STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lancaster County

Honorable Brian M. Gibbons, Circuit Court Judge

Opinion No. 2019-UP-272 (S.C. Ct. App. Filed 9/19/2019)

THE STATE,

RESPONDENT,

V.

JOHN M. GHENT, JR.,

APPELLANT

APPELLATE CASE NO 2019-001771

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 September 19, 2019.

QUESTION PRESENTED

Whether the Court of Appeals erred by finding the trial judge's instruction that "evidence of a suicide attempt is probative of a defendant's consciousness of guilt" was a harmless insubstantial error in this murder case since this improper jury instruction was a highly prejudicial charge on the facts where other explanations for petitioner's suicide attempt were apparent from the record, and where the facts of the fatal incident made accident, involuntary manslaughter, and voluntary manslaughter verdict options?

STATEMENT

Procedural History

Petitioner 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. 408 – 411. 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. R. 1.

On March 17, 2016 the jury found the petitioner guilty of murder, and possession of a firearm or knife during the commission of a violent crime. R. 404, ll. 10-19. Judge Gibbons sentenced petitioner 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. R. 406, l. 21 – 407, l. 3.

The Court of Appeals affirmed in a summary parenthetical opinion in State v. John Marion Ghent, Jr., 2019-UP-272 (filed July 24, 2019). App. 1-2. Petitioner sought rehearing App. 3-7, which was denied. App. 8.

Relevant Facts

Tabitha Reynolds was appellant's daughter. Petitioner went by the nickname "Butch," and he was fifty-six years old at the time of his trial. R. 46, l. 16 – 47, l. 20.

Reynolds was married, and she had two children. Reynolds testified that her decedent mother had been supporting petitioner for more than ten years. "She was ready to leave." R. 48, ll. 1-18.

On October 28, 2013 at 4:00 in the morning petitioner left a voice message on Tabitha's telephone. When she woke at 7:00 a.m., she listened to the message from appellant, and

immediately woke up her husband, Mike Reynolds. Mike went to check on her decedent mother. R. 52, l. 20 – 54, l. 5.

Tabitha confirmed that in the "weeks leading up" to the fatal incident that petitioner had "talked to her" about killing himself. R. 56, ll. 14-24. Dr. Jad Ghandour, a physician working at Springs Memorial Hospital, treated petitioner on the day of the stabbing. R. 36, l. 22 – 38, l. 8. Dr. Ghandour confirmed petitioner had an abrasion on his wrist but stated petitioner did not need medical treatment for the injury. R. 38, l. 4 – 41, l. 17. However, Dr. Ghandour acknowledged that appellant's blood pressure dropped to 70/50 at one point. Petitioner received "a liter of fluid to help increase his blood pressure . . ." R. 42, ll. 9-16.

Mike, the husband of Tabitha Reynolds, recalled going to the house that petitioner 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." R. 59, l. 7 – 61, 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. R. 61, l. 20 – 62, l. 19.

Tressa Howle was the sister of the decedent. Howle testified that she learned the decedent had told petitioner to leave the house. Howle maintained that she learned petitioner refused to leave. On the day of the fatal incident, Howle said that her mother telephoned. Her mother said that Tabitha Reynolds had received a text message stating that petitioner 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." R. 70, l. 14 – 72, l. 2.

When she arrived at the house shared by petitioner and the decedent, she tried to resuscitate the decedent. However, the decedent "was hard," and "she had done took [sic] rigor mortis." R. 73, ll. 9-15. Howle heard appellant's son, Jonathan, ask appellant: "What he did to his mother?" Petitioner allegedly responded: "[H]e killed her. And he said, 'If you don't quit kicking me I'm going to kill you too.'" R. 73, l. 23 – 74, 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.'" R. 84, ll. 11-15.

On cross-examination, Jonathan admitted he told the police that petitioner said, "I stabbed her," and not "I fucking stabbed her." Jonathan also admitted that he did not tell the police that petitioner allegedly threatened him by stating: "I will stab you too." R. 88, l. 2 – 89, l. 13.

Fifty-six-year-old Petitioner John Ghent, Jr took the stand in his own defense. R. 293, l. 19 – 294, l. 11. Petitioner 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." R. 294, l. 24 – 295, l. 7.

