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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions
Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2013-002444

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

DEMETRISS ALSHAWN GLENN,

APPELLANT.

INITIAL REPLY BRIEF OF APPELLANT

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I. INVOLUNTARY MANSLAUGHTER

The State wrongly contends that Appellant's argument "hinges on a perceived ambiguity in Plumley's testimony regarding when Appellant became aware of the plan to rob Victim." The State wrongly asserts "there was not any evidence that Appellant only learned of the armed robbery after he had bashed Victim on the head," and thus there was no evidence to support the requested charge on involuntary manslaughter. (Resp. Initial Br., pp. 11-12.)

In fact, there was unambiguous evidence presented from which a jury, properly instructed, could have concluded that Appellant was suddenly awakened while sleeping or passed out drunk in a car during a robbery by others, and was called inside a house to defend a friend who was being attacked for reasons that arguably were unknown or uncertain to him.

Charles Plumley, the jailhouse snitch and accused murderer, testified that Appellant initially "just told me that that he was involved – he was with some people that went on a robbery, and his co-defendant killed somebody." (Tr. p. 376.) Appellant said that "Marie [Driggers] and K Dog [Walters] was planning a robbery, and he was asleep in the back seat, and that they went in there and robbed a man, and K Dog hit the man, and then they left." Although Appellant knew about the plan, he said he did not intend to participate and stayed in the car. (Tr. pp. 377-78.) On cross-examination, Plumley again testified that Appellant told him the robbery was solely the idea and plan of Driggers and Walters. Appellant "was just along for the ride." Appellant was asleep or passed out in the car when the plan was discussed. (Tr. pp. 385-87.) Although the State objected to

Plumley speculating about exactly when Appellant learned of the plan, the testimony that was given nonetheless constitutes evidence that Appellant lacked the requisite intent to commit any crime. It also is inferable from these facts that Appellant was asleep or passed out when the robbery was planned and knew nothing about the details, including the identity or location of the potential victim.

The State's position is untenable because juries routinely are – and should be – instructed on lesser included offenses even when a judge or juror ultimately might respond, "Yeah, right!" when asked if particular evidence is credible or persuasive. The crucial point of all the case law requiring the jury to be charged on a lesser offense when there is *any evidence* from which the jury could infer the defendant committed a lesser rather than greater offense is predicated on the long-established principle that a defendant has the right to present his defenses and arguments based on the evidence regardless of whether that evidence ultimately may be deemed compelling or persuasive. See e.g. State v. Drafts, 288 S.C. 30, 340 S.E.2d 784 (1986) (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); State v. White, 361S.C. 407, 412, 605 S.E.2d 540, 542 (2004) stated another way, if there is any evidence from which the jury could infer the defendant committed a lesser rather than a greater offense, the trial judge must charge the lesser-included offense).

In each of the similar cases cited by Appellant in which a firearm was at issue (instead of a wine bottle or bar stool), a disbelieving utterance or shake of the head may well have greeted the defendant's argument for an involuntary manslaughter charge. You can almost hear the "Yeah, right!" echoing off the pages: See State v. Light, 378 S.C.

641, 664 S.E.2d 465 (2008) (holding that an involuntary manslaughter charge was appropriate where defendant attempted to take gun from victim, and gun went off immediately after defendant jerked it away from the victim); Tisdale v. State, 378 S.C. 122, 662 S.E.2d 410 (2008) (holding that an involuntary manslaughter charge was warranted where defendant and victim fought for gun, and it "went off" while still in victim's hands); State v. Mekler, 379 S.C. 12, 664 S.E.2d 477 (2008) (reversing conviction for failure to charge involuntary manslaughter where evidence showed that defendant had cocked the gun and told victim to stop, but she did not remember pulling the trigger or intend to shoot victim); State v. Burriss, 334 S.C. 256, 264, 513 S.E.2d 104 (1999) (reversing conviction for failure to charge accident and involuntary manslaughter where evidence showed that defendant shot victim accidentally while defending himself from an assault).

Nevertheless, the Court in each of the cited cases concluded that the defendant was entitled to such a charge – just as Appellant was entitled to the charge in this case.

Appellant submits that the trial judge actually was headed in the right direction while "leaning toward" charging involuntary manslaughter, but veered off course when the "Yeah, right!" response kicked in. The judge reasoned:

> Just to explain a little further, the Court's ruling is – and I'll be candid. When I initially left here yesterday, I thought that where I would probably fall on this thing was to charge involuntary manslaughter but not voluntary manslaughter.
>
> But when I got to the house and I started looking at case law and looking at this case, it's just such a basic fundamental process regarding charging juries, and that is that the charge has to follow and be supported by the evidence.
>
> And in looking at this case and looking at the evidence that's in this record, there was just nothing in the record that would support the charge of either involuntary or voluntary manslaughter, at least in my opinion, and reviewing the testimony in

my mind. I didn't have the benefit of the replay we just heard. But it does seem to support my recollection.

