STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County

Honorable Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICHAEL JOE SMITH,

APPELLANT

APPELLATE CASE NO 2019-000536

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by refusing to instruct the jury on voluntary manslaughter where there was evidence appellant was being threatened by the decedent drug dealer about a drug debt, that appellant pulled a gun in response to a new threat where appellant reasonably believed the decedent was armed, the decedent grabbed the gun, and appellant shot him, since this was evidence of a killing in a heat of passion upon a sufficient legal provocation mandating an instruction on that lesser-included offense?

STATEMENT OF THE CASE

Appellant was indicted at the June 7, 2018 term of the Florence County Grand Jury for the offense of the murder of Malcolm Kindred Kemmerlin. Rasheem Kevin Thomas a/k/a "Ra Ra" was also indicted for the murder of Kemmerlin, and as an accessory before the fact of a felony in his murder. Appellant's wife, Debra Smith, was indicted for being an accessory after the fact in that same indictment. R. 409.

Appellant's case was called to trial on March 18, 2019 before the Honorable Thomas A. Russo, and a jury. Scott Floyd and Christie Henderson represented appellant. W. Ryan White was the assistant solicitor. R. 1.

On March 21, 2019, the jury found appellant guilty. R. 392, ll. 15-19. Judge Russo sentenced appellant to life imprisonment. R. 404, ll. 2-5.

This appeal follows.

STANDARD OF REVIEW

"The law to be charged to the jury is determined by the evidence presented at trial." *State v. Hill*, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). "The trial court is required to charge a jury on a lesser-included offense if there is evidence from which it could be inferred that the defendant committed the lesser, rather than the greater, offense." State v. Sams, 410 S.C. 303, 308, 764 S.E.2d 511, 513 (2014); see also *State v. Drafts*, 288 S.C. 30, 340 S.E.2d 784 (1986); *State v. Gourdine*, 322 S.C. 396, 472 S.E.2d 241 (1996).

"In determining whether the evidence requires a charge on a lesser-included offense, the [appellate court] must view the facts in the light most favorable to the defendant." Sams, 410 S.C. at 308, 764 S.E.2d at 513 (citing *State v. Cole*, 338 S.C. 97, 525 S.E.2d 511 (2000)). "The charge request is properly rejected when there is no evidence tending to show the defendant was guilty of the lesser offense." Id. (citing *State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996); *State v. Cooney*, 320 S.C. 107, 463 S.E.2d 597 (1995); *State v. Gadsden*, 314 S.C. 229, 442 S.E.2d 594 (1994)).

ARGUMENT

The court erred by refusing to instruct the jury on voluntary manslaughter where there was evidence appellant was being threatened by the decedent drug dealer about a drug debt, that appellant pulled a gun in response to a new threat where appellant reasonably believed the decedent was armed, the decedent grabbed the gun, and appellant shot him, since this was evidence of a killing in a heat of passion upon a sufficient legal provocation mandating an instruction on that lesser-included offense

Relevant Facts

Daniel Craig Williams was the best friend of the decedent, Kenny Kemmerlin. Williams admitted that Kemmerlin sold prescription drugs to other people. R. 105, l. 12 – 108, l. 20. Appellant owed the decedent money for his past drug purchases.

On February 1, 2017, Williams remembered that appellant called and asked if he knew where the decedent was at the time. Williams told appellant the decedent was "waiting to hear from you." Appellant then drove into the apartment complex parking lot where Williams was living in a short time later. Williams recalled that another man, "a black man," "Ra Ra" was with appellant. R. 108, l. 3 – 110, l. 22.

Williams watched appellant through his apartment window get into another car with the decedent. While Williams was inside his apartment watching the *Game of Thrones*, "I heard something that sounded like somebody hit my air condition[er]. It was a big pow and I thought somebody had ran into my air conditioner because it sticks out . . . So I stood up and then I heard three more pows, pow pow, and that's when I noticed that Kenny was coming around the front of his car and Mike was retreating away back towards his car." R. 110, l. 17 – 112, l. 4.

