ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Lancaster County

Honorable Brian M. Gibbons, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOHN M. GHENT, JR.,

APPELLANT

APPELLATE CASE NO 2016-000643

INITIAL BRIEF OF APPELLANT

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by instructing the jury that "evidence of a suicide attempt is probative of a defendant's consciousness of guilt" since this was an improper jury instruction, it was a charge on the facts, and it was highly prejudicial?

STATEMENT OF THE CASE

Appellant was indicted by the Lancaster County Grand Jury for the offenses of murder, and possession of a firearm or knife during a violent crime. The decedent was his wife. R. *. His case was called to trial on March 14, 2016 before the Honorable Brian M. Gibbons, and a jury. Michael C. Watkins represented appellant. Lisa Collins and Randy Newman were the assistant solicitors. Tr. 1.

On March 17, 2016 the jury found the appellant guilty of murder, and possession of a firearm or knife during the commission of a violent crime. Tr. 509, ll. 10-19. Judge Gibbons sentenced appellant to fifty-four years imprisonment for murder, and he imposed a five year consecutive term for possession of a weapon during the commission of a violent crime. Tr. 518, l. 21 – 519, l. 3.

This appeal follows.

ARGUMENT

The court erred by instructing the jury that "evidence of a suicide attempt is probative of a defendant's consciousness of guilt" since this was an improper jury instruction, it was a charge on the facts, and it was highly prejudicial.

Relevant Facts

Tabitha Reynolds was appellant's daughter. Appellant went by the nickname "Butch," and he was fifty-six years old at the time of his trial. Tr. 149, l. 16 – 150, l. 20.

Reynolds was married, and she had two children. Reynolds testified that her decedent mother had been supporting appellant for more than ten years. "She was ready to leave." Tr. 151, ll. 1-18.

On October 28, 2013 at 4:00 in the morning appellant left a voice message on her telephone. When she woke at 7:00 a.m., she listened to the message from appellant, and immediately woke up her husband, Mike Reynolds. Mile went to check on her decedent mother. Tr. 155, l. 20 – 157, l. 5.

Reynolds confirmed that in the "weeks leading up" to the fatal incident that appellant had "talked to her" about killing himself. Tr. 159, ll. 14-24. Dr. Jad Ghandour, a physician working at Springs Memorial Hospital, treated appellant on the day of the stabbing. Tr. 128, l. 22 – 130, l. 8. Dr. Ghandour confirmed appellant had an abrasion on his wrist, but stated appellant did not need medical treatment for the injury. Tr. 130, l. 4 – 133, l. 17. However, Dr. Ghandour acknowledged that appellant's blood pressure dropped to 70/50 at one point. Appellant received "a liter of fluid to help increase his blood pressure . . ." Tr. 134, ll. 9-16.

Mike, the husband of Tabitha Reynolds, recalled going to the house that appellant and the decedent shared after listening to the voice message. Mike testified that appellant's son, Jonathan, forced the bedroom door open. "He went in there and Elaine [the decedent] was laying there and Butch [appellant] was laying in front of her, Jonathan grabbed Butch. I went in there, I checked Elaine's pulse and looked to see where she was stabbed at ... she was cold to the touch." Tr. 162, l. 7 – 164, l. 19.

Mike remembered that Jonathan started beating appellant, yelling at him: "Don't get up, you're going to rot in hell for this." Mike told Jonathan to stop hitting appellant. Tr. 164, l. 20 – 165, l. 19.

Tressa Howle was the sister of the decedent. Howle testified that she learned the decedent had told appellant to leave the house. Howle maintained that she learned appellant refused to leave. On the day of the fatal incident, Howle recalled that her mother telephoned. Her mother said that Tabitha Reynolds had received a text message stating that appellant said he had "done something to my sister, and I live closer than they did so I jumped in the car and I got over there about the same time they did." Tr. 173, l. 14 – 175, l. 2.

When she arrived at the house shared by appellant and the decedent she tried to resuscitate the decedent. However, the decedent "was hard," and "she had done took [sic] rigor mortis." Tr. 176, ll. 9-15. Howle heard appellant's son, Jonathan, ask appellant: "What he did to his mother?" Appellant allegedly responded: "[H]e killed her. And he said, 'If you don't quit kicking me I'm going to kill you too.'" Tr. 176, l. 23 – 177, l. 5.

Johnathan Ghent testified that when he found his mother's body he started "punching him [appellant]. As I was punching him I ask him what did he do to my mother, and about the 20th punch he said, 'I fucking stabbed her.'" Tr. 187, ll. 11-15.

On cross-examination, Jonathan admitted he told the police that appellant said "I stabbed her," and not "I fucking stabbed her." Jonathan also admitted that he did not tell the police that appellant allegedly threatened him by stating: "I will stab you too." Tr. 191, l. 2 – 192, l. 13.

