STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County

Ralph King Anderson, Jr., Special Circuit Court Judge

Opinion No. 2011-UP-562 (S.C. Ct. App. filed 12/13/2011)

08-GS-21-1877.

THE STATE,

RESPONDENT,

V.

TARUS TREMAINE HENRY, SR.,

PETITIONER

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on 1/13/2012.

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in affirming the trial court's admission of the statement of petitioner to the sheriff's investigators when the statement was not voluntary due to petitioner's state of mind, and the coercion by the investigators when they told petitioner that they could help him out because the judge took their word very seriously.

2. Whether the Court of Appeals erred in affirming the trial court's refusal to charge the jury on the lesser included charges of assault and battery of a high and aggravated nature and attempt to burn when there was evidence that the victim attacked petitioner first.

STATEMENT OF THE CASE

On November 20, 2008, the Florence County Grand Jury indicted Tarus Tramaine Henry, Sr. on the charges of assault and battery with intent to kill (ABWIK), arson second degree, two counts of unlawful conduct towards a child. On July 27 – 31, 2009, Henry proceeded to trial before the Honorable Ralph King Anderson, Jr., and a jury. He was represented by Karen Parrott, and the state was represented by Stephen Hill, Assistant Solicitor. The jury returned verdicts of guilty on all four charges as indicted. Henry's attorney filed a notice of appeal. The Court of Appeals affirmed the trial court on December 13, 2011. State v. Henry, 2011-UP-562 (Ct. App. Filed December 13, 2011). App. 1 – 2. Appellate counsel filed a petition for rehearing which was denied on January 13, 2012. App. 3; App. 20. This petition for a writ of certiorari follows.

ARGUMENT

I.

Whether the Court of Appeals erred in affirming the trial court's admission of the statement of petitioner to the sheriff's investigators when the statement was not voluntary due to petitioner's state of mind, and the coercion by the investigators when they told petitioner that they could help him out because the judge took their word very seriously.

Tarus Henry told the court that he and Carol Parker had known each other about three years and had been married about one year. They had an infant daughter, and Tarus had a five year old son who lived with them. R. 417, ll. 7 – 25; R. 418, ll. 1 – 12. Tarus had been diagnosed in the past with psychosis and schizophrenia for which he had taken medications. He was currently on the medication, Seroquel, for bipolar disorder. R. 419, ll. 1 – 25; R. 420, ll. 1.

Tarus testified that after he was arrested for this incident and sent to the detention center, he was judicially admitted to Columbia Care Center on November 25 2008 where he remained until February 9, 2009. He was placed on the medication Seroquel in November 2008 and received treatment while he was hospitalized as well as an evaluation. R. 420, ll. 1 – 25.

The incident for which he was arrested occurred on June 23, 2008. Tarus and Carol were having trouble paying the rent and had been to talk to the magistrate to make an arrangement to pay it. They were having disagreements about money and about Carol's mother keeping their daughter . R. 424, ll. 24 – 25; R. 425, ll. 1 – 25; R. 426, ll. 1 – 24.; R. 427, ll. 1 – 25; R. 428, ll. 1 – 25.

When they returned home to their apartment, Carol began having a tantrum and yelling and crying. R. 428, ll. 23 – 25; R. 429, ll. 1 – 25; R. 430, ll. 1 – 15. He left the bedroom to make a bottle for the baby when he was attacked by Carol with a machete. When he reached for the machete, he

was cut on his hands and the fight escalated. He received sutures for two of the multiple cuts. R. 430, ll. 15 – 25; R. 431, ll. 1 – 25; R. 432, ll. 1 – 25; R. 433, ll. 1 – 25; R. 434, ll. 1 – 22.

Carol continued to come after him with the machete as she had had enough and there was nothing to talk about. R. 433, ll. 23 – 25. He then had a black out and did not remember anything that happened or what he did with the machete until he heard his son calling him by saying daddy. He then realized he was holding the machete which had blood on it. He saw Carol lying on the floor, and he panicked because he was "trying to come to terms with what had just happened." He then started helping Carol, and finally got her and the children in the car. R. 435, ll. 1 – 25.; R. 436, ll. 1 – 25; R. 437, ll. 1 – 25; R. 438, ll. 1 – 25; R. 439, ll. 1 – 25; R. 440, ll. 1 – 10.

