STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

John C. Hayes, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

HUBERT FLOYD BROWN, JR.,

APPELLANT.

APPELLATE CASE NO. 2013-001543

FINAL BRIEF OF APPELLANT

CARMEN V. GANJEHSANI
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Appellant is entitled to a new trial where the Trial Court erred in instructing the jury that the charge of attempted murder does not require a specific intent to kill.

STATEMENT OF THE CASE

On September 13, 2012, Appellant Hubert Floyd Brown was indicted by the York County Grand Jury for (1) attempted murder and (2) first degree burglary. R. 264 - 267.

Appellant was tried before the Honorable John C. Hayes, III and a jury on July 9-11, 2013. R. 1. Appellant was represented by David C. Cook, and the State was represented by Assistant Solicitor E.B. Springs. Id.

On July 11, 2013, the jury found Appellant guilty as charged. R. 258, ll. 17-25. Pursuant to S.C. CODE ANN. § 17-25-45, the State had served notice of its intention to seek life imprisonment without the possibility of parole ("LWOP"). R. 259, l. 5 – 260, l. 9. Judge Hayes sentenced Appellant to two LWOP sentences on each of the charges. R. 262, ll. 2-3; R. 263, 266 (Sentencing sheets).

Appellant timely filed and served the Notice of Appeal on July 12, 2013.

STATEMENT OF FACTS

The charges against Appellant stem from an altercation he was involved in on the evening of June 8, 2012 with Michael Mahoney and Christopher Calvert. Mahoney had been a good friend of Appellant and had worked with Appellant at Rock Hill Industrial Pipe and Fabrication. R. 22, l. 9 – 23, l. 12. Appellant had been laid off of work at Rock Hill Industrial Pipe and Fabrication approximately six months prior to the night of the incident. R. 23, ll. 3-9. After Appellant was laid off from work, Mahoney hired Appellant to complete certain jobs around Mahoney's house, such as building a chicken coop and constructing a privacy fence. R. 23, ll. 13-25.

On June 8, 2012, Mahoney and Christopher Calvert worked a half day at Rock Hill Industrial Pipe and Fabrication. R. 28, ll. 6-10. Calvert also resided at Mahoney's home, along with Mahoney's wife, Amy, and another individual named Billy Odom who had passed away by the time of trial. R. 22, ll. 2-8. Mahoney and Calvert first went home after they got off of work for the day. Around dinnertime, the two decided to go to Hooter's restaurant. R. 28, l. 16 – 29, l. 6.

Around 9:00 p.m. that evening, while Mahoney and Calvert were still at Hooter's, Mahoney had a telephone conversation with Appellant. Mahoney asked Appellant if he wanted to join Mahoney and Calvert at the restaurant, but Appellant declined. Mahoney invited Appellant to meet them back at Mahoney's house a little while later, and Appellant agreed. R. 29, l. 12 – 30, l. 2.

Mahoney and Calvert left Hooter's shortly thereafter and returned home. Approximately five minutes after they arrived at the house, Appellant pulled up in his vehicle. R. 30, ll. 3-12.

Appellant's wife and children were with him when he went to Mahoney's house. R. 30, l. 25 – 31, l. 2; 70, ll. 4-8. Appellant got out of his vehicle and came over to talk to Mahoney. Appellant asked Mahoney if the two could go around back to talk by themselves. The two walked around to the back of the house to talk. R. 31, ll. 5-14.

According to Mahoney, the two eventually began talking about work, and Mahoney alleged that Appellant told him "you wouldn't have your job if I wasn't there to watch your back." Mahoney said Appellant got in his face and began pointing at him with his right finger. Mahoney testified that he pushed Appellant. R. 33, ll. 2-11. After Mahoney pushed Appellant, Mahoney alleged that Appellant began swinging at him and the two ended up tussling on the ground. R. 34, l. 12 – 35, l. 14.

Calvert had remained by Mahoney's truck when Appellant and Mahoney went around back to talk. R. 32, ll. 15-17. At trial, Calvert admitted that he had snorted cocaine in the bathroom of Hooter's earlier that evening. R. 68, ll. 15-18. Calvert also admitted to previous convictions of assault and battery of a high and aggravated nature and petty larceny. R. 83, ll. 6-12.

