

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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NOV 27 2013

SC COURT OF APPEALS

Appeal from Colleton County

Diane Schafer Goodstein, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MAURIO DAETREL RIVERS,

APPELLANT.

APPELLATE CASE NO. 2012-213729

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. The Trial Court erred in failing to grant Appellant's motion for a directed verdict on the charge of attempted murder where: (1) there was no evidence that Appellant fired any gunshots; (2) the State failed to present any evidence of a common scheme or plan between Appellant and his passenger, the person who fired the gunshots, to commit any criminal act; and (3) the State failed to establish that Appellant had the requisite specific intent to kill as required by S.C. CODE ANN. § 16-3-29.

- II. The Trial Court erred in failing to instruct the jury that they could not convict Appellant of attempted murder unless they found that Appellant had a specific intent to kill.

STATEMENT OF THE CASE

On August 25, 2011, Appellant Maurio Daetrel Rivers was indicted by the Colleton County Grand Jury for (1) one count of attempted murder of Deputy J. Burnette; (2) one count of attempted murder of Deputy J. Eaches; and (3) one count of possession of a weapon during the commission of a violent offense. Tr. 8, ll. 8-12; 9, l. 16 – 10, l. 2; R.*.

Appellant was tried before the Honorable Diane S. Goodstein and a jury on December 12-13, 2012. Tr. 1. Appellant was represented by John D. Bryan, and the State was represented by Assistant Solicitor Steven Knight. Id.

On December 13, 2012, the jury found Appellant not guilty of attempted murder of Deputy J. Eaches and not guilty of the possession charge. Tr. 216, ll. 13-21. The jury found Appellant guilty of attempted murder of Deputy J. Burnette. Tr. 216, ll. 7-12. Judge Goodstein sentenced Appellant to thirty years imprisonment. Tr. 228, ll. 13-17; R.*.

Appellant timely filed and served his Notice of Appeal on December 17, 2012.

STATEMENT OF FACTS

On July 12, 2011, at 7:00 p.m., Deputy Justin Eaches with the Dorchester County Sheriff's Office was conducting traffic enforcement on I-95 when he observed a black vehicle traveling southbound move off to the right and then make an abrupt lane change to the left without using a turn signal. Tr. 62, l. 19 – 63, l. 24. Deputy Eaches exited his stationary position in the median and attempted to stop the vehicle. Deputy Eaches testified that he first pulled along side of the vehicle and observed two black males inside the vehicle. Deputy Eaches identified Appellant as the driver. Tr. 64, l. 1 – 65, l. 1. According to Deputy Eaches, he attempted to stop the vehicle with blue lights and siren but the vehicle did not stop. Tr. 66, l. 25 – 67, l. 16.

Deputy Eaches sought the assistance of Lieutenant Joseph Burnette with the Dorchester County Sheriff's Office in the chase of the vehicle, and Lt. Burnette took over the pursuit. Tr. 67, l. 25 – 68, l. 12; 77, l. 9 – 78, l. 24. The vehicle in pursuit exited off of I-95 onto Highway 61. Tr. 150, ll. 5-10. Lt. Burnette testified that during the chase on Highway 61, he heard gunshots. Tr. 87, ll. 15-17. He forcefully made contact with the vehicle with his car in order to stop it. The black vehicle flipped over on its roof. Lt. Burnette testified that in the course of the vehicle going backwards just prior to it flipping over, he heard gunshots again. Tr. 84, l. 13 – 87, l. 25.

According to Lt. Burnette, both the driver and passenger fled the vehicle after it wrecked. Tr. 85, ll. 19-24. Lt. Burnette released his K-9 on them, and with the assistance of the K-9, Lt. Burnette apprehended Appellant. Tr. 85, l. 12 – 86, l. 11.

Deputy Eaches assisted in the apprehension of the passenger, Bronson Shelley. Shelley had a holster in his pocket when he was apprehended. Tr. 73, ll. 4 – 17.

At trial, Lt. Burnette testified that it was the passenger Bronson Shelley that shot at him and that Shelley had looked at him. Tr. 92, l. 19 – 93, l. 7. Lt. Burnette testified that while there were two different volleys of shootings that he heard, he only saw one person, Bronson Shelley, shoot. Tr. 97, ll. 4-15.

There were three guns recovered from the wreck scene. One gun was found on the ground after the vehicle was rolled upright. Tr. 106, ll. 9-18. Another gun was found lying in plain view while the vehicle was still upside down. Tr. 109, ll. 1-4. The last gun was found inside the glove box of the black vehicle. Tr. 111, ll. 22-24. Swabs of DNA were taken from the guns, but the swabs were not tested. Tr. 136, ll. 10-18.

Appellant was ultimately charged and found guilty of the attempted murder of Lt. Burnette.