Gary Pace testified that he was employed with the Windy Hill Fire Department, and that he responded to a fire call on June 23, 2008 to the apartment of Tarus Henry. His job was to oversee the fire operations. The firemen arrived on the scene at 11:52 and had the fire under control at 12:07. R. 54, ll. 1 – 25; R. 55, ll. 1 – 25.

Steve McCormack testified that he was employed as a fireman with the Windy Hill Fire Department. He also responded to the fire call at Tarus's apartment. He said the fire started in the bedroom. R. 61, ll. 1 – 25; R. 66, ll. 1 – 25; R. 67, ll. 1 – 20.

Tarus did not remember if he went back into the apartment but he did see smoke from the apartment. However, he did not know anything about the fire, although he said he did tell the detectives falsely during interrogation that he set the fire because he felt under "extreme pressure" from two of the three detectives - Detectives Bert Turner and Calvin Timmons. R. 440, ll. 8 – 25; R. 441, ll. 1 – 11.

Tarus took Carol to McLeod Hospital, and he then went to his mother in Bishopville for her to take care of the children. His brother told him the nearest hospital was in Kershaw County so and

his mother and children went to Kershaw County hospital for him to receive treatment for his injuries. He had already made up his mind to turn himself in to law enforcement, although he did not tell the medical staff the truth at first because he feared they would not treat him. R. 442, ll. 1 – 25; R. 443, ll. 1 – 25; R. 444, ll. 1 – 25; R. 445, ll. 1 – 25; R. 446, ll. 1 – 25; R. 447, ll. 1 – 25.

Law enforcement came and arrested him at the hospital, but he was taken to the local police station where Investigator Timmons picked him up and took him to Florence. R. 449, ll. 1 – 25.

Amy Corbett was the nurse who treated Tarus at Kershaw Hospital on June 23, 2008. Henry had his mother and two small children with him. He had wounds on the palms of both hands with about five lacerations. He required sutures on two of the cuts. She contacted law enforcement. R. 98, ll. 1 – 21; R. 99, ll. 22 – 25; R. 100, ll. 1 – 25; R. 101, ll. 1 – 25; R. 102, ll. 1 – 25; R. 103, ll. 1 – 13.

Carol Parker's testimony was she was taking her baby to her mother's and she wanted to look for a job. They did argue because Tarus did not want the baby leaving. R. 359, ll. 1 – 25; R. 360, ll. 1 – 25; R. 361, ll. 1 – 25; R. 363, ll. 1 – 25; R. 366, ll. 1 – 25. Her story was that she told him she needed to go and he attacked her with the machete. R. 369, ll. 1 – 25; R. 370, ll. 1 – 25.

Carol told him just before he hit her that something was obviously wrong with him because of the way he was acting. R. 369, ll. 6 – 14. She testified on cross examination that she had never seen him look that way before as he looked at her in a strange way. R. 386, ll. 5 – 18.

Dr. Mark Reynolds, the emergency room physician who treated Carol Parker, testified that she had twenty-eight wounds which were life-threatening. He said she was close to death when she was admitted. R. 337, ll. 10 – 25; R. 343, ll. 22 – 25; R. 344, ll. 1 – 25; R. 345, ll. 1 – 25; R. 346, ll. 1 – 25; R. 347, ll. 1 – 2. She may have some permanent damage but that she would recover ninety-five percent of her original capacity. R. 356, ll. 1 – 14.

Dr. Richard Frierson, a forensic psychiatrist, testified for the defense that he completed two court ordered mental evaluations on Tarus Henry: one to determine his competency to stand trial and the second was to determine his level of criminal responsibility at the time of the alleged offense. R. 389, ll. 4 – 25; R. 391, ll. 1 – 25; R. 392, ll. 1 – 9. Dr. Frierson reported that Tarus was competent to stand trial and that he knew right from wrong. However, he did have some impairment in his capacity to conform his behavior but it was not substantial. R. 392, ll. 10 – 25; R. 393, ll. 1 – 3.

