderson represented Appellant. R.1. The jury found Appellant guilty on all counts. R. 985, lines 16 – R. 987, line 9. Judge Hayes sentenced Appellant to life imprisonment for murder, to thirty years' imprisonment for burglary, to five years' imprisonment on each count of forgery and uttering, and to five years' imprisonment for exploitation of a vulnerable adult. He ordered all of the sentences to run concurrently. R. 1002, line 19 – R. 1003, line 2; R.1043.

He took a matter under advisement concerning the conviction for abuse or neglect of a vulnerable adult resulting in death. R. 991, lines 22 – 23; R. 992, lines 1 – R. 993, line 21. On November 5, 2012, Judge Hayes reconvened the matter to consider Appellant's motion concerning the conviction of abuse or neglect of a vulnerable adult resulting in death. Judge Hayes denied Appellant's motion and determined that she could be convicted and sentenced for both murder and death of a vulnerable adult based on abuse and neglect. Essentially, he concluded the convictions did not violate the double

jeopardy provision of the United States Constitution. R. 1005; R. 1006. lines 13-21. Thereafter, Judge Hayes sentenced Appellant to thirty years' imprisonment for abuse or neglect resulting in death of a vulnerable adult and ordered the sentence to run concurrently with all other sentences. R.1007, lines 11-13; R. 1043.

Appellant filed a timely notice of appeal. This brief follows.

ARGUMENT

The trial judge erred in failing to instruct the jury as to voluntary manslaughter, a lesser included offense of murder, because Appellant's conduct was precipitated by the deceased angrily hitting Appellant with a telephone and pulling Appellant's hair, which provided evidence that Appellant acted during the sudden heat of passion based upon sufficient legal provocation.

Relevant facts

Appellant worked at an assisted living facility in Rock Hill. R. 426, lines 8-14. Due to her position at the facility, she became acquainted with Pauline Cook, a resident. On November 12, 2011, Cook, with the help of the personnel of the assisted living facility, contacted the police regarding possibly forged checks. R. 242, line 21 -- R. 243, line 2; R. 435, line 11 -- R. 436, line 4; R. 440, line 25 -- R. 441, line 1. Cook was very angry regarding the possible forgeries; in fact, Cook's anger led to yelling, which was completely out of character for her. R. 243, lines 12-25; R. 435, lines 3-10; R. 462, lines 13-18. Based upon the information contained on the allegedly forged checks, the police and others at the assisted living facility suspected that Appellant had stolen Cook's checks and forged them. R. 435, line 11- R. 441, line 1; R. 442, lines 5 -- 12; R. 490, lines 5-11; R. 491, lines 7-11; R. 493, lines 2-9. In fact, another employee of the assisted living facility contacted Appellant by phone to inform her of the accusations being made. R. 464, line 11 -- R. 466, line 6; R. 472, lines 9-19.

Cook was found dead in her apartment at the assisted living facility during the early morning hours of November 13, 2011. R. 197, line 11 -- R. 200, line 11; R. 231, lines 8 -- 24; R. 254, line 15 -- R. 256, line 5; R. 275, lines 6-16; R. 445, line 16 -- R. 447,

line 17. Based upon the allegations of forgery made the previous day, the officers suspected that Appellant may have been involved in Cook's death. R. 276, line 24 – R. 277, line 3; R. 294, lines 15-21; R. 295, lines 1-11; R. 448, line 21 – R. 449, line 7.

The police arrested Appellant on several counts of forgery. While Appellant was in jail on the forgery warrants, the police served her with an arrest warrant for murder. After being served with the murder warrant, Appellant was interviewed by the police concerning Cook's death. R. 838, lines 2-10; R. 715, lines 10-19. In a statement to police, Appellant explained that she went to the assisted living facility at 8:00 p.m. on November 12, 2011. She went to Cook's room. Appellant explained that she had cashed Cook's checks because she was in need. Appellant offered to repay Cook, but Cook was upset. Cook responded that she had already called the police. Cook got up to call the police again. Appellant explained to Cook that there was no need to call the police because she only wanted to talk. Cook then hit Appellant with the telephone, which fell out of Cook's hand. The two "started to tussle and fell onto the bed." During the struggle, Cook hit her hand on the bedside table. Appellant was on top of Cook trying to calm Cook. Cook screamed and pulled Appellant's hair. Appellant assured Cook that she was not there to hurt her. Then, Cook stopped moving. Appellant checked for a pulse, but found none. R. 723, line 25 – R. 726, line 17; R. 850, line 17 – R. 858, line 25; R.1017.

At the conclusion of the presentation of the evidence, Appellant requested the judge instruct the jury as to voluntary manslaughter, a lesser-included offense of murder. Appellant argued that based upon her statement to police, the evidence indicated she had not intent to harm Cook or engage in any unlawful activity when she entered Cook's

apartment. During Appellant's conversation with Cook, "things got excited" and Appellant simply attempted "to stop the wailing or flailing and stop her hair from being pulled but did not intend any adverse consequences." R. 897, line 21 – R. 898, line 9. The state countered there was no evidence of sufficient legal provocation. Specifically, the state argued "[t]here's no evidence that Cook did anything to provoke her to arouse her passion such that it would then necessitate the assault upon her." R. 898, lines 12-20. The judge denied the request. R. 897, lines 11 – 20; R. 898, line 10.

