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Mar 15 2023

SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dorchester County

Honorable Maite Murphy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

IVINGTON DANIEL ALLEN,

APPELLANT.

APPELLATE CASE NO. 2022-000638

ANDERS BRIEF OF APPELLANT

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in refusing to give appellant's requested charge on superseding and intervening circumstances?

STATEMENT OF THE CASE

Appellant Ivington Daniel Allen was indicted in Dorchester County for murder, attempted armed robbery and a weapons charge. R. 483-484; R. 487-488; R. 491-492. On April 18, 2022, appellant was tried before the Honorable Maite Murphy and a jury. R. 1. David Osborne and John Rivers, IV, represented the State and Melisa Gay represented appellant. R. 1. The jury convicted appellant. R. 473, l. 20 – 474, l. 6. Judge Murphy sentenced appellant to life imprisonment for murder and a concurrent thirty years' imprisonment for armed robbery. R. 480, l. 25 – 481, l. 20. This appeal follows.

STANDARD OF REVIEW

“It is well-settled the law to be charged is determined from the evidence presented at trial, and if any evidence exists to support a charge, it should be given.” State v. Burriss, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999). “The trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence.” Id.

ARGUMENT

The trial court erred in refusing to give appellant's requested charge on superseding and intervening circumstances.

The State's case against appellant for the murder of James Williams ("Williams") rested almost entirely on hearsay admitted as excited utterances. Williams' father lived with his son and was awakened by the sound of a gunshot. R. 104, l. 2 – 105, l. 1. The father heard Williams say that "A-1" shot him. R. 105, l. 2 – 9. "A-1" had asked Williams for money for his daughter's prom expenses. R. 105, l. 11 – 18. Williams' sister, mother, and aunt all testified under the excited utterance exception that Williams said A-1 shot him. R. 117, l. 1 – 9 (sister); R. 153, l. 6 – 12 (mother); R. 177, l. 5 – 24 (aunt).

Williams' aunt, Gloria Green ("Green") testified that she knew "A-1" and identified him as appellant. R. 178, l. 10 – 179, l. 21. At the hospital, Green questioned Williams about the events of the shooting. R. 180, l. 4 – 184, l. 4. Williams supposedly told Green that appellant came to the door and asked for money. R. 180, l. 4 – 184, l. 4. Williams refused. R. 180, l. 4 – 184, l. 4.

Appellant went to his car and returned. R. 180, l. 4 – 184, l. 4. Appellant put a gun to Williams' head and demanded the money. R. 180, l. 4 – 184, l. 4. Williams tried to fight appellant and push him out of the door and in the tussle, the gun fell. R. 180, l. 4 – 184, l. 4. During the struggle over the gun, Williams was shot. R. 180, l. 4 – 184, l. 4. The State used cell phone records to dispute appellant's statement that he was not near Williams' home.

Williams was in the hospital for about a week and was discharged to hospice care. R. 148, l. 1 – 13. He died about eight days after he was discharged. R. 149, l. 5 – 9. The State's pathologist, Dr. Erin Presnell ("Presnell"), described the "significant" health problems Williams

had before the shooting. R. 271, l. 10 – 272, l. 4. Williams had congestive heart failure and end-stage cirrhosis of the liver. R. 271, l. 10 – 272, l. 4. The bullet traveled through Williams' abdomen and through the liver. R. 272, l. 17 – 274, l. 6. Williams also developed a severe infection in his abdomen. R. 272, l. 17 – 274, l. 6.

Dr. Presnell noted that the toxicology report after Williams' death showed oxycodone and tramadol. R. 272, l. 1 – 4. These drugs are used in hospice for comfort. R. 272, l. 1 – 4. Appellant called Dr. James Downs to testify about the toxicology report. R. 365, l. 12 – 376, l. 2. Dr. Downs said the levels of oxycodone and tramadol were both “in the lethal range.” R. 365, l. 12 – 376, l. 2. Dr. Downs opined that Williams died from polypharmacy and a drug overdose. R. 365, l. 12 – 376, l. 2. The drug overdose was “a superseding event” and Dr. Downs would have ruled Williams death an accident instead of a homicide because it “medically trumps the gunshot wound.” R. 375, l. 10 – 18. The State called Dr. Presnell in reply who speculated that the damage to Williams' liver affected how his body metabolized the hospice drugs and resulted in the high numbers on the toxicology report. R. 391, l. 19 – 392, l. 23.