Dr. Frierson's testimony was that Tarus previously had part of his brain removed which was part of his right non-dominant hemisphere. This was because as a child he suffered irretractable seizures which did not respond to medication. The seizures were so severe that he was a candidate for the removal of part of his brain. One side effect of the removal of part of his brain was the inability to recognize fear in other people. Dr. Frierson's opinion was that seeing fear in other people when in an altercation might serve as a "stopping mechanism" to help the person control his behavior. R. 389, ll. 1 – 25; R. 391, ll. 1 – 25; R. 392, ll. 1 – 25; R. 393, ll. 1 – 25; R. 394, ll. 1 – 25; R. 395, ll. 1 – 25; R. 396, ll. 1 – 8.

Dr. Frierson testified that Tarus had other mental illnesses which included depression where he had attempted suicide; was hospitalized for hallucinations related to schizophrenia; and now met the criteria for bipolar disorder. He had been hospitalized at Bryan Psychiatric Hospital twice and at Duke University where he had the neurosurgery; he also attended Tricounty Mental Health Center. R. 393, ll. 4 – 17; R. 396, ll. 9 – 25; R. 397, ll. 1 – 25; R. 398, ll. 1 – 25. He said that people with these mental illnesses frequently stopped their medications but that the person will likely have future episodes. R. 398, ll. 6 – 25; R. 399, 1 – 25. Frequently people who commit a violent act that

was something they would not typically do, then their mind may block it out as a defense mechanism. R. 401, ll. 1 – 24.

A Jackson v. Denno,[1] hearing was held pretrial as Tarus gave a statement to law enforcement following his arrest. The solicitor explained that one of the three investigators who were present during the statement was in Afghanistan: Investigator Calvin Timmons. The other two investigators were Officer Kathleen Street and Officer Bert Turner. The judge proceeded with the hearing. R. 4, ll. 9 – 25; R. 5, ll. 1 – 25.

Officer Street testified that Tarus signed the waiver of rights form and she had copies of the statement he gave.[2] R. 6, ll. 18 – 25; R. 7, ll. 1 – 25. According to her testimony, Tarus's statement was not recorded on video but was recorded with audio only. R. 11, ll. 1 – 8; R. 12, ll. 17 – 25. She admitted that Tarus told them that he had had surgery on his brain a few years earlier for a seizure disorder. However, they continued to take his statement. R. 9, ll. 1 – 11. Officer Calvin Timmons was the one who went to Kershaw County Hospital and transported Tarus to Florence. Officer Street did not know what was said in the car. R. 13, ll. 1 – 25; 14, ll. 1 – 9. She admitted on cross examination that sometimes informal interrogation occurred before the recording, but she did not know if Officer Timmons did this. R. 20, ll. 1 – 25; R. 21, ll. 1 – 3.

On cross examination, defense counsel referred to the transcribed statement which Officer Street had in front of her. R. 22, ll. 1 – 15. Officer Street stated that Officer Timmons, Officer Turner and she were all present during the entire statement. R. 22, ll. 1 – 4. Counsel referred to page six of the statement where Officer Turner asked Tarus if he were prescribed any medication, and Tarus said not that he knew of. Then further on the page, Tarus said he was on Zyprexa for

[1] Jackson v. Denno, 378 U.S. 368 (1964).

schizophrenia and psychosis, but it had been discontinued. Officer Street confirmed that was in the statement. R. 23, ll. 1 – 25; R. 24, ll. 1 – 25.

Counsel said that on page ten, Tarus told them he was still bleeding, but Officer Street admitted they did not talk with anyone at Kershaw Hospital to inquire what medications he may be taking or the extent of his injuries. R. 25, ll. 1 – 21.

