

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Honorable Deadra L. Jefferson, Circuit Court Judge

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

NICK RUSSELL EVANGELISTA,

APPELLANT

APPELLATE CASE NO. 2018-000448

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

The state incorrectly asserts that battered person syndrome evidence was irrelevant to an immunity claim under the Protection of Persons and Property statute. Further, the trial judge repeatedly stated Dr. Veronen's testimony on appellant's "state of mind" as a battered person was not proper during the immunity hearing, and since this record shows continued argument would have been futile, this issue is preserved for appellate review.

The state argues that the "[immunity] statute does not provide for the consideration of battered persons syndrome." Brief of Respondent at 2. Appellant submits that is incorrect.

In order to be entitled to immunity a defendant must show that all of the elements of self-defense exist to the satisfaction of the trial court by a preponderance of the evidence, save the duty to retreat. State v. Curry, 406 S.C. 364, 372, 752 S.E.2d 263, 267 (2013). Battered women's syndrome -- here, the battered person's syndrome -- was recognized as relevant and applicable to self-defense in Robinson v. State, 308 S.C. 74, 417 S.E.2d 88 (1992). In Robinson, the Supreme Court explained this complex syndrome which may sometimes even result in the battered person striking at a moment of relative calm to kill her abuser in self-defense.

Consequently, appellant, as a battered person was entitled to present expert testimony on the battered person's syndrome to prove his immunity case -- as he must -- by a preponderance of the evidence. See S.C. Code § 16-11-440-450. State v. Duncan, 392 S.C. 404, 709 S.E.2d 263 (2013)(standard for a defendant during an immunity hearing is proof by a preponderance of the evidence).

The trial judge in this case was adamant that the expert testimony of Dr. Lois Veronen at the immunity hearing was irrelevant and inadmissible. Defense counsel argued that Dr. Veronen's testimony was necessary to prove the elements of the statute. R. 3, ll. 3-19.

However, the judge repeatedly stated that she did not think Dr. Veronen's expert testimony on "somebody's state of mind" was probative on the immunity issue. The solicitor moved that Dr. Veronen not be allowed to testify at the immunity hearing and the judge agreed that Dr. Veronen's testimony was "speculative at best" and, while it might amount to a self-defense argument [before the jury] it was not probative to the preponderance of the evidence standard at the stand your ground immunity hearing. R. 8, l. 22 – 12, l. 5.

Any further argument by appellant on the Dr. Veronen expert opinion testimony on the battered persons syndrome expert testimony being admissible during the immunity hearing would have been futile. The error was preserved. See State v. Primus, 341 S.C. 592, 605, 535 S.E.2d 152, 159 (Ct.App. 2000), *reversed in part on other grounds State v. Primus*, 349 S.C. 576, 564 S.E.2d 103 (2002). Appellant fully understands the duty of defense counsel to zealously advocate the admissibility of evidence counsel believes is admissible. That happened here. This is therefore one of the rare cases where the judge had ruled where further argument would have been futile, and the state's error preservation argument is not about fairness to the trial judge – it is respectfully a "gotcha argument" – where error preservation becomes a rule of affirmance rather than a rule of fairness. State v. Atlantic Coast Builders Contractors, LLC v. Lewis, 398 S.C. 323, 333, 730 S.E.2d 282, 287 (2012)(Toal, C.J., concurring and dissenting in part). See State v. Primus, 341 S.C. 592, 605; 535 S.E.2d 152, 159 (Ct.App. 2000), *reversed in part on other grounds State v. Primus*, 349 S.C. 576, 564 S.E.2d 103 (2002).

In Dr. Veronen's report which was attached to the motion and memorandum in support of the motion to bar prosecution under S.C. Code § 16-11-410 – 450, Dr. Veronen wrote:

"[N]ick has been a victim of violent acts, assaults, and degrading acts in his relationship with Becca Melton. These acts coupled with his compassion for her depression and his love for her, produced cognitive, affective, and behavioral changes in Nick that

have come to be known as the ‘Battered Spouse Syndrome’. His cognitive problem-solving ability had been impaired, and he was reliving experiences of previous abusive episodes when she attacked him. He acted reflexively in a way to preserve his life. This was not a conscious free-thinking adult man capable of volitional acts, but a man biologically and psychologically responding to past threats and attacks.”

R. 516 – 525. (Report of Dr. Veronen attached to motion for immunity).

Dr. Veronen’s *subsequent trial testimony* shows it was relevant and probative on the “stand your ground” issue during the immunity hearing. Dr. Veronen opined before the jury, “we determined that Nick was traumatized by the increasing threats and Becca’s degrading behavior. Basically, to the outside world, Nick was a hard-working, competent, compassionate professional, treating patients in the orthopedic clinic or assisting surgeries at the hospital. At home, at night with Becca, he became an appeaser, a highly conforming partner to her depressive and at times irrational demands.” R. 380, ll. 9-23. Dr. Veronen testified that appellant was suffering from post-traumatic stress disorder and a major depressive disorder. R. 381, l. 14 – 383, l. 4.

Dr. Veronen explained to the jury that the battered person syndrome was more difficult for men to handle “because of feelings [of] pride, that they should be able to manage this situation.” There was also a stigma for a man being a victim of violence at the hands of his partner. “And there’s certainly humiliating aspects, embarrassment, all those factors that are associated with men not reporting.” R. 383, ll. 5-20.

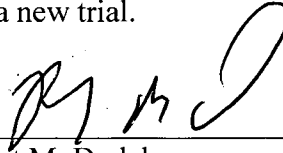
As explained in appellant’s initial brief, on the night appellant killed his live-in girlfriend, Dr. Veronen opined that appellant was suffering from the battered person syndrome and he was suffering from post-traumatic stress disorder. This was “[t]he psychological disorder of, at times reliving experiences, heightened levels of fear and anxiety, and dissociative times in which one

has a loss of complete awareness because of the heightened emotional arousal.” Dr. Veronen said appellant *was not “a free-thinking adult man” and “he was not engaging in volitional behavior.”* R. 389, ll. 4-21. (emphasis added).

For the reasons explained in appellant’s initial brief, and this reply brief, appellant should be granted a new trial where he can properly have *the trial court* consider the expert testimony of Dr. Veronen on the battered person’s syndrome on the issue of immunity from prosecution pursuant to S.C. Code § 16-11-440(C) & 450.

CONCLUSION

By reason of the arguments in appellant's brief and in this reply brief, appellant's conviction should be reversed, and this case remanded to the Beaufort County Court of General Sessions for a new immunity hearing, and if necessary, a new trial.



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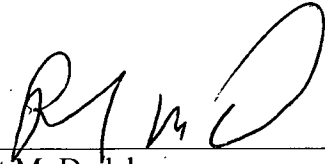
ATTORNEY FOR APPELLANT

This 15th day of October, 2019.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Reply Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

October 15, 2019.



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