Calvert heard a commotion so he went around back. He saw Mahoney and Appellant wrestling on the ground and said Appellant had rolled on top of Mahoney. Calvert then hit Appellant on the head with a gear shift. R. 71, l. 2 – 72, l. 21.

Mahoney testified that after Calvert hit Appellant on the head, "a whole bunch of blood started gushing down [Appellant's] face. R. 36, ll. 7-8. Mahoney said Appellant was "completely dazed," and Appellant was "mumbling trying to get the words out of his mouth that he ha[d] been hit . . . ." R. 36, ll. 2-10.

Calvert admitted to hitting Appellant hard and testified that Appellant had come to after being hit. R. 73, ll. 2-11. Appellant had a severe laceration on his head and suffered a skull fracture that crossed both the left and right cerebral hemispheres. R. 91, l. 17; 94, ll. 17-18; 156, l. 20 – 157, l. 7. Dr. Carol Walser, a neurological psychologist, would later evaluate Appellant, and she testified at trial that Appellant had suffered a traumatic brain injury as a result of the blow to Appellant's head by Calvert. R. 97, ll. 19-25; 137, ll. 13-15; 138, ll. 4-6; 140, l. 9 – 141, l. 20; 143, ll. 23-25. Dr. Walser opined that immediately following the blow to Appellant's head, Appellant was not able to think clearly, speak clearly, and act in a rational way due to the head injury. R. 143, ll. 2-10; 144, ll. 3-4.

At trial, Mahoney testified that after Calvert struck Appellant on the head, Appellant eventually went back to his vehicle, pulled out a hatchet, and began chasing Calvert around the yard. R. 37, ll. 17 – 38, l. 7. Mahoney claimed that Appellant yelled he would kill them. R. 37, ll. 10-24. According to Mahoney, Appellant then went to his vehicle to retrieve a machete and began chasing Calvert again, at one point running through the house. R. 38, l. 22 – 39, l. 22. Mahoney testified that Appellant eventually got back in his vehicle. Mahoney saw the vehicle leave the driveway. R. 42, ll. 3-8.

Mahoney and Calvert went inside the house to the bathroom to wash up. R. 43, ll. 23-24. While they were washing up, Appellant allegedly appeared in the bathroom swinging the machete. R. 77, ll. 14-24. Calvert threw his hands up, and the machete hit his hand. His thumb was partially severed. R. 78, ll. 9-23.

Mahoney's wife, Amy Mahoney, also testified at trial as to her observation of the events on the evening of June 8, 2012. During the incident, she heard Calvert making threats to Appellant. R. 89, ll. 25 – 90, l. 10.

Appellant was later charged with attempted murder and first degree burglary. No charges were ever brought against Calvert for the severe head injury he inflicted upon Appellant.

ARGUMENT

Appellant is entitled to a new trial where the Trial Court erred in instructing the jury that the charge of attempted murder does not require a specific intent to kill.

The Trial Court charged the jury that "[a] specific intent is not an element of attempted murder but it must be a general intent to commit serious bodily injury." R. 233, l. 25 – 234, l. 2. The jury later requested to hear the charge on attempted murder again. R. 249, ll. 14-19; R. 269 (Court's Ex. 9). The Trial Court again repeated the charge that specific intent to kill is not an element of attempted murder but there must be a general intent to commit the serious bodily injury. R. 251, ll. 21-22. Following the re-charge, the solicitor informed the Trial Court that attempted murder requires a specific intent to kill and not just a mere general intent. R. 255, l. 21 – 256, l. 2. The Trial Court disagreed and declined to charge that attempted murder requires a specific intent to kill, stating: "Well that's what I've got in my charge and – a specific intent to kill is not an element of attempted murder. There must be a general intent to commit serious bodily injury." R. 256, ll. 3-6.[1]

The Trial Court's ruling was erroneous. 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." S.C. CODE ANN. § 16-3-29 (emphasis added). This statute became effective on June 2, 2010 and replaced the

[1] While Appellant's counsel did not also object, the issue is nonetheless preserved for this Court's review where the Trial Court considered the issue and ruled upon it. Any further objection by Appellant's counsel would have been futile. See State v. Alexander, 309 S.C. 495, 499 n.1, 424 S.E.2d 526, 529 n.1 (Ct. App. 1992). This Court does not require the parties to engage in futile actions to preserve issues for appellate review. Fettler v. Gentner, 396 S.C. 461, 469, 722 S.E.2d 26, 31 (Ct. App. 2012).

