STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Richland County

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JAN 17 2017

SC Court of Appeals

Honorable DeAndrea G. Benjamin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CHEO D. GREEN,

APPELLANT

APPELLATE CASE NO 2016-000124

ANDERS BRIEF OF APPELLANT

DAVID ALEXANDER
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in refusing to charge voluntary manslaughter where the State's primary witness testified that appellant and the decedent had an argument before the shooting?

STATEMENT OF THE CASE

On November 13, 2013, a Richland County grand jury indicted appellant for murder, carjacking with injury, and a weapons charge. R. 892. On January 8, 2016, a pre-trial conference was held before the Honorable Deandrea G. Benjamin. R. 864. On January 11, 2016, appellant was tried before Judge Benjamin and a jury. R. 1. Margaret Fent Bodman, Joseph B. Berry, and Dolly J. Garfield represented the State. R. 1. Nicole L. Singletary and William J. Sims represented appellant. R. 1. The jury convicted appellant. R. 850, l. 23 – 854, l. 16. Judge Benjamin sentenced appellant to concurrent terms of forty-five years' imprisonment for murder, twenty-five years' imprisonment for carjacking, and five years' imprisonment on the weapons charge. R. 861, l. 9 – 862, l. 13. This appeal follows.

ARGUMENT

The trial court erred in refusing to charge voluntary manslaughter where the State's primary witness testified that appellant and the decedent had an argument before the shooting.

The State opposed the defendant's request for a voluntary manslaughter instruction despite its own earlier agreement to accept such a plea. Prior to trial, the solicitor placed on the record its offer of a negotiated plea to voluntary manslaughter with a fifteen-year sentence. R. 887, l. 12 – 888, l. 20. After the close of the evidence, appellant requested a voluntary manslaughter instruction. R. 740, l. 3 – 742, l. 22.

The court recessed for the evening and heard further argument the next morning. R. 760, l. 22 – 763, l. 15. The State opposed appellant's request for the lesser-included offense. R. 763, l. 16 – 764, l. 12. The solicitor argued that "words alone do not suffice for a voluntary instruction." R. 763, l. 16 – 764, l. 12. To support its position, the State cited State v. Johnson, 324 S.C. 38, 476 S.E.2d 681 (1996); State v. Holland, 385 S.C. 159, 682 S.E.2d 898 (Ct. App. 2009); State v. Starnes, 388 S.C. 590, 698 S.E.2d 604 (2010); and Cook v. State, 415 S.C. 551, 784 S.E.2d 665 (2015).

The trial judge accepted the State's argument that words alone were insufficient to charge voluntary manslaughter. R. 764, l. 13 – 765, l. 8. The court found that "in the light most favorable to the Defendant, I still did not see any evidence of any overt act or threatening behavior." R. 764, l. 13 – 765, l. 8. Judge Benjamin cited two additional cases to support her ruling, State v. Lowry, 315 S.C. 396, 434 S.E.2d 272 (1993) and State v. Frazier, 401 S.C. 224, 736 S.E.2d 301 (Ct. App. 2013).

Appellant's request for a voluntary manslaughter instruction was based on the testimony of the State's witness, Austin Murray ("Murray"), who claimed to have witnessed the shooting.

R. 397, ll. 2 – 18. Murray was also charged with murder and carjacking in connection with the decedent's death. R. 408, ll. 14 – 19. Murray claimed he had not been promised anything by the State in exchange for his testimony against appellant. R. 408, l. 20 – 409, l. 3. He professed to have "no idea" what would happen with his charges and said he was testifying because "it's the right thing to do." R. 408, l. 20 – 409, l. 3.

Murray was walking home late at night from a football game in downtown Columbia. R. 385, l. 25 – 386, l. 20. The decedent pulled alongside Murray in a car. R. 386, ll. 14 – 20. The decedent offered to rent Murray the car he was driving in exchange for crack. R. 386, ll. 14 – 20. R. 423, ll. 3 – 5.

Murray had no drugs, so he called his friend Jamil Brennan ("Brennan"). R. 388, ll. 8 – 20. Brennan called Murray back and then Murray called appellant. R. 388, l. 15 – 389, l. 19. Appellant was at Broad River Road. R. 389, ll. 17 – 19. Murray got into the car with decedent and they "made our way to Broad River." R. 389, ll. 22 – 24.

