STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Colleton County

Perry M. Buckner, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRONSON SHELLEY,

APPELLANT

APPELLATE CASE NO. 2012-213520

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

In instructing the jury on the law of attempted murder did the trial judge err in defining malice as 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 when attempted murder requires a specific intent to kill?

STATEMENT OF THE CASE

In August of 2011, the Colleton County Grand Jury indicted Shelley for two counts of attempted murder and possession of a weapon during the commission of a violent crime, indictments #2011-GS-15-552, 553, 554. On November 13, 2012, Shelley proceeded to jury trial before the Honorable Perry M. Buckner. Attorney David Matthews represented Shelley at trial. Attorney Steven Knight prosecuted the case on behalf of the State. The jury returned a verdict of not guilty for attempted murder of Deputy J. Eaches, indictment #2011-GS-15-553. The jury returned guilty verdicts for attempted murder of Deputy J. Burnette, indictment #2011-GS-15-552 and possession of a weapon during the commission of a violent crime, indictment #2011-GS-15-554. Judge Buckner sentenced Shelley to twenty five (25) years for the attempted murder charge and five (5) years concurrent for the weapon charge. A timely notice of intent to appeal was served on November 19, 2012. This appeal follows.

STATEMENT OF FACTS

On July 12, 2012, at 7:00 PM Deputy Justin Eaches with the Dorchester County Sheriff's Department was conducting traffic enforcement on I-95 when he observed a black vehicle move off to the right and then make an abrupt lane change to the left without using a turn signal. (Tr. p. 85, line 7 – p. 86, lines 1-11). The Deputy testified that he pulled next to the vehicle and observed Maurio Rivers as the driver and Appellant as the passenger. (Tr. p. 86, line 13 – p. 87, lines 1-24). According to the Deputy he attempted to stop the vehicle with blue lights and siren but the vehicle did not stop. (Tr. p. 88, line 22 – p. 89, lines 1-25). The Deputy testified that the vehicle reached a speed of over a hundred miles per hour crossing into Colleton County. (Tr. pp. 89 – 93).

Lieutenant Joseph Burnette with the Dorchester County Sheriff's testified that he took over the chase as the car entered Colleton County and onto Highway 61. (Tr. p. 131, lines 1-21). Lt. Burnette made contact with the vehicle with his car in order to stop it. The vehicle spun around, hit a tree and flipped over. (Tr. p. 131, line 22 – p. 132, lines 1-14). Lt. Burnette testified that during the chase he observed the passenger shoot at him through the sun roof of the car. (Tr. p. 132, line 15 – p. 133, 134, lines 1-25). According to Lt. Burnette both the driver and the passenger fled after the car wrecked. (Tr. p. 135, lines 3-14).

Officer Paul Timothy Knight with the Dorchester County Sheriff's Department testified that he assisted Lt. Burnette in apprehending Maurio Rivers. According to Officer Knight, Rivers was identified by an unknown source as the driver. (Tr. p. 204, lines 11-18). According to Officer Knight, the Appellant was apprehended about an hour later. (Tr. p. 204, line 25 – p. 205, lines 1-21). Stephen Bellew with the Colleton County Fire and

Rescue testified that he treated the second person at the scene who identified himself the unrestrained driver of the vehicle. (Tr. pp. 182-185).

ARGUMENT

In instructing the jury on the law of attempted murder the trial judge erred in defining malice as 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 when attempted murder requires a specific intent to kill.

At the close of the State's case, Appellant requested that the judge instruct the jury with the definition of attempted murder found in State v. Sutton, 340 S.C. 393, 532 S.E.2d 283 (2000). (Tr. p. 223, lines 7-13). Prior to the jury instruction the judge held a charge conference off the record. (Tr. p. 225, line 23 – p.226, lines 1-3). The next day the judge declined to instruct the jury pursuant to Sutton but placed on the record Appellant's objection to the proposed charge. (Tr. p. 225, lines 18 – p. 226 lines 1-25). During the jury instruction on the law of attempted murder the judge defined malice stating, "Malice is hatred, ill-will or hostility towards another person. It is – malice 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." (Tr. p. 264, lines 1-5). At the conclusion of the jury instructions Appellant objected to the definition of malice that included the words "intent to inflict an injury." (Tr. pp. 272-274). Counsel for Appellant specifically stated, "And, Your Honor, when mentioning the intent to inflict injury, it sounds like – it sounds like – it waters down the defendant's purpose, the level of intent, Your Honor. I know we discussed this, but I'm just putting my position on the record." (Tr. p. 273, line 23 – p. 274, lines 1-2).

The judge denied Appellant's request to instruct the jury with the definition of attempted murder provided in State v. Sutton, 340 S.C. 393, 532 S.E.2d 283 (2000). stating:

(Tr. p. 275 lines 4-23). The trial judge erred.