And so that's the reason that the Court has declined to charge those two things, because I just think it would be an improper charge if it's a charge that's not supported by the evidence in the case. And what had me leaning toward the possibility of thinking that involuntary may be appropriate was my conversation in my head about, "Well, you know what, what if the jury doesn't believe the State's witnesses that he knew prior?"

Well, that's not a luxury the Court has. I'm not allowed to speculate as to what will a jury decide or what could a jury decide. A jury could decide to discard everything the State presented and acquit. So it's not about what could a jury do or what can a jury do, what might a jury do.

The charge is about being supported by the evidence in the record. And how the jury treats that evidence is their provence [sic]. It's up to them how they treat that evidence. So that is the basis for the denial of charging the involuntary and the voluntary manslaughter.

(Tr. pp. 473-475.)

Respectfully, the trial judge erred because, in the end, he did exactly what he was trying not to do, which was to avoid invading the province of the jury. The judge apparently responded with a disbelieving shake of the head to the notion that Appellant could not have known or intended to participate in the robbery – despite evidence in the record supporting that conclusion. However, the law requires that the judge let the jury hear the evidence and the appropriate charges on the offenses based on that evidence, and then let the jury decide. Appellant's jury heard the evidence, but Appellant was deprived of the opportunity to argue that, based on the evidence, he was not guilty of murder, but of the lesser offense of involuntary manslaughter.

Contrary to the State's argument, there are no "logic gymnastics" required to accept Appellant's argument. The evidence supported Appellant's request for an involuntary manslaughter charge; it is as simple as that. But due to the trial judge's

ruling, Appellant was reduced in closing argument to attacking the credibility of the admitted criminals presented by the State. Appellant in closing argument repeatedly pointed out the witnesses' criminal nature, habitual lies and inconsistencies in their statements, as well as emphasizing their obvious motive to lie to please a prosecutor who would have them in the crosshairs soon enough. (Tr. pp. 504-21.) While that was certainly appropriate, what the jury really needed to hear, and what it never got the chance to hear from Appellant, was a plausible explanation for Appellant's unintentional killing of the deceased.

II. DEFENSE OF OTHERS AND RIGHT TO ACT ON APPEARANCES

The State wrongly contends that jury charges on defense of others and the right to act on appearances were not required for the same reasons the involuntary manslaughter charge was not required – because Appellant wishes to rely on a "purported ambiguity" and take evidence out of context. (Resp. Initial Br., pp. 16-17.)

Again, for the reasons explained above, Appellant was entitled to these jury charges because there was unambiguous evidence presented from which a jury, properly instructed, could have concluded that Appellant was suddenly awakened while sleeping or passed out drunk in a car during a robbery by others, and was called inside a house to defend a friend who was being attacked for reasons that arguably were unknown or uncertain to him.

Again, the crucial point of all the case law requiring the jury to be charged on a lesser offense when there is *any evidence* from which the jury could infer the defendant committed a lesser rather than greater offense is predicated on the long-established principle that a defendant has the right to present his defenses and arguments based on

the evidence regardless of whether that evidence ultimately may be deemed compelling or persuasive. It is the task of an appropriately instructed jury to decide the context, weight and credibility of the evidence.

Furthermore, the focus in this case should necessarily be on Appellant and his belief about what was happening when he walked into the house, not on actions of his friend, Walters. While Walters may have been at fault in bringing on the difficulty by trying to rob the victim, there was evidence that Appellant did not intend to participate in the robbery, did not plan it and arguably did not know the reason for the fight between Walters and the victim. Consequently, the jury should have been instructed as requested by Appellant.

CONCLUSION

For the foregoing reasons, Appellant requests that the Court of Appeals reverse his convictions for murder, armed robbery and first degree burglary, and remand this case for a new trial.

Respectfully submitted,

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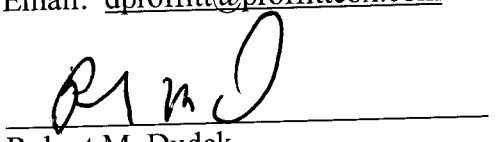

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Reply Brief of Appellant in the above referenced case has been served upon Donald J. Zelenka, Esquire, Office of the Attorney General, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 2nd day of March, 2015.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 2nd day of March, 2015.

Rhonda Denise Foxworth (L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021.

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