Williams saw appellant had a gun in his hand. While he did not see appellant shoot the decedent, he saw that the gun in appellant's hand was "smoking." Williams speculated that appellant had shot the decedent four times. R. 112, ll. 6-17. Williams called EMS 9-1-1, and he later admitted he did not tell the responding officers that he saw the shooting or that the decedent was a drug dealer. R. 122, l. 10 – 124, l. 6.

Tracy Tolson was a Francis Marion University police officer. She responded to the nearby scene of the shooting since the university police often assisted the Florence County Sheriff's Department when available, and the incident was close proximity to campus. R. 130, l. 23 – 132, l. 13.

Tolson remembered seeing a white vehicle in the apartment complex parking lot that had all of its doors open. She also noticed that the door to one of the apartments was open, and a person [the decedent] was lying in the doorway. R. 132, l. 9 – 133, l. 20. Tolson immediately detained Williams, and she asked the decedent: "If he knew who shot him. And I can't exactly quote, but he said yes, something along the lines of, Mike shot me, Mike Smith shot me." R. 135, l. 21 – 136, l. 9. This testimony was admitted as a dying declaration without objection.[1]

Tolson said the decedent was badly injured and EMS "did what's unofficially called a scoop and run." R. 137, ll. 15-17. Tolson testified that this meant the decedent was quickly put on a stretcher, placed in the ambulance, and rushed to the hospital for emergency surgery. R. 137, ll. 15-22.

Florence County Sheriff's Department crime scene investigator Andrew Clendenin testified that the gunshot residue (GSR) tests on the hands of both the decedent and Williams

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[1] See Rule 804 (b)(2), SCRE Statement under Belief of Impending Death: "[A] statement by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death . . . [is admissible where the declarant is unavailable as a witness]."

were negative. R. 165, l. 7 – 167, l. 10. Clendenin related that no gun was ever recovered in this case. R. 167, ll. 15-17.

The pathologist, Dr. Ellen Riemer, testified that the decedent had "[t]hree distinct gunshot wounds, one to the right side of the chest, and that gunshot wound went through the diaphragm, the liver, small bowel, which is your intestines, and ended up in the left hip." There was also a gunshot wound in the decedent's back and a gunshot wound to his right forearm. R. 179, l. 5 – 183, l. 22. There was no stippling, which meant the shot was not a contact wound or a shot from a very close distance. The pathologist also revealed that the decedent's blood was negative for drugs or alcohol. R. 188, l. 13 – 189, l. 24.

Appellant's wife, Debra Smith, claimed that she had heard appellant talking with another man about breaking into the car of a man who "kept medicine" in his car. This conversation allegedly occurred about two weeks before the fatal encounter in this case. R. 222, l. 22 – 223, l. 14.

Smith testified when appellant returned home on February 1, 2017, the date of the shooting, that he was very nervous. Appellant purportedly told her, "I just saw Ra Ra shoot Kenny." R. 223, l. 15 – 224, l. 14. Smith testified she then drove appellant to the beach. Smith claimed when they were on the way to the beach, appellant put his hand over her face and told her she was smelling gun powder. "He [appellant] said I had to do it, I had to shoot him, he was going to hurt Ra Ra." R. 225, ll. 10-17.

Smith also said appellant took a gun out of his pants and placed it on the floorboard of her car. In addition, "he had some pills and he put them in his hand and he said I don't know what all I've got here." R. 225, l. 23 – 226, l. 5.

Smith also maintained that, while she was driving, a cell phone rang. Appellant removed the phone from his back pocket. He told Smith that the phone must belong to the decedent, and he allegedly threw it out the window. R. 226, l. 14 – 227, l. 5. Smith dropped appellant off at the Sea Mist Motel. She claimed when she left that appellant was attempting to sell the gun to another man. Smith drove to her niece's house on Surfside Beach. R. 227, l. 11 – 228, l. 16.

