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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Xzavier Shariff Davis, Appellant

Appellate Case №. 2021-000982

Appeal From Newberry County
Benjamin H. Culbertson, Circuit Court Judge

Unpublished Opinion № 2024-UP-247
Submitted June 1, 2024 - Filed July 3, 2024

Petition for Rehearing

Pursuant to Rule 221 of the South Carolina Appellate Court Rules, X'zavier Shariff Davis, the Appellant above named, hereby Petitions this court to rehear this matter based upon the following grounds:

1. This court erred in failing to consider or acknowledge *State v. Quick*, 168 S.C. 76, 167 S.E. 19, 20 (1932) where the South Carolina Supreme Court said, "The defendant, while admitting that she fired the shot that killed Stanton, testified that she did not mean to hurt any one; that she was trying to quiet the McManus woman, who was drunk, very boisterous, and using profane language; that she asked her to be quiet and to go into the rear room and lie down, but she would not do so; that defendant merely intended to shoot through the floor to scare her, but that the bullet went at such an angle through the counter as to strike Stanton and mortally

wound him." The same factual situation exists in this case. The record contains testimony that Mr. Davis did not intent to hurt anyone. As our supreme court has said, "We reasoned that involuntary manslaughter is at its core an unintentional killing." *Douglas v. State*, 332 S.C. 67, 74, 504 S.E.2d 307, 310 (1998). In this case the killing was unintentional.

This Court erred in concluding as a matter of law Mr. Davis could not have been convicted of malicious injury to personal property when he shot into the automobile. As noted in the Appellant's brief, "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)(emphasis added). No court can say as a matter of law, the act Mr. Davis committed was not malicious injury to personal property. The determination as to which act Mr. Davis committed should have been decided by the jury. This court should rehear this matter an issue an opinion stating there was a misdemeanor that the jury could have concluded was the predicate offense to make this act involuntary manslaughter.

2. The trial court originally instructed the jury, "Malice is hatred, ill will, or hostility towards another person. It is the intentional doing of a wrongful act without just cause or excuse and with an intent to inflict an injury or under circumstances that the law will infer an evil intent." Rec, on App. at 779, ll 3-8. During the colloquy with the juror, this portion of the intent requirement as to the murder charge for which Mr. Davis was convicted was not repeated or discussed. The emphasis in the colloquy was as to general intent and not an "intent to inflict injury" as originally given to the jury. If the trial judge was going to engage in such a lengthy discussion as to the intent portion of the jury charge, the trial judge should have given the full

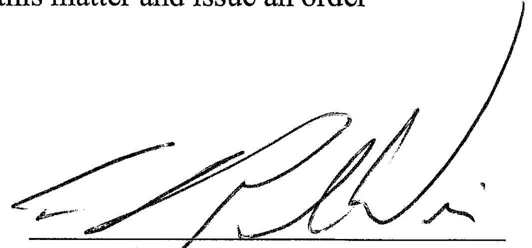
charge to include the "intent to cause injury." By discussing intent without the full meaning of intent simply mislead the jury. This court held, "[W]hen viewed as a whole, the jury charge contained the correct definition and adequately covered the law." *State v. Davis*, Op. № 2024-UP-247 (S.C.Ct.App. filed July 3, 2024) at 3. What this conclusion ignores is that when the jury was asking specific questions about intent, to fail to give the full charge about the intent required to convict is to imply to the jury the court had given during the discussion the jury the relevant portion to answer their questions. As noted by trial counsel, the simple answer to the question was "no." The trial judge should have given that answer and not engage in a confusing discussion with the juror.

3. Prior to the jury being sworn, Solicitor David Stumbo brought to the attention of the court the indictment was improperly worded. Rec. on App. at 13, ll 12-25. He suggested to the court that the phrase "expressed or implied" be stricken from the indictment. Trial counsel objected to permitting the state to amend the incorrect indictment. Rec. on App. at 19, ll 10-16. While trial counsel did not use the word "quash" this point, the record is clear that trial counsel was calling to the attention of the trial judge that the indictment as prepared was defective. The state even conceded this point as the state dismissed two indictments against others because they could not prove specific intent. Rec. on App. at 18, ll 15-22. At this point the state should have elected to simply not call the case and present a proper indictment to a new grand jury. The record is clear that all parties knew the indictment was defective. This court erred in holding that trial counsel did not preserve this issue for review.

CONCLUSION

For the foregoing reason, this court should rehear this matter and issue an order remanding the case for a new trial.

August 7, 2024



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Trial Court Case No. 2019GS3600356, 600357,600359
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CERTIFICATE OF SERVICE

I, Sandy Traynham, hereby Certify that I am the Secretary for C. Rauch Wise, Attorney for the Appellant, in the above entitled case. That on August 7, 2024, I did send via e-mail a copy of the Petition for Rehearing to Alan Wilson and Tommy Evans, Jr., South Carolina Attorney General Office, at tommyevansjr@scag.gov and agwilson@scag.gov.

August 7, 2024

/s/Sandy Traynham
Sandy Traynham
Secretary

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