Counsel then referred Officer Street to page twelve where Officer Timmons said to Tarus: "And don't just like I told you, Tarus, in the car, man, don't spoon feed us any information." R. 25, ll. 22 – 25; R. 26, ll. 1 – 7. Then counsel referred to page thirty-seven of the statement where Officer Timmons said to Tarus:

> We can help you out, man. I mean, the judge takes our word very serious.

R. 27, ll. 16 – 25; R. 28, ll. 1 – 4.

Officer Street said:

> That's what's transcribed here.

R. 28, ll. 4 – 5.

During the trial, defense counsel referred Officer Bert Turner to page 40 of the transcribed statement where he and Officer Timmons asked Tarus about his state of mind. Officer Timmons said to Tarus:

> Tarus, you need some help, man, too, okay. I mean, I mean, I'm not a psychiatrist or a doctor or anything, you know, but I, I from just sitting across the table, I can see you need some help, okay.

R. 292, ll. 1 – 25; R. 293, ll. 1 – 10.

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[2] The written statement was not admitted into evidence, but a CD of the audio recorded statement was admitted into evidence as State's Exhibit 74.

Officer Turner replied that he was there when that was said. R. 293, ll. 10 – 11. Officer Turner also admitted that Tarus told them he had tried to cut his wrists in the past. Officer Turner admitted that these things could be symptoms of mental illness. He denied they put any pressure on Tarus. R. 294, ll. 1 – 25; R. 295, ll. 1 – 14.

Defense counsel argued at the end of the pretrial hearing that the statement was not voluntarily given and should be suppressed as the officers had information that Tarus had been on medication for psychosis or schizophrenia. He told the officers he was diabetic and no food or water was offered to him. Part of the tape had been erased by the transcriptionist, Donna McDaniel, and therefore was incomplete. Counsel argued that considering the totality of the circumstances, the statement was not voluntary. R. 35, ll. 1 – 25; R. 36, ll. 1 – 25; R. 37, ll. 1 – 21; R. 40, ll. 8 – 13.

The judge denied counsel's motion and ruled that the statement was voluntary. It was admitted. R. 37, ll. 22 – 25; R. 38, ll. 1 – 25; R. 39, ll. 1 – 25; R. 40, ll. 1 – 25.

In Bram v. United States, 168 U.S. 532 (1897), the Court held that a confession "obtained by any direct or implied promises, however slight," was not voluntary. Although the Supreme Court later wrote in Arizona v. Fulminante, 499 U.S. 279 (1991), that Bram did not set the standard for determining the voluntariness of a confession, the Court wrote that the promise had to be considered in light of the totality of the circumstances. The Court held that the confession of a prison inmate to his cell mate, who was an undercover FBI agent, was not voluntary but coerced. Id.

In Ex parte Matthews, So.2d (Ala. 1992), the court held that the confession was coerced where police told the defendant it would make a big difference with prosecutors and judge whether defendant cooperated or not. The Court in Womack v. State, 205 So.2d 579 (Ala. 1967), held that it was coercive to tell the defendant it would "go lighter on him" if he confessed.

A statement induced by a promise of leniency is involuntary only if so connected with the inducement as to be a consequence of the promise. State v. Miller, 375 S.C. 370, 652 S.E.2d 444 (Ct. App. 2008). The test of voluntariness is whether a defendant's will was overborne by the circumstances surrounding the given statement. Id.

Tarus's statement was not voluntarily made. His will was easily overborne as he was upset about what happened as indicated by his blackout, and the fact that he took his wife to the hospital after it happened. He told the officers of his history of mental problems and the fact that he was not on medication. This should have been a red flag to the officers. Also, the fact that he told them he had brain surgery should have caused concern for the officers and the trial judge.

The Court of Appeals affirmed the trial court on both issues. On Issue One, the court held that there was no evidence that Henry's statement was coerced where there was no evidence that the police threatened him. App. 2.

It is respectfully submitted that the Court of Appeals misapprehended the issues. The fact that the expert, Dr. Frierson, testified that Henry had part of his brain removed, and that there was some impairment was significant evidence. The fact that the officers told Henry that they had influence with the judge was in itself coercion.