ARGUMENT

- I. The Trial Court erred in failing to grant Appellant's motion for a directed verdict on the charge of attempted murder where: (1) there was no evidence that Appellant fired any gunshots; (2) the State failed to present any evidence of a common scheme or plan between Appellant and his passenger, the person who fired the gunshots, to commit any criminal act; and (3) the State failed to establish that Appellant had the requisite specific intent to kill as required by S.C. CODE ANN. § 16-3-29.**

The Trial Court erred in failing to direct a verdict for Appellant on the charge of attempted murder of Lt. Burnette where the evidence, taken in the light most favorable to the State, fails to establish that Appellant (1) fired any gunshots himself; (2) attempted to kill another person under the theory of accomplice liability; or (3) had the requisite specific intent to kill. Tr. 153, l. 11 – 155, l. 24; 165, l. 19-166, l. 5. S.C. CODE ANN. § 16-3-29 provides that a person commits the offense of attempted murder when the person “with intent to kill, attempts to kill another person with malice aforethought, either express or implied.”

A defendant is entitled to a directed verdict at trial when the State fails to present evidence on a material element of the offense charged. State v. Brown, 360 S.C. 581, 586, 602 S.E.2d 392, 395 (2004). The grant of a directed verdict motion for acquittal by a defendant is proper if there is a failure of competent evidence tending to prove the charge. State v. Jackson, 395 S.C. 250, 254, 717 S.E.2d 609, 611 (Ct. App. 2011).

If there is any direct or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the trial court should submit the case to the jury. Otherwise, “a trial judge should grant a directed verdict motion when the evidence merely raises a suspicion the accused is guilty.” “Suspicion” implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof. State v. Buckmon, 347 S.C.

316, 321-22, 555 S.E.2d 402, 404-05 (2001); see also State v. Odems, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011); State v. James, 362 S.C. 557, 561, 608 S.E.2d 455, 457 (Ct. App. 2004).

A. The State failed to present any evidence that Appellant fired the shots at Lt. Burnette.

As an initial matter, there was no evidence presented at trial that Appellant actually fired shots at Lt. Burnette. Lt. Burnette testified that it was the passenger Bronson Shelley that shot at him. Tr. 92, l. 19 – 93, l. 7. Lt. Burnette further testified that while there were two different volleys of shootings that he heard, he only saw one person, Bronson Shelley, shoot. Tr. 97, ll. 4-15.

The jury found Appellant not guilty on the charge of possession of a weapon during the commission of a violent offense. Tr. 216, ll. 18-21. By finding that Appellant was not in the possession of a firearm or visibly displayed what appears to be a firearm during the commission of a violent crime, the jury implicitly found that Appellant did not fire the shots at Lt. Burnette. See S.C. CODE ANN. § 16-23-490(A). Therefore, if the jury found Appellant guilty of attempted murder, it had to have done so under the theory of accomplice liability.

B. The evidence presented by the State was insufficient to support a conviction for attempted murder under the theory of accomplice liability.

The State also failed to present sufficient evidence that Appellant is guilty of attempted murder under an accomplice liability theory.

Under the “hand of one is the hand of all” theory of accomplice liability, “one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose. . . . Under

accomplice liability theory, a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act.” State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) (internal citations omitted).

“In order to be guilty as an aider or abettor, the participant must be chargeable with knowledge of the principal's criminal conduct. . . . Prior knowledge that a crime is going to be committed, without more, is not sufficient to make a person guilty of the crime. . . . Mere presence at the scene is not sufficient to establish guilt as an aider or abettor.” Id. at 480, 697 S.E.2d at 584 (internal citations omitted).

“To admit evidence under [the accomplice liability] theory, the existence of the common design and the participation of the accused against whom the evidence is offered should first be shown.” State v. Langley, 334 S.C. 643, 648, 515 S.E.2d 98, 101 (1999).

The State failed to present sufficient circumstantial evidence of a common plan or scheme to accomplish an illegal purpose between Appellant and his passenger, Bronson Shelley. The State’s evidence only shows that Appellant and Shelley were traveling in a car together and that Appellant was driving at a high rate of speed and did not stop for a blue light. There is no evidence in the record of (1) how long Appellant and Shelley knew either other; (2) why Shelley was in the vehicle with Appellant; (3) why Appellant was driving at a high rate of speed and did not stop for a blue light; or (4) that Appellant knew his passenger would fire shots at law enforcement. There is also no evidence that Appellant maneuvered the vehicle in any way to make it easier for Shelley to fire at Lt. Burnette. Accordingly, the record lacks sufficient circumstantial evidence that Appellant agreed to, and did act in concert with Shelley, to achieve an illegal purpose.

Where there is insufficient evidence to establish that Appellant joined with Shelley to accomplish an illegal purpose through a common scheme or design, Appellant cannot be liable for the acts spontaneously and independently committed by Shelley and thus is not guilty of attempted murder. The Trial Court therefore erred in failing to grant Appellant's motion for a directed verdict on the charge of attempted murder.