During a preliminary charge conference, defense counsel told Judge Murphy she would request a charge on a superseding event breaking the causal chain. R. 387, l. 8 – 17. Defense counsel later elaborated on her request and specifically asked the court to charge:

An intervening cause is when something or someone interrupts the chain of events started by the defendant, a force that actively operated to produce harm to another after the actor's act or omission has been committed. If the intervening cause is strong enough to relieve the wrongdoer of the liability, it becomes the superseding cause. Typically, an intervening, superseding cause cuts the defendant off from criminal liability because it is much closer or proximate to the resulting harm. . . .

R. 413, l. 14 – 414, l. 13.

Judge Murphy declined to give appellant's charge, reasoning that her instruction on proximate cause covered the request. R. 415, l. 2 – 7. The court's charge instructed the jury that

more than one proximate cause may exist and that the existence of another proximate cause does not relieve a defendant from criminal liability. R. 459, l. 5 – 24.

The trial judge erred in refusing appellant's requested charge. A trial court must give a valid charge if there is any evidence to support it. State v. Burriss, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999). Appellant's request was arguably an accurate statement of the law based on State v. Matthews, 291 S.C. 339, 353 S.E.2d 444 (1986). In Matthews, the defendant argued for a superseding cause instruction because doctors prematurely declared the victim brain dead and harvested her organs for transplantation. Id. The trial judge charged that jury that simple negligence by a doctor would not relieve criminal liability, but gross negligence or intentional or willful wrongdoing would be a superseding cause. Id. The Matthews Court approved the judge's charge. Id. See also State v. Patterson, 367 S.C. 219, 625 S.E.2d 239 (2006).

A jury could have found the drug overdose to be gross negligence by doctors given Williams' liver injury. A jury also could have concluded that Williams intentionally took an overdose of opiates. Dr. Downs' testimony provided the evidence needed to require a superseding cause charge. Judge Murphy's proximate cause charge failed to adequately tell the jury that a superseding cause can relieve a defendant of criminal liability. The question of superseding cause was an issue of fact for the jury. The court charged the jury on attempted murder as well as murder.¹ Charging the jury on attempted murder meant that the trial court believed evidence existed that Williams did not die as a result of the gunshot. This Court should reverse.

¹ When conducting its Anders review, this Court should also consider, in the event that error preservation rules change during the pendency of this appeal, the trial judge's curious charge on inferred malice that refers to deadly weapons and lists examples of deadly weapons, but does not expressly state that the jury could infer malice from the use of a deadly weapon. See State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019) (abolishing jury charge that malice may be inferred from the use of a deadly weapon).

CONCLUSION

For the foregoing reasons, appellant's convictions should be reversed and this case remanded for a new trial.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 15th day of March, 2023.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Ivington Daniel Allen states:

1. He is 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 Maite Murphy, which was held on April 18 - 20, 2022, 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 Ivington Daniel Allen.

Respectfully Submitted,



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

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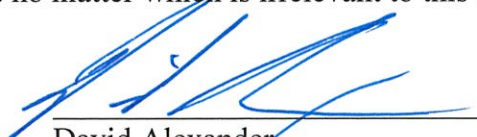
APPELLATE CASE NO. 2022-000638

**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(s) and sentence sheet(s):
- (2) Trial Transcripts (Volume 1 through 3) dated April 18 – 20, 2022.

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



David Alexander
Appellate Defender

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ATTORNEY FOR APPELLANT

This 15th day of March, 2023.

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."

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CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Anders Brief of Appellant and Designation of Matter in the above-referenced case has been served upon Melody J. Brown, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Ivington Daniel Allen, #260003, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 15th day of March, 2023.



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