On cross-examination, Smith admitted she had lied to the police about what she knew. She also did not tell the police about other things she claimed at trial had occurred. Smith was charged with being an accessory after the fact of a felony. She acknowledged that she hoped for sentencing consideration given her testimony. R. 239, l. 13 – 245, l. 8. Indeed, the indictment against Smith for being an accessory after the fact of a felony had a nolle prosequi disposition on March 21, 2019.[2]

Ben Price was the lead investigator for the Florence County Sheriff's Department. Price testified that appellant was the "prime suspect" in the shooting since the decedent named him as the shooter when the police responded to the 9-1-1 call. R. 291, l. 3 – 293, l. 9. Appellant was arrested on February 4, 2017 after his wife told the police where they could find appellant in Myrtle Beach. R. 293, l. 7 – 299, l. 23.

Investigator Price admitted that appellant told him that the decedent had threatened appellant and his wife. Price also recalled appellant telling him that the decedent grabbed his gun which caused it to "go off." R. 311, l. 3 – 312, l. 21.

In appellant's first interview with Price, which was played for the jury, and is before this Court for viewing, appellant told Price he was very tired and wished to talk the next day instead. Price agreed to talk to appellant the next day. State's Exhibit 77.

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2 See Florence County Twelfth Judicial Circuit Public Index, State v. Debra Turner Smith, 2018-GS-21-01079.

The second interview was not held until February 9, 2017, which was five days later. In this interview, state's exhibit #76, which is on file with this Court, appellant described the decedent as a "big time drug dealer," who sold about $1000 or more in prescription pills each day. Appellant related that the decedent had threatened to kill him and his wife.

Appellant also told Price he took Ra Ra for "backup" because he was afraid, given the threats that had been made against him. When appellant was again threatened in the parking lot by the decedent, whom he believed was always an armed drug dealer, appellant pulled his gun, the decedent grabbed the gun, and the decedent was shot. Appellant expressed surprise to Price that the decedent had been shot since the decedent ran. Appellant told Price, at about 10:43 on the interview clock, that the decedent immediately before the fatal encounter said, "New game, Mike." Appellant said this was another threat that the decedent was going to kill him.[3]

Charge Conference

Defense counsel requested a jury instruction on voluntary manslaughter. Defense counsel argued that appellant felt threatened, and "there was a subsequent sudden heat of passion and the threat was sufficient legal provocation, along with the overt act of [the decedent] reaching for the gun. Your Honor, I would just request the charge of voluntary manslaughter on that basis." R. 343, ll. 16-25.

The judge reasoned that appellant had maintained he did not intend to shoot the decedent, and that the only reason the gun discharged was because the decedent grabbed it. The judge ruled that these facts did not support a jury instruction on voluntary manslaughter. R. 344, ll. 1 – 18.

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[3] Much of this discussion occurred between appellant and Price from about 10:33 to 10:44 of the second interview, on State's Exhibit 76, which is before this Court for viewing.

After the judge gave the jury only the verdict option of finding appellant guilty or not guilty of murder, defense counsel again took exception to the judge's refusal to charge voluntary manslaughter. R. 388, l. 2 – 389, l. 24.

Discussion

"Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation." State v. Knoten, 347 S.C. 296, 303, 555 S.E.2d 391, 394 (2001), *quoting* State v. Cole, 338 S.C. 97, 101, 102, 525 S.E.2d 511, 513 (2000). Here, there was evidence the decedent had threatened to kill appellant and his wife. Appellant testified that he believed the decedent drug dealer was always armed.

Appellant told the police that he brought Ra Ra with him as "backup" because he feared what the decedent drug dealer might do to him. The decedent said, "New game, Mike," which appellant took as a threat to kill him, and that is why appellant pulled his gun. When the decedent grabbed onto appellant's gun, appellant reluctantly acknowledged that he must have shot him.