C. The State failed to establish that Appellant had the requisite specific intent to kill as required by S.C. CODE ANN. § 16-3-29.

Assuming *arguendo* that there was sufficient evidence that Appellant and Shelley were acting together to flee or elude law enforcement, Appellant is nevertheless entitled to a directed verdict on the charge of attempted murder where there is no evidence that possessed the requisite specific intent to kill as required by S.C. CODE ANN. § 16-3-29.

Attempted murder is defined by statute as: "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." § 16-3-29 (emphasis added). This statute became effective on June 2, 2010 and replaced the former common law statute of assault and battery with intent to kill, formerly S.C. CODE ANN. § 16-3-620.

The statute defining attempted murder requires a specific intent to kill. In State v. Sutton, 340 S.C. 393, 532 S.E.2d 283 (2000), the South Carolina Supreme Court declined to recognize the offense of attempted murder which had not yet been codified. The court, in its reasoning, observed that an attempt to commit murder requires a specific intent to kill:

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) (emphasis added).

For a jury to convict Appellant of attempted murder, the State must present evidence that Appellant possessed a specific intent to kill. State v. Brown, 360 S.C. 581, 586, 602 S.E.2d 392, 395 (2004). The State failed to prove that material element of attempted murder.

The State did not prove that Appellant used a deadly weapon. The State at most has shown that Appellant and Shelley were in a vehicle together fleeing police. Even if Appellant and Shelley acted in concert to flee the police, the State must still prove that Appellant shared Shelley's intention to kill Lt. Burnette. "But where the purpose established is less in degree than such an intention, and where the record shows merely a spontaneous act of [attempted murder] by one, the other is not, without a greater showing of a personal designed to kill, guilty of [attempted murder.]" People v. Hayes, 117 A.D.2d 621, 622 (N.Y. Sup. Ct. 1986) (internal citations omitted); see also State v. Adams, 319 S.C. 509, 511, 462 S.E.2d 308, 209 (Ct. App. 1995) ("[W]hile conspirators are responsible for all incidental and consequential acts growing out of a general design, conspirators are not responsible for the independent acts of any one conspirator.").

The record is lacking of any evidence that Appellant shared Shelley's specific intent to kill. That Appellant was driving a vehicle in which the two were fleeing police is not

sufficient to support a conviction for attempted murder when Appellant did not fire the shots at Lt. Burnette. According, Appellant is entitled to a directed verdict on the charge of attempted murder for the State's failure to present any evidence of his specific intent to kill.

II. The Trial Court erred in failing to instruct the jury that they could not convict Appellant of attempted murder unless they found that Appellant had a specific intent to kill.

Appellant requested that the Trial Court charge the jury that attempted murder requires a specific intent to kill. R.* [Memorandum on Specific Intent to Kill.] The Trial Court did not instruct the jury that attempted murder requires a specific intent to kill. Tr. 196, l. 19 – 200, l. 5. Defense counsel objected to the Trial Court's failure to charge the jury that they must find Appellant specifically intended to kill Lt. Burnette before the jury could convict him of attempted murder. Tr. 207, ll. 24-25. The Trial Court noted his exception for the record. Tr. 208, ll. 1-3.

As set forth above, attempted murder, as defined by statute, requires a specific intent to kill. § 16-3-29.

“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 court has a duty to give a requested instruction that is supported by the evidence and correctly states the law applicable to the issues.” State v. Lee-Grigg, 374 S.C. 388, 405, 649 S.E.2d 41, 50 (Ct. App. 2007). A trial court commits reversible error where it fails to give a requested charge on an issue raised by the evidence. Id. at 406, 649 S.E.2d at 50.

Appellant was prejudiced by the Trial Court's failure to charge the jury that attempted murder requires a specific intent to kill where Appellant was not the person

who fired the shots at Lt. Burnette. It cannot be said, beyond a reasonable doubt, that a charge that Appellant must have specifically intended to kill Lt. Burnette would not have made a difference in the outcome of the case. The Trial Court's failure to charge the jury that attempted murder requires a specific intent to kill requires reversal.

CONCLUSION

For the reasons set forth above, Appellant Maurio Daetrel Rivers requests that this Court issue an Order of acquittal on the charge of attempted murder, or in the alternative, reverse Appellant's conviction and remand this case for a new trial.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

This 27th day of November, 2013.

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IN THE COURT OF APPEALS

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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) Memorandum regarding specific intent to kill;
- (3) Transcript of Trial held December 12-13, 2012 (designated pages only): 1-12; 48-228; and
- (4) Sentencing sheet.

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

November 27th, 2013



Carmen V. Ganjehsani
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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 Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Maurio Daetrel Rivers, #232669, Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 27th day of November, 2013.



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 27th day of November, 2013.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.