Petitioner testified on the night of the incident they were lying in bed when his decedent wife told him "she wanted to leave me." Petitioner 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." Petitioner 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." R. 296, l. 7 – 297, l. 25.

Petitioner 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." R. 298, l. 1 – 299, l. 7. Petitioner tried to stop the bleeding but he panicked. Petitioner testified he laid his wife back down on the bed, went to get "some pills," and he tried to cut his wrist. R. 299, l. 8 – 300, l. 18.

Petitioner 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." R. 299, l. 24 – 300, l. 20.

Charge Conference

The judge stated he was going to instruct the jury on voluntary manslaughter, and involuntary manslaughter as lesser included offenses of murder due to the struggle over the weapon. He also charged the defense of accident. R. 354, l. 21 – 357, l. 13.

The solicitor asked the judge to give an instruction on a suicide attempt being probative of the defendant's consciousness of guilt. R. 358, l. 8 – 359, 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. R. 359, l. 2 – 360, 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." R. 360, 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." R. 372, 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." R. 376, ll. 22-24; R. 382, l. 15 – 384, l. 22.

Jury Instruction

The judge charged the jury the law of murder, voluntary manslaughter, involuntary manslaughter and accident. R. 395, l. 7 – 399, 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." R. 399, ll. 14-17. Defense Counsel Lifsey again took exception to the judge's jury instruction on suicide. R. 403, l. 1-5.

Court of Appeals

As stated, the Court of Appeals affirmed in a summary parenthetical opinion in State v. John Marion Ghent, 2019-UP-272 (filed July 24, 2019), citing State v. Cartwright, 425 S.C. 81, 819 S.E.2d 756 (2018); State v. Stanko, 402 S.C. 252, 264, 741 S.E.2d 708, 714 (2013), and State v. Martucci, 380 S.C. 232, 261, 669 S.E.2d 598, 614 (Ct.App. 2008) on an "insubstantial

error" is harmless when guilt has been conclusively proved "such that no other rational conclusion can be reached." App. 1-2.

Rehearing

Petitioner sought rehearing noting the court may have overlooked the fact that petitioner was entitled to the benefit of State v. Cartwright, 425 S.C. 81, 819 S.E.2d 756 (2018) which held that a jury instruction, such as the one in this case, that "evidence of a suicide attempt is probative of a defendant's consciousness of guilt" was improper, and should not be given even in the rare case where suicide attempt evidence is admissible. Petitioner argued that at a minimum the Court of Appeals should grant rehearing because it cannot be correctly held that the trial judge here did not abuse his discretion in giving this suicide evidence instruction. State v. John Marion Ghent, Jr., 2019-UP-272 (July 24, 2019) at p. 2. App. 3.

Further, petitioner point out, the forbidden suicide consciousness of guilt jury instruction was not harmless error. "As petitioner explained in his reply brief to this Court:

> "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. R. 399, 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,' (R. 297, ll. 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; R. 399, ll. 14-17. (emphasis added)."

Reply brief at 3."

App. 4.

Petitioner reminded the Court on rehearing that there was evidence he tried to commit suicide for reasons unrelated to his wife's fatal stabbing. "The jury in his case was charged also charged on voluntary manslaughter, involuntary voluntary manslaughter, and accident. Petitioner made this Court aware in his brief that "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." Brief at 10." App 5.

> "Finally, as petitioner also argued: "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." Brief at 10. Petitioner was convicted of murder which is the killing of another human being with malice aforethought. See S.C. Code §16-3-10. The jury instruction in this case was not harmless error because at a minimum it was going to be confusing to the jury, and our Supreme Court in State v. Cartwright, 425 S.C. 81, 819 S.E.2d 756 (2018), held jury instructions on suicide attempt evidence should not be given.
>
> The present case is respectfully a textbook example of why a jury instruction that "evidence of a suicide attempt is probative of a defendant's consciousness of guilt" should not be given. It simplistically and callously informs the jury that an attempt to commit suicide can be understood as consciousness of guilt, and a desire to avoid earthly punishment. Suicide is often much more complicated than that as petitioner argued in his brief

in this case, and our Supreme Court explained in State v. Cartwright, 425 S.C. 81, 819 S.E.2d 756 (2018).