Discussion

A jury charge to a lesser-included offense is required when the evidence warrants such an instruction. State v. Geiger, 370 S.C. 600, 606, 635 S.E.2d 669, 673 (Ct. App. 2006). South Carolina law mandates a jury instruction on a lesser-included offense when there is any evidence from which it could be inferred that the lesser, rather than the greater, offense was committed. State v. Watson, 349 S.C. 372, 375, 563 S.E.2d 336, 337 (2002); see also State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241, 241 (1996). In other words, the evidence must allow "a rational inference" that the defendant committed the lesser offense. Geiger, 370 S.C. at 607, 635 S.E.2d at 673. In determining whether such a rational inference exists the court must examine the totality of evidence. Id. As this Court explained in State v. Patterson, 337 S.C. 215, 233, 522 S.E.2d 845, 854 (Ct. App. 1999), "[i]n order to justify a charge of a lesser included offense, the evidence must be capable of sustaining either the greater or the lesser offense, depending on the jury's view of the facts."

An appellate court views the evidence in the light most favorable to the defendant in determining whether the evidence required a charge of voluntary manslaughter. State

v. Gadsden, 314 S.C. 229, 442 S.E.2d 594 (1994). Only when the record contained no evidence to support voluntary manslaughter should the trial court decline to charge the jury concerning the lesser-included offense. State v. Cooley, 342 S.C. 63, 67-68, 536 S.E.2d 666, 668-669 (2000). “To warrant the court in eliminating the offense of manslaughter it should very clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter.” State v. Wharton, 381 S.C. 209, 214, 672 S.E.2d 786, 788 (2009); see also Casey v. State, 305 S.C. 445, 447, 409 S.E.2d 391, 392 (1991) (emphasis in original)(holding that in murder cases, trial courts should charge manslaughter unless “there is no evidence whatsoever tending to reduce the crime from murder to manslaughter”).

Manslaughter is defined by Section 16-3-50 of the South Carolina Code as “the unlawful killing of another without malice, express or implied.” S.C. Code Ann § 16-3-50. Voluntary manslaughter is the unlawful killing of another in sudden heat of passion upon sufficient legal provocation. State v. Kornahrens, 290 S.C. 281, 350 S.E.2d 180 (1986). The South Carolina Supreme Court made it clear that both of these elements must be present in order to warrant a voluntary manslaughter charge. See State v. Starnes, 388 S.C. 590, 596, 698 S.E.2d 604, 608 (2010) “The provocation must be such as to render the mind of an ordinary person incapable of cool reflection and produce an uncontrollable impulse to do violence.” Cooley, 342 S.C. at 67, 536 S.E.2d at 668. “Sudden heat of passion upon sufficient legal provocation” mitigating felonious killing to manslaughter “must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence.” State v. Wiggins, 330

S.C. 538, 549, 500 S.E.2d 489, 495 (1998) (citing State v. Lowry, 315 S.C. 396, 399, 434 S.E.2d 272, 274 (1993) (quotations omitted).

“[F]ear resulting from an attack can constitute a basis for voluntary manslaughter.” Starnes, 388 S.C. at 598, 698 S.E.2d at 609. While fear of an attack, by itself, is not enough to satisfy the heat of passion element, Starnes reaffirmed “the principle that a person’s fear immediately following an attack or threatening act may cause the person to act in a sudden heat of passion.” Id.

“Whether a voluntary manslaughter charge is warranted turns on the facts.” Id. at 597, 698 S.E.2d at 608. Appellant, and others, described Cook as exceptionally upset regarding the suspected forgery. Cook was acting out of character due to her agitation and frustration concerning the missing checks and missing funds. Upon being confronted by Appellant regarding the checks, Cook indicated a desire to contact the police yet again. When Appellant tried to talk Appellant out of calling the police by explaining she only wanted to talk to Cook – even offering to pay Cook for the money – Cook responded by hitting Appellant with the telephone. This was the first act of violence that evening. Cook, who flailed her arms, continued to fight Appellant by pulling Appellant hair. Appellant reacted to the acts of violence by trying to subdue Cook. She placed her body weight on Cook to stop Cook’s aggression. Appellant acted in the sudden heat of passion based upon sufficient legal provocation based upon Cook’s initial act of aggression followed by Cook’s continuous attempts to attack Appellant. The trial judge erred in failing to instruct the jury concerning voluntary manslaughter where the state’s case-in-chief presented evidence to satisfy the elements of voluntary manslaughter.

CONCLUSION

Appellant respectfully requests this Court reverse her convictions and remand the matter for a new trial.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of September, 2013.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County

John C. Hayes, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRAQUETTE WYKINA WALTON,

APPELLANT

APPELLATE CASE NO. 2012-213552

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Braquette Wykina Walton states:

1. She is Appellate Defender for the S.C. Office of Appellate Defense, and was appointed to represent Appellant.
2. She has reviewed the record of Appellant's trial before Judge John C. Hayes, III, which was held on October 29 – November 1, 2012 and the motions hearing held on November 5, 2012, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Appellant.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of September, 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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APPELLANT

APPELLATE CASE NO. 2012-213552

**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) Entire trial transcript dated Oct. 29 – Nov. 1, 2012;
- (2) Entire transcript dated November 5, 2012;
- (3) State's exhibits #113, #114, #115
- (4) True-billed indictments;
- (5) Sentence sheets

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

September 5th, 2013

Susan B. Hackett

Susan B. Hackett
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

Attorney for Appellant

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 August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

September 5, 2013

Susan B. Hackett

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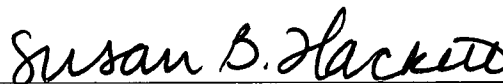
BRAQUETTE WYKINA WALTON,

APPELLANT

APPELLATE CASE NO. 2012-213552

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal in the above referenced case has been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Braquette Wykina Walton, #353118 at Leath Correctional Institution, 2809 Airport Road Greenwood, SC 29649 this 4th day of September, 2013.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 5th day of September, 2013.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022