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).

By charging the jury that specific intent to kill was not an element of attempted murder, the Trial Court incorrectly stated the law to the jury. "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 charge to the jury that attempted murder did not require a specific intent to kill. There was ample evidence presented at trial that despite Mahoney's and Calvert's allegations that Appellant was yelling that he was going to kill them, Appellant had just suffered a serious and traumatic head and brain injury that caused him to behave irrationally. R. 91, l. 17; 94, ll. 17-18; 97, ll. 19-25; 137, ll. 13-15; 138, ll. 4-6; 140, l. 9 – 141, l. 20; 143, ll. 2-10, 23-25; 144, ll. 3-4; 156, l. 20 – 157, l. 7. The State' expert, Dr. Richard Frierson, a forensic psychiatrist, agreed that if a person was operating under a specific delusion while making certain statements or engaging in certain actions, then that person would lack criminal responsibility. R. 174, ll. 23-25; 186, ll. 1-7; 188, ll. 5-7. Dr. Frierson further acknowledged that if someone stated their intent of what he or she planned to do, that person could be criminally irresponsible if his or her intent was based in delusion. R. 187, ll. 16-18. Thus, there was evidence that Appellant did not know what he was doing immediately after he suffered the blow to his head and that any statements he made or actions he took may have been based in delusion, thus negating any specific intent to kill.

Had the Trial Court correctly charged the jury that attempted murder required a specific intent to kill, the evidence presented at trial certainly could have supported a jury finding that Appellant lacked this requisite intent. Instead, the jury was informed that the law did not require a specific intent to kill for the charge of attempted murder.

It cannot be said, beyond a reasonable doubt, that a charge that Appellant must have specifically intended to kill Calvert would not have made a difference in the

outcome of the case. See Lee-Grigg, 374 S.C. at 414, 649 S.E.2d at 55 ("For the error to be harmless, [this Court] must determine beyond a reasonable doubt the error complained of did not contribute to the verdict obtained."); see also State v. Buckner, 341 S.C. 241, 247, 534 S.E.2d 15, 18 (Ct. App. 2000) ("In making a harmless error analysis, [the Court's] 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."). The Trial Court's erroneous charge to the jury that attempted murder does not require a specific intent to kill mandates reversal in this case.

The Trial Court's erroneous jury charge on attempted murder further requires reversal of Appellant's convictions for both attempted murder and first degree burglary. While the erroneous jury charge only related to attempted murder, the indictment against Appellant for first degree burglary alleged that Appellant entered the dwelling with "the intent to commit the crime of assault on a person or persons inside the dwelling." R.*. The attack on Calvert was therefore the underlying offense for the charge of first degree burglary.

The jury may have based its guilty verdict for attempted murder on the erroneous jury charge. It may have then based its guilty verdict for first degree burglary on the premise that Appellant entered the dwelling to commit attempted murder. The two charges against Appellant are accordingly inextricably intertwined such that the erroneous jury charge on attempted murder could have influenced the jury's decision to find Appellant also guilty of first degree burglary. The Trial Court's correct statement of law on first degree burglary over an erroneous charge on attempted murder only fosters prejudice and confusion. See State v. Robinson, 306 S.C. 399, 401-02, 412 S.E.2d 411,

413 (1991). Appellant is therefore entitled to a new trial on both attempted murder and first degree burglary.

CONCLUSION

For the reasons set forth herein, Appellant Hubert Floyd Brown respectfully requests this Court to reverse his convictions for attempted murder and first degree burglary and remand for a new trial.

Respectfully submitted,

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

This 1st day of July, 2014.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief 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."

July 1st, 2014

Carmen V. Ganjehsani
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1330

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Jennifer E. Roberts, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 1st day of July, 2014.

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 1st day of July, 2014.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.