Fifty-six year old Appellant John Ghent, Jr took the stand in his own defense. Tr. 398, l. 19 – 399, l. 11. Appellant described the state of his marriage at the time of the fatal incident as "kind of shaky." He acknowledged his wife was "talking about leaving, we've split up before but we have always got back together." Tr. 399, l. 24 – 400, l. 7.

Appellant testified on the night of the incident they were lying in bed when his decedent wife told him "she wanted to leave me." Appellant said he picked up a knife because "I was already planning on cutting my wrists and all and I just wanted to talk to her first before I did it. I guess -- I can't remember whether she said anything or I said, I don't remember what we said. I guess she seen the knife in my hand beside me." Appellant explained that he wanted to be sure his wife was actually going to leave him before he killed himself. "I didn't want to live without her." Tr. 401, l. 7 – 402, l. 25.

Appellant told the jurors that he thought the decedent grabbed the knife at that time. "[A]nd then she grabbed ahold of my wrist and I was trying to get my hand away from her and my hand just slipped -- arm just slipped out of her hand then went straight into her chest. There was blood everywhere. I couldn't stop her." Tr. 403, l. 1 – 404, l. 7. Appellant tried to stop the bleeding but he panicked. Appellant testified he laid his wife back down on the bed, went to get "some pills," and he tried to cut his wrist. Tr. 404, l. 8 – 405, l. 18.

Appellant then he telephoned his sister and his daughter and told them he was sorry: "I don't know why I said what I said, I was just in a panic. I didn't know what was going on." Tr. 404, l. 24 – 405, l. 20.

Charge Conference

The judge stated he was going to instruct the jury on voluntary manslaughter, and involuntary manslaughter as a lesser included offenses of murder due to the struggle over the weapon. He also charged the defense of accident. Tr. 459, l. 21 – 462, l. 13.

The solicitor asked the judge to give an instruction on a suicide attempt being probative of the defendant's consciousness of guilt. Tr. 463, l. 8 – 464, l. 7. Defense counsel correctly argued that the solicitor could argue in closing about the suicide attempt if he wished but that it would be an improper jury charge. It would be an impermissible comment on the facts. Tr. 464, l. 2 – 465, l. 24.

The judge said that he thought the suicide instruction was a "reasonable statement and that it is a reasonable statement of law as well." The judge ruled that he was going to charge the suicide instruction over the defense objection." Tr. 465, ll. 12-24.

Closing arguments

In his closing argument defense counsel Lifsey warned the jurors that he did not know how the solicitor would play the suicide issue in his closing. He reminded the jurors that the state during the trial mocked the idea that appellant tried to kill himself, and "they get to argue last so they may turn around now and say, well, yeah, he did try and kill himself and that proves he's guilty." Tr. 477, ll. 12-19.

The solicitor argued that appellant planned to kill his wife: "Tonight is the night. Tonight is the night he had been planning, planning to kill his wife and maybe kill himself." Tr. 481, ll. 22-24; tr. 487, l. 15 - 489, l. 22.

Jury Instruction

The judge charged the jury the law of murder, voluntary manslaughter, involuntary manslaughter and accident. Tr. 500, l. 7 – 504, l. 8.

As to the suicide attempt the judge instructed the jury: "Evidence of a suicide attempt is probative of a defendant's consciousness of guilt, and you ladies and gentlemen of the jury can give this evidence of a suicide attempt whatever weight, if any, you think it deserves." Tr. 504, ll. 14-17. Defense Counsel Lifsey again took exception to the judge's jury instruction on suicide. Tr. 508, l. 1-5.

Discussion

In State v. Orozco, 392 S.C. 212, 708 S.E.2d 227 (Ct.App. 2011) this Court noted that whether evidence of attempted suicide is probative of the accused's consciousness of guilt was an issue of first impression in South Carolina." This Court wrote that flight evidence was relevant when there was a nexus between the flight and the offense charged." R. p. 7. This Court reasoned evidence of the suicide attempt was relevant and admissible because the totality of the evidence created an inference that Orozco's actions in attempting suicide were motivated as a result of his belief that sexual misconduct allegations had been made against him.

There was no South Carolina authority supporting admission of evidence of a suicide attempt as evidence of consciousness of guilt as this Court recognized in Orozco. Undersigned appellate counsel represented Orozco when all five members of the Supreme Court voted to grant certiorari. However, Orozco elected to drop his appeal prior to oral argument.

There was evidence in this case that appellant wanted to kill himself because his wife was going to leave him. "I could not live without her." Appellant obviously would not have been the

first man or woman to kill himself or herself -- or attempt to kill himself or herself -- over the emotions involved in the unwanted end of a love affair or marriage.