On June 2, 2010, S.C. Code §16-3-29 became effective creating the statutory offense of attempted murder. S.C. Code §16-3-29 provides, "A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder. A person who violates this section is guilty of a felony, and, upon conviction, must be imprisoned for not more than thirty years. A sentence imposed pursuant to this section may not be suspended nor may probation be granted." In State v. Sutton, 340 S.C. 393, 532 S.E.2d 283 (2000) the South Carolina Supreme Court found that, at the time, the offense of attempted murder was not recognized in South Carolina. In Sutton the Court wrote:

> In general, "[a]ttempt is a specific intent crime." 21 Am.Jur.2d Criminal Law § 176 (1998). "The act constituting the attempt must be done with the intent to commit that particular crime." Id. See also Wharton's Criminal Law Attempt §§ 694-695 (1996)("To constitute an attempt, there must be an intent to commit a particular crime ... Although a murder may be committed without an intent to kill, an attempt to commit murder requires a specific intent to kill.") In the context of an "attempt" crime, specific intent means that the defendant consciously intended the completion of acts comprising the choate offense. In other words, the completion of such acts is the defendant's purpose. United States v. Calloway, 116 F.3d 1129 (6th Cir.1997). Attempted murder would require the specific intent to kill and conduct towards that end. ABIK requires an unlawful act of violence to the person of another with malice. Clearly, each offense has an element the other does not. However, simply because convictions for both offenses would not violate double jeopardy, we are not constrained to recognize the offense of attempted murder.

Sutton, 340 S.C. at 397, 532 S.E.2d at 285 (footnote omitted).

Appellant requested that the judge use the language above from Sutton to define attempted murder. Importantly, the judge's instruction did not instruct the jury that "[a]ttempted murder would require the specific intent to kill and conduct towards that

end." Appellant objected when the judge denied the request to use the Sutton language and further objected to the judge's definition of malice that included the words "intent to inflict an injury." While the judge instructed the jury that "[a] person, who with the intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder" (Tr. p. 263, lines 22-25), the intent element was diluted by the judge's instruction defining malice as 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.

"To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010). A trial judge's failure to give requested jury instructions is not prejudicial error where the instructions given afford the proper test for determining the issues. Id. at 479, 697 S.E.2d at 583–84. "An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." Id. at 479, 697 S.E.2d at 584.

First, the judge erred in defining malice as 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. In footnote note five in State v. Belcher, 385 S.C. 597, 610, 685 S.E.2d 802, 809 (2009) the south Carolina Suprmee court wrote, "Under South Carolina law, "[m]alice is a legal term implying wickedness and excluding a just cause or excuse. The term malice indicates a formed purpose and design to do a wrongful act under the circumstances that exclude any legal right to do it." State v. Fennell, 340 S.C. 266, 275 n. 2, 531 S.E.2d 512, 517 n. 2 (2000); see also State v. McDaniel, 68 S.C.

304, 312, 47 S.E. 384, 387 (1904) (same). "It is something which springs from wickedness, from depravity, from a heart devoid of social duty and fatally bent on mischief." Arnold v. State, 309 S.C. 157, 163, 420 S.E.2d 834, 837 (1992); see also Singletary v. State, 281 S.C. 444, 446, 316 S.E.2d 369, 370 (1984) (same); State v. Kinard, 373 S.C. 500, 504, 646 S.E.2d 168, 170 (Ct.App.2007) (same)." The traditional definitions of malice do not include "an intent to inflict an injury" and this language should not have been included in the definition of malice given to the jury in this case.

Second, Appellant was prejudiced by the erroneous jury instruction. Attempted murder, as defined by statute, requires a specific intent to kill. In defining malice by using the intent to inflict an injury the judge diluted the specific intent to kill required for attempted murder. The single reference to intent to kill in the jury charge was not sufficient in light of the erroneous malice charge. The trial judge should have charged the language from Sutton as requested.

In State v. Buckner, 341 S.C. 241, 247, 534 S.E.2d 15, 18 (Ct.App. 2000) the South Carolina Court of Appeals wrote:

> Where the charge contains both the correct and incorrect law, an appellate court must assume the jury followed the incorrect charge. State v. Taylor, 323 S.C. 162, 473 S.E.2d 817 (Ct.App.1996) (citing People v. Hess, 214 Mich.App. 33, 543 N.W.2d 332 (1995)). Moreover, in determining whether the error was harmless, we must determine beyond a reasonable doubt that the error complained of did not contribute to the verdict. State v. Andrews, 324 S.C. 516, 479 S.E.2d 808 (Ct.App.1996). We must review the facts the jury heard and weigh those facts against the erroneous jury charge to determine what effect, if any, it had on the verdict. State v. Jefferies, 316 S.C. 13, 446 S.E.2d 427 (1994). In making a harmless error analysis, our inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered. Id.

The erroneous charge contributed to the verdict rendered. As in Buckner the jury charge lowered the burden necessary to find Appellant guilty. The erroneous instruction on attempted murder requires reversal.

CONCLUSION

Based on the above argument, the Appellant's conviction and sentence should be reversed and the case remanded for a new trial.

Respectfully submitted,

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 20th day of November, 2013.

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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 indictments and sentencing sheets;
(2) Trial transcript pages 1-60; 77 – 291.

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

November 20th, 2013

Kathrine H. Hudgins
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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and also served upon Mr. Bronson Shelley, 353229 Broad River Correctional Institution 4460 Broad River Road Columbia, SC 29210 , this 20th day of November, 2013.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 20th day of November, 2013.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.