STATE OF SOUTH CAROLINA

IN THE 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 REPLY 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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ARGUMENT IN REPLY

The Brief of Respondent highlights why a jury instruction that "evidence of a suicide attempt is probative of the defendant's consciousness of guilt" is so problematic since people are driven to suicide, and suicide attempts for a many reasons. Tr. 504, ll. 14-17. The state argues that: "Direct and circumstantial evidence links appellant's admitted suicide attempt to the accusations which engendered the current convictions . . ." The state also argues that appellant attempted suicide "as a means of evading criminal responsibility for the act committed." Brief of Respondent at 10.

The state, then pivots to urge that "appellant *staged a suicide attempt by making it appear* that he slit his wrists after the murder. The wounds were classified as abrasions requiring no medical treatment." Brief of Respondent at 10.

The state then notes that "*alternatively*, appellant testified to the rationale that he 'didn't want to live without her,' (Tr. p. 402, lines 19-25), which permitted the jury to infer that appellant's suicide attempt *resulted from despair* caused by an accidental death or otherwise unintended result. Appellant's defense relied upon the evidence of a suicide attempt as a means of pleading that Elaine's death *was accidental*." Brief of Respondent at 11.

However, correctly urging that the jury could have determined appellant's suicide attempt resulted from despair, and not a desire to kill himself to avoid going to jail, highlights the problem with the jury instruction that "evidence of a suicide attempt **is probative of the defendant's consciousness of guilt**." Brief of Respondent at 10; Tr. 504, ll. 14-17. (emphasis added).

As the Court reasoned in State v. Mann, 132 N.J. 410, 424, 625 A.2d 1102, 1108-1109 (1993), if evidence of a suicide attempt was ever properly admitted, then jury instructions were necessary that *if the jury could credit any alternative explanation for the suicide attempt*, it could

not infer consciousness of guilt. "If evidence of a defendant's suicide attempt is admitted, the trial court should charge the jury on its proper use. The jury should be instructed that it first must find that an actual suicide attempt had occurred. It should then consider whether that attempt was made to avoid the burdens of prosecution and punishment. The jury should also determine whether defendant's attempted suicide demonstrated consciousness of guilt. The trial court should instruct the jury that if it credits any **alternative** explanation offered by the defendant, *it may not infer consciousness of guilt* from the evidence of a suicide attempt " State v. Mann, 132 N.J. 410, 424, 625 A.2d 1102, 1108-1109 (1993) (emphasis added).

The jury instruction here is quite the contrary. The only inference the jury is instructed on is that the defendant's attempt to commit suicide -- to kill himself – is probative of his consciousness of guilt." This was an impermissible charge on the facts, it was and is legally and morally offensive, and it impermissibly puts the judicial thumb firmly on the state's side of the scale.

Despair and the unfortunately feeling that life is no longer worth living often not fit neatly into the "consciousness of guilt" state's side of the scale.

The current suicide attempt instruction on it being probative of consciousness of guilt – and that instruction being a charge on the facts argument is pending in State v. Harold Cartwright, Appellate Case Number 2016-00005, which was argued before the Supreme Court on March 22, 2017. The jury instruction that evidence of a suicide attempt is probative of the defendant's consciousness of guilt by its implication and inference instructs the jury to disregard alternative reasons for the suicide attempt – the antithesis of State v. Mann, supra.

As appellant argued in his brief, at a minimum, evidence or arguments on suicide attempts, like evidence and arguments on flight, should *not* be furthered *by jury instructions* that flight or

suicide attempts show consciousness of guilt. Brief of Appellant at 9. See State v. Grant, 275 S.C. 404, 408, 272 S.E.2d 169, 171 (1980). There are alternative theories to leaving town or the state following a crime other than it was fleeing to avoid capture for a crime the defendant committed. A person may leave town or the state for innocent reasons or simply to avoid constant police investigation the future defendant believes has become harassment or the communities scorn due to suspicion the person has committed a serious crime.

As seen above, the state acknowledges, as it must, that there are also alternative theories to attempting suicide – despair being principal among them – and despair often being grounded in a variety of reasons. Yet, with suicide attempts, unlike flight, the trial court is presently still allowed to instruct the jury that it can infer the suicide attempt shows a defendant's consciousness of his guilt.

Respectfully, as the State v. Grant, 275 S.C. 404, 408, 272 S.E.2d 169, 171 (1980) Court did 37 years ago as to flight, the Court should now hold that this jury instruction on a suicide attempt showing consciousness of guilt is an impermissible charge on the facts. That the jury can give the attempted suicide instruction whatever weight it desires is no answer to the clear fact that the trial judge's instruction advocates the state's consciousness of guilt theory over other alternative theories.

Appellant would finally respectfully urge that this Court await the guidance of the Supreme Court from the case of State v. Harold Cartwright which, as stated above, is currently pending before the state Supreme Court.

CONCLUSION

By reason of the foregoing arguments, and the arguments in the Initial Brief of Appellant, this Court should reverse appellant's conviction and remand this case to the Lancaster Court of General Sessions for a new trial.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 10th day of August, 2017.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Reply Brief of Appellant in the above referenced case has been served upon Caroline M. Scrantom, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Reply Brief of Appellant have been served on John M. Ghent, Jr., #367453, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 10th day of August, 2017.

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 10th day of August, 2017.

Courtney Powers (L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.