Since appellant believed the drug dealer decedent was armed, this shooting could well have been found by the jury to have been in a heat of passion upon a sufficient legal provocation. It's elementary that in determining whether the evidence requires a charge on voluntary manslaughter, the court views the facts in the light most favorable to the defendant. State v. Byrd, 323 S.C. 319, 321, 474 S.E.2d 430, 431 (1996).

Here, the decedent signaled to appellant his intention to harm him, which constituted a sudden legal provocation. A threat of an imminent deadly assault is sufficient to require manslaughter instructions in a murder case. See State v. Jackson, 301 S.C. 41, 389 S.E.2d 650 (1990). Appellant reasonably believed the decedent was armed, and pointing a gun at a person is

an adequate provocation for purposes of voluntary manslaughter. See State v. Penland, 275 S.C. 537, 273 S.E.2d 765 (1991). Appellant had the right to act on appearances where he reasonably believed the decedent was armed. State v. Fuller, 297 S.C. 440, 443-444, 377 S.E.2d 328, 331 (1989); State v. Gandy, 113 S.C. 147, 148, 101 S.E. 644 (1919). Appellant also did not have to wait for the decedent to get the drop on him before he acted. State v. Rash, 182 S.C. 42, 50, 188 S.E.435, 438 (1936).

Further, much milder provocations than the drug dealer decedent's actions in this case have been held to constitute a sufficient legal provocation. Humiliating assaults, such as spitting in the face of a person or grabbing him by the ear and leading him around in the presence of others, have been held to constitute sufficient legal provocations. State v. Gallman, 79 S.C. 229, 240, 60 S.E.2d 682, 687 (1908); State v. Petit, 144 S.C. 452, 472, 142 S.E.2d 725, 733 (1928).

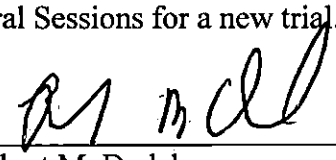
Moreover, fear can constitute a basis for voluntary manslaughter. State v. Wiggins, 330 S.C. 538, 549, 500 S.E.2d 489, 495 (1998). Fear following an attack or threatening act may cause a person to act in a sudden heat of passion. In order to constitute "sudden heat of passion upon sufficient legal provocation," the fear must be the result "of sufficient legal provocation and cause the defendant to lose control and create an uncontrollable impulse to do violence." See State v. Starnes, 388 S.C. 590, 598, 698 S.E.2d 604, 609 (2010).

The continuing threats to harm appellant and his wife, when coupled with the immediate threat to harm appellant, which caused appellant to pull his gun -- and the decedent to grab appellant's gun -- caused the shooting in this case. The jury reasonably could have found appellant was acting in a rage or out of uncontrollable fear when he shot the decedent. These facts, respectfully, warranted an instruction on voluntary manslaughter. The failure to charge voluntary manslaughter where there was evidence, "any evidence" of that lesser-included

offense, was reversible error. See State v. Knoten, 347 S.C. 296, 303, 555 S.E.2d 391, 394 (2001).

CONCLUSION

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



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 6th day of March, 2020.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County

Honorable Thomas A. Russo, Circuit Court Judge

THE STATE,

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V.

MICHAEL JOE SMITH,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Michael Joe Smith states:

1. He is Chief 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 Thomas A. Russo, which was held on March 18 - 21, 2019, 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 Michael Joe Smith.

Respectfully Submitted,

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

This 6th day of March, 2020.

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DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True-billed indictment
(2) Transcript of trial held March 18-21, 2019
(3) State's Exhibit #76 (Interview on disk 2/9)
(4) State's Exhibit #77 (Interview on disk 2/4)

I certify that this designation contains no matter which is irrelevant to this appeal.

March 06, 2020

Robert M. Dudek
Chief Appellate Defender

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ATTORNEY FOR APPELLANT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders 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."

March 06, 2020.

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