Beyond the nexus of attempted suicide to the crime charged -- its ambiguity -- this suicide instruction is troubling not only as a legal matter but as a moral matter. Suicide is often a matter of despair rather than desperation over being charged with a crime. Suicide, as here, is often attributable to the feeling that the sheer number of obstacles in one's life --his wife leaving him, maybe an inability to care for himself any longer because of a drug problem -- have become too much to overcome. To use a suicide attempt in a court of law in this state as evidence of guilt of a criminal offense – to instruct that the jury can treat it that way -- should *most respectfully*, be distasteful (at a minimum), and not allowed.

Defense counsel in this case argued that if the solicitor wanted to use a suicide attempt against appellant in his closing argument that was permissible. It could also backfire, and counsel urged the jury not to let the state use the suicide attempt as a shield (to ridicule appellant's emotions), and a sword (to use the suicide attempt as proof of consciousness of guilt to the crime of murder). However, for the trial court to give a jury instruction on suicide was improper, and it was a charge on the facts.

In Pettie v. State, 316 Md. 509, 560 A.2d 577 (1989) the court held it was error to admit evidence of an alleged suicide attempt as evidence of the accused's consciousness of guilt. The court cited various reasons for its holding. These reasons included that the inmate accused of various sex offenses may have feigned attempted suicide to invite mitigation on the sentence he was serving when the alleged sexual offense occurred. The court also noted that the suicide note itself was never even offered into evidence nor was it contents explained to the jury. The court refused the answer the question whether evidence of a suicide attempt *was ever admissible.*

In State v. Mann, 132 N.J. 410, 625 A.2d 1102 (1993), the court found it was reversible error to admit evidence of an attempted suicide without first conducting a full pretrial hearing on the issue. The defendant argued he had a preexisting propensity to commit suicide because of other factors in his life, and the court cautioned that such ambiguities weigh strongly in favor of extreme caution before such evidence can be admitted. A defendant's psychological, social or financial situation may play a role in the suicide attempt. In short, an accusation of criminal wrongdoing can be the last straw in an otherwise troubled life.

The court in Mann also reasoned that if evidence of a suicide attempt *was ever properly admitted that jury instructions were necessary* that if the jury could credit *any alternative explanation* for the suicide attempt it could not infer consciousness of guilt. In South Carolina, of course, a solicitor may argue flight in this context but *instructions of evidence of flight are improper*. See, State v. Grant, 275 S.C. 404, 408, 272 S.E.2d 169, 171 (1980). Suicide attempts, much more than flight, are *ambiguous*, and a jury instruction that they can be considered probative of consciousness of guilt are improper, they are charges on the facts, and morally troublesome.

The court in State v. Coudotte, 7 N.D. 109, 72 N.W. 913 (1897), opined that a jury should never be able to treat a suicide attempt as evidence of guilt. The court reasoned that the one who flees seeks to escape punishment where one who attempts suicide *seeks to avoid the disgrace* that attaches to being charged with a crime. The court stated that this motive "of delicacy" would be more powerful in an innocent, rather than a guilty person. While it may have been a cultural truth the court also wrote the incidence of suicide was higher *among innocent than guilty persons*.[1]

The court in State v. Onorato, 171 Vt. 577, 762 A.2d 858 (2000) held that the probative value of an attempted suicide and suicide note was substantially outweighed by unfair prejudice

[1] There was also a North Dakota statute that mandated an accomplice's testimony must be corroborated to maintain a conviction.

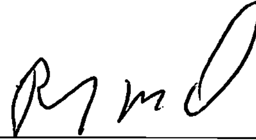
and a confusion of the issues. The court noted that the reasons for an attempted suicide are "*numerous and complex, and may be even less indicative of guilt than flight evidence.*" The Court went on to say that evidence of attempted suicide is "highly equivocal and circumstantial" such that its admissibility "may introduce remote, secondary concerns that might confuse the jury."

In People v. Foster, 56 Ill.App.3d 22, 371 N.E.2d 961, 13 Ill.Dec. 869 (1977), the court held that evidence of the defendant's suicide attempts were not admissible because there was not a sufficient nexus between the actions taken and the crime charged. The court found that not only was there too much time between the suicide attempt and the offense *but also* the defendant's psychological problems and interactions with police could be credited for his behavior.

This issue in presently pending before the Supreme Court in State v. Harold Cartwright, Appellate Case No. 2016-00005, which is scheduled to be orally argued on March 22, 2017, twelve days after the filing of this initial brief. In the final analysis, the charge on suicide was an impermissible charge on the facts. As seen, the jury was also instructed on voluntary manslaughter, involuntary manslaughter and accident. The jury instruction that the suicide attempt could be probative of consciousness of guilt was very prejudicial since accident is excusable in the law, and involuntary manslaughter is merely criminal negligence and not an intentional act.

CONCLUSION

By reason of the foregoing argument, appellant's conviction should be reversed and this case remanded to the Lancaster Court of General Sessions for a new trial.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 10th day of March, 2017.