Murray and the decedent made two stops before the claimed meeting with appellant. R. 390, l. 2 – 391, l. 18. Murray bought gasoline at a station on North Main Street and cigarettes at a different convenience store. R. 390, l. 2 – 391, l. 18. Appellant got into the car in a parking lot and they headed toward Monticello Road. R. 391, l. 2 – 392, l. 21. Murray admitted he was with the decedent for 30-45 minutes before meeting appellant. R. 391, l. 2 – 392, l. 21.

According to Murray, the decedent began asking repeatedly about when he would receive his drugs. R. 392, l. 22 – 394, l. 5. The decedent asked for appellant and Murray to "Get me straight." R. 392, l. 22 – 394, l. 5. Murray then testified, "So we get back around in front of the house, **and then it is like, basically, like an argument. They started getting into it, started**

arguing." R. 393, ll. 17 – 19 (emphasis added). The decedent felt like the delay getting the drugs "was planned." R. 393, ll. 20 – 22.

Appellant and the decedent were "still arguing" and Murray told the decedent to take him home and he would put more gas in his car. R. 396, ll. 15 – 24. Murray knows that the decedent would not take anyone home "for free." R. 458, ll. 19 – 24. They drove a little further and Murray "out of the blue" saw sparks from a gun. R. 397, ll. 2 – 10. The decedent was yelling. R. 397, ll. 2 – 18. The decedent fell out of the car and Murray got behind the wheel and drove away. R. 397, l. 11 – 398, l. 17. Murray drove them to Brennan's house. R. 399, ll. 7 – 16. On cross-examination, Murray admitted that Brennan was his "home boy." R. 445, ll. 15 – 16.

The trial court erred in not charging voluntary manslaughter. "A court may eliminate the offense of manslaughter where it clearly appears that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter." State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 166 (2008). "In determining whether the evidence requires a charge of voluntary manslaughter, the Court views the facts in a light most favorable to the defendant." State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001).

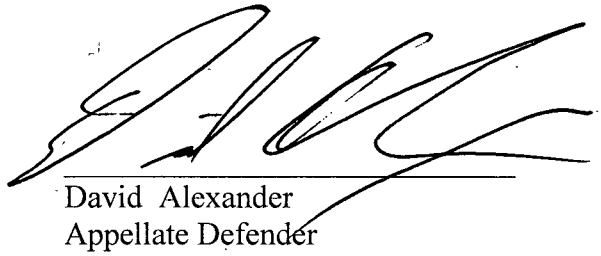
Manslaughter is "the unlawful killing of another without malice, express or implied." S.C. Code Ann. § 16-3-50. "Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation." State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000). "Words accompanied by hostile acts may, according to the circumstances, reduce a charge from murder to voluntary manslaughter." State v. Byrd, 323 S.C. 319, 322, 474 S.E.2d 430, 432 (1996).

The trial court erroneously failed to view the evidence in the light most favorable to appellant. See State v. Light, 378 S.C. 641, 648-49, 664 S.E.2d 465, 468-69 (2008) (holding that

defendant was entitled to self-defense and involuntary manslaughter charges despite inconsistent statements). The court relied on the cases cited by the State for the proposition that words alone cannot constitute sufficient legal provocation, but had the court viewed the inferences from Murray's testimony in the light most favorable to appellant, it would have found the hostile argument was sufficient to charge voluntary manslaughter. Critically, Murray also testified that it was clear that the decedent was not going to take them home "for free," and keeping appellant in the car against his will would satisfy any requirement for an overt act. R. 458, ll. 19 – 24. This evidence establishes that appellant could have been acting under a sudden heat of passion after legal provocation. Furthermore, the State essentially admitted before trial that the evidence warranted a voluntary manslaughter instruction when it offered appellant a plea to that charge. R. 887, l. 12 – 888, l. 20. Appellant was entitled to a jury instruction on voluntary manslaughter and this Court should reverse.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's convictions and remand this case for a new trial.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of January, 2017.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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THE STATE,

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V.

CHEO D. GREEN,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Cheo D. Green states:

1. He is an 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 DeAndrea G. Benjamin, which was held on January 8, 11-14, 2016 (Pretrial, Trial), 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 Cheo D. Green.

Respectfully Submitted,

David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

This 17th day of January, 2017.