ARGUMENT

II.

Whether the Court of Appeals erred in affirming the trial court's refusal to charge the jury on the lesser included charges of assault and battery of a high and aggravated nature and attempt to burn when there was evidence that the victim attacked petitioner first.

Defense counsel requested the judge to charge the jury on the lesser included charge of assault and battery of a high and aggravated nature (ABHAN) for the ABWIK, and the lesser included crime of attempt to burn for the arson second. Counsel argued there was evidence of ABHAN, and that the black out described by Tarus would negate any intent to kill, and indicated a loss of control. R. 470, ll. 1 – 23.

The judge refused, and counsel asked the court to please note her objection. R. 470, ll. 24 - 25; R. 471, ll. 1 – 7.

The trial court is required to charge a jury on a lesser-included offense if there is any evidence from which it could be inferred the lesser, rather than the greater, offense was committed. Suber v. State, 371 S.C. 554, 640 S.E.2d 884 (2007); citing State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241, 242 (1996).

There was evidence of ABHAN as Tarus testified that Carol attacked him first with the machete in which case he would only have been trying to stop an action. Malice would not be an issue. The nurse who treated Tarus confirmed the wounds he suffered on the palms of both hands would reasonably be consistent with his grabbing a machete. The DNA expert testified that there was blood from both Tarus and Carol on the machete. R. 230, ll. 4 – 12.

In State v. Tyler, 348 S.C. 526, 560 S.E.2d 888 (2002); citing State v. Fennell, 340 S.C. 266, 531 S.E.2d 512 (2000), the Supreme Court wrote that a defendant may be convicted of ABHAN regardless of whether malice was present.

In State v. Pilgrim, 326 S.C. 24, 482 S.E.2d 562 (1997), the Supreme Court reversed a conviction of ABWIK because the jury may have thought there had to be a finding of heat of passion in order to convict of ABHAN where the trial judge compared ABHAN with voluntary manslaughter.

The Court of Appeals misapprehended the issue. Henry had bloody wounds on the palms of his hands consistent with grabbing the machete. DNA confirmed that some of the blood on the machete was Henry's. The case law held that malice was not required for ABHAN as held in State v. Tyler, 348 S.C. 526, 560 S.E.2d 888 (2002).

The judge should have charged the jury on the lesser included offense of attempt to burn as there was evidence presented of the lesser. Tarus testified that he did not know anything about the fire. He also testified that he blacked out and did not remember hitting Carol or any thing else until his son called to him.

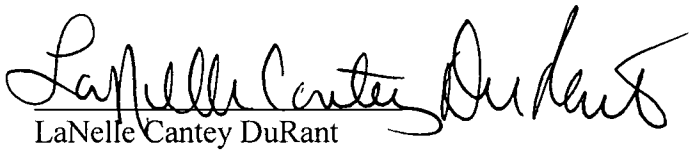
Furthermore, the half-page opinion of the Court of Appeals cited State v. Lindsey, 394 S.C. 354, 714 S.E.2d 554, 558 (Ct. App. 2011) and held that an argument is abandoned on appeal when it is "conclusory and made without supporting authority." App. 2. This truly Kafuesque ruling is refuted by the brief. Petitioner cited appropriate authority concerning the necessity of charging lesser offenses. See Brief p. 14.

The brief cited pertinent authority concerning the necessity of charging ABHAN. See Brief p. 15. The brief cited evidence supporting ABHAN. See Brief, p. 14. The Court of Appeals did not limit this ruling to the attempt to burn issue. App. 1-2.

CONCLUSION

By reason of the foregoing arguments, a petition for writ of certiorari to the Court of Appeals should be issued.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of April, 2012

STATE OF SOUTH CAROLINA
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PETITIONER

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on David Spencer, Esquire, Tarus Henry, and the S.C. Court of Appeals this 13th day of April, 2012.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 13th day of April, 2012.

(L.S.)

Notary Public for South Carolina
My Commission Expires: December 4, 2017.