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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM NEWBERRY COUNTY
Court of General Sessions
Benjamin H. Culbertson, Circuit Court Judge

Appellant Case № 2021-000982
Lower Court Case Nos. 2019GS3600356, 357, 359

The State . . . . . Respondent,

vs.

Xzavier Sharif Davis. . . . . Appellant.

FINAL REPLY BRIEF

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Question I

Did the trial court err in failing to charge involuntary manslaughter when the record contained evidence that X'Zavier Sharif Davis was intending to commit the misdemeanor crime of malicious injury to personal property when he fired the shot that killed his stepson?

As to this issue, the state makes a forceful argument that the facts were sufficient to support a conviction for murder by pointing out that the reckless conduct of Mr. Davis was sufficient to permit the jury to find implied malice based upon his conduct. The issue, however, is whether there was any evidence to support the argument of Mr. Davis that the trial judge should have instructed the jury on involuntary manslaughter.

The State in an attempt to justify not charging the jury on involuntary manslaughter states, "However, a defendant that intentionally shoots at a person, that is not an unintentional act, so the defendant does not warrant an involuntary manslaughter charge." Br. of Resp. at 9. The problem with the position of the State is that testimony in this case supports the proposition that Mr. Davis was not intentionally shooting at anyone. The testimony from Indigo Davis, the wife of Mr. Davis, is very clear that she did not believe Mr. Davis was shooting at her but was in fact shooting at the tires of the car. She stated:

> Q. (By Mr. Geoley) Any doubt in your mind whether or not he was trying to shoot you?
> A. (By Ms. Davis) No, ain't no doubt in my mind. He was - - -
> Q. What?
> A. - - - not trying to - - -
> Q. - - - what - - -
> A. - - .- shoot me.

Q. What was he trying to shoot?
A. Well looking at the pictures, he was trying to shoot at the tires.
Rec. on App. at 215, ll 6-15.

The State may not believe her testimony. The State may think her testimony is not plausible. When determining if a charge should be given, all that is required is the existence of evidence to support the charge. *State v. Coleman,* 342 S.C. 172, 536 S.E.2d 387 (Ct. App. 2000). Unless this court were to hold that the intentional discharge of a firearm can never support an involuntary manslaughter charge, then this conviction should be overturned. Such a holding, however, would have the impact of overturning *State v. Quick,* 168 S.C. 76, 167 S.E. 19 (1932). This Court does not have the power to overrule an opinion of the Supreme Court. In addition, the record in this case shows that the solicitor in this case had also previously permitted a defendant to plea to involuntary manslaughter where the firearm was intentionally discharged without the intent of hurting anyone. Rec. on App. at 540, l 9 to 541, l 12

As evidence in the record exists by which the jury could have concluded that Mr. Davis was acting reckless when shooting at the tires of the automobile, the lesser included charge of involuntary manslaughter should have been given. This court is not required to believe that evidence in order for the charge to be given. Only the existence of that evidence is required.

Question II

Did the trial court err in failing to giving the jury a improper definition of malice as being a disregard for human and a confusing explanation of intent when the jury expressed confusion over the meaning of total disregard for human life and intent to inflict injury?

The discussion among the solicitor, the defense attorney and the court as to how to answer the jury question "Does total disregard for human life supersede the intent to inflict

injury" Rec on Appeal at 651, l 21 to 666, l 10. During the entire discussion, defense counsel constantly urged the court to simply answer the question with one word, "no." The attempt by the trial judge to give meaning to the question resulted in total confusion. The discussion with the jury extends from line 18, of page 666 of the Record on Appeal to line 18 of page 670 of the Record on Appeal.

During the discussion with the jury, the trial judge mentioned specific intent and general intent. He also mentioned inferred intent. The juror asked the question, "Again, under murder, we don't need to show a specific intent if we have the implied inference that - - -" Rec. on App. at 670, ll 2-4. The juror seems to suggest that implied malice is something the jury accepts if the state proves circumstances to show implied malice. The trial judge does not attempt to tell the juror that any implied malice is an inference the jury is justified in rejecting even if the facts are proven by the state. This failure to instruct the right to reject the inference makes the entire conversation prejudicial to Mr. Davis.