App. 5-6.

Rehearing was denied. App. 8.

ARGUMENT

The Court of Appeals erred by finding the trial judge's instruction that "evidence of a suicide attempt is probative of a defendant's consciousness of guilt" was a harmless insubstantial error in this murder case since this improper jury instruction was a highly prejudicial charge on the facts where other explanations for petitioner's suicide attempt were apparent from the record, and where the facts of the fatal incident made accident, involuntary manslaughter, and voluntary manslaughter verdict options

In State v. Cartwright, 425 S.C. 81, 819 S.E.2d 756 (2018) this Court held that a jury instruction on a suicide attempt being evidence of consciousness of guilt should not be given even in the rare case where evidence of a suicide attempt is allowed. Petitioner pointed out in his brief before the Court of Appeals that in State v. Orozco, 392 S.C. 212, 708 S.E.2d 227 (Ct. App. 2011), that Court noted that whether evidence of attempted suicide was probative of the accused's consciousness of guilt was an issue of first impression in South Carolina." The Court wrote that flight evidence was relevant when there was a nexus between the flight and the offense charged." R. 7. The 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.

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

The error here pursuant to State v. Cartwright was not harmless. There was evidence petitioner wanted to kill himself because his wife was going to leave him. "I could not live without her." Petitioner 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.

The trial court's suicide charge here was a prejudicial charge on the facts. See Pettie v. State, 316 Md. 509, 560 A.2d 577 (1989); State v. Mann, 132 N.J. 410, 625 A.2d 1102 (1993); State v. Coudotte, 7 N.D. 109, 72 N.W. 913 (1897); State v. Onorato, 171 Vt. 577, 762 A.2d 858 (2000); People v. Foster, 56 Ill.App.3d 22, 371 N.E.2d 961, 13 Ill.Dec. 869 (1977).

The jury looks to the judge to correctly charge it on the law, and the judge has the duty to charge the law under our State Constitution. Jury instructions on suicide attempts as our jury instructions on flight are tremendously prejudicial. See, State v. Grant, 275 S.C. 404, 408, 272 S.E.2d 169, 171 (1980). It would seem only in a very rare case would an improper jury instruction on flight be found to be harmless error. Yet, suicide attempts, much more than flight, are *ambiguous*, and the jury instruction here that the suicide attempt could be considered probative of petitioner's consciousness of guilt was not only improper as found by the Court of Appeals. It was a highly prejudicial charge on the facts.

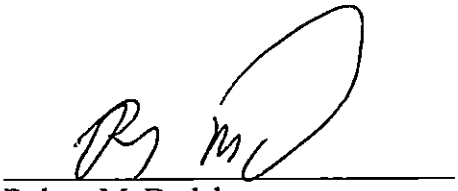
The jury could have found petitioner not guilty by reason of accident. The jury could have convicted petitioner of involuntary manslaughter for having caused the decedent's death with criminal negligence or it could have found him guilty of voluntary manslaughter for having killed the decedent in a heat of passion upon a sufficient legal provocation. As long time Solicitor Myers of Lexington once argued before this Court: "No one knows what a jury will do." However, it certainly is not a stretch to conclude that the jury verdict of murder in this case was unfairly tainted

by the improper suicide is probative of consciousness of guilt instruction. The Court of Appeals incorrectly held the error was "insubstantial" and harmless given the unusual facts of this case. App. at 2, *citing* State v. Martucci, 380 S.C. 232, 261, 669 S.E.2d S.E.2d 598, 614 (Ct.App. 2008). App. 2.

CONCLUSION

By reason of the foregoing argument, a writ of certiorari should be issued to allow full briefing on this issue

Respectfully Submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of November, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lancaster County
Honorable Brian M. Gibbons, Circuit Court Judge

Opinion No. 2019-UP-272 (S.C. Ct. App. filed 9/19/2019)

THE STATE,

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JOHN M. GHENT, JR.,

APPELLANT

CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on Caroline M. Scrantom, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and John M. Ghent, Jr., #367453, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210; and the Court of Appeals, at 1220 Senate Street, Columbia, SC 29201, this 12th day of November, 2019.

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 12th day of November, 2019.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: March 10, 2025.