Our Supreme Court has said, "A jury charge is no place for purposeful ambiguity." *State v. Belcher*, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009), extended by *State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019). The exchange between the jury and the trial judge was confusing. Defense counsel was correct when he stated the answer to the question was a simple "no."

Arguably, because the jury acquitted Mr. Davis of attempted murder, the discussion as to specific intent is simply not relevant. The problem is with the specific intent instruction. While the state is correct when they argue that at the end of the original jury charge, defense counsel raised no objection, the same is not true when the issue as to the jury question was raised. At that

point defense counsel made numerous objections as to what the trial judge had instructed the jury. Those issues are clearly preserved for review by this court. The confusion is as to how the trial judge's instructions during the colloquy with the jury prejudiced Mr. Davis as to the assault and battery of a high and aggravated charge.

At line 19 of page 668, the juror starts explaining the confusion the jury was having as to the question they presented. As the jury is explaining the confusion, the trial judge interrupts and attempts to guess at what the juror is trying to explain. The trial judge correctly notes that attempted murder requires a specific intent. Rec. on App. at 669, ll 19-22. The use of the words "general intent" at this point could have confused the jury to believe the general intent of assault and battery of a high and aggravated nature is the general intent to simply fire the weapon. At the original charge as to assault and battery of a high and aggravated nature, no mens rea was given. Rec. on App. at 639, ll 6-21. Thus, when the trial judge told the jury only a general intent is required, the jury could easily have interpreted that to mean an intent to fire the weapon.

Under what was charged to the jury, both originally and the colloquy, and arguably even under the definition contained in S. C. Code § 16-3-600(B) Mr. Davis could be convicted simply based on a negligent act. Defense counsel was correct when he said the answer to the question was simply, "no."

Question III

Did the trial court err in failing to quash the indictment as to attempted murder when the indictment contained the improper language of implied malice?

Counsel agrees that defense counsel did not use the word "quash" in stating his objection to the proposal of the State to amend the indictment. Had the trial judge decline to accept the

State's proposed amendment, the practical affect would have been to require the State to go back and seek another indictment. The State conceded that the indictment was not proper because it contained the charge of attempted murder by implied malice.

The fact that Mr. Davis was convicted of assault and battery of a high and aggravated nature simply re-enforces his argument. The trial jury did not find expressed malice. From this, the logical conclusion is that the grand jury also did not find expressed malice but relied upon implied malice. To the extent the grand jury relied upon implied malice, the indictment is a nullity.

The State has argued that the trial court did not grant the State's motion to amend the indictment. This may not be entirely correct. The trial judge did say to the solicitor, "We'll leave it in there." Rec. on App. at 19, l 21. The trial judge in charging the jury took out the implied malice. As noted in the opening brief, the indictment as presented by the grand jury is improper. The improper indictment was brought to the attention of the trial judge by both the solicitor and defense counsel. Defense counsel refused to consent to amending the indictment. At that point the only choice available to the trial judge was to dismiss the indictment and permit the state to present a valid indictment to the grand jury. Instead, the trial judge elected to not amend the indictment, but did in fact also elect not to charge the jury was to implied malice as to attempted murder. This had the effect of amending the indictment.

As the Supreme Court has said, "Thus, a motion to amend an indictment should be granted when the proposed amendment does not change the nature of the offense or affect the sufficiency of the indictment." *State v. Means*, 367 S.C. 374, 387, 626 S.E.2d 348, 356 (2006). In this case, the elimination of the improper basis for the indictment changed the nature of the

charges. As an indictment that alleges a defendant committed attempted murder by an inference of malice is not a valid indictment, the trial judge should not have permitted the state to go forward on the improper indictment.

CONCLUSION

For the foregoing reasons and for the reasons stated in the opening brief, this Court should reverse the conviction of Xzavier Shariff Davis and remand for a new trial.

January 30, 2023

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief of Appellant complies with Rule 211(b), SCACR.

Jan. 30th, 2023

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