ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Larry B. Hyman, Jr., Circuit Court Judge

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MAR 05 2015
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

BRADLEY GERALD MULLINS,

APPELLANT

APPELLATE CASE NO. 2013-002662

FINAL BRIEF OF APPELLANT

ROBERT M. DUDEK
Chief 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

Whether the court erred by instructing the jury that an implication of malice may arise where one intentionally kills another person during the commission of a felony and that first degree burglary was a felony, since the charge was confusing where the state agreed appellant and his accomplices did not think the decedent was home at the time of the burglary, an accomplice testified that the decedent unexpectedly appeared and began shooting at them, and that appellant then shot the victim, since the implication of malice instruction was unnecessary, confusing and prejudicial given the facts of this case?

STATEMENT OF THE CASE

Appellant was indicted by the Horry County Grand Jury for the offenses of murder and burglary in the first degree. R. p. 411. His case was called to trial on December 2, 2013 before the Honorable Larry B. Hyman, and a jury. William I. Diggs represented appellant. J. Scott Hucks and George DeBusk were the assistant solicitors. R. p. 1.

At the conclusion of the trial the jury found appellant guilty on both counts. R. p. 402, l. 25 – 403, l. 12. Judge Hyman sentenced appellant to life imprisonment for burglary in the first degree and life imprisonment for murder. R. p. 410, ll. 6-14.

This appeal follows.

ARGUMENT

The court erred by instructing the jury that an implication of malice may arise where one intentionally kills another person during the commission of a felony and that first degree burglary was a felony, since the charge was confusing where the state agreed appellant and his accomplices did not think the decedent was home at the time of the burglary, an accomplice testified that the decedent unexpectedly appeared and began shooting at them, and that appellant then shot the victim, since the implication of malice instruction was unnecessary, confusing and prejudicial given the facts of this case.

Relevant Facts

Anthony Earl Ray was serving a fifteen-year prison term for first-degree burglary for his role in the crime in this case. R. p. 224, ll. 10-25. Ray admitted he also was charged with armed robbery and murder at the time he testified against appellant. R. p. 225, ll. 1-5. Appellant was Ray's first cousin. R. p. 224, ll. 22-24.

Ray testified on the date of the incident he was drinking beer and cooking out on a grill with eight to ten other people. R. p. 226, ll. 5-23. Ray claimed that he, appellant and two other men, "Little Charlie" and "Arlie Mullins," began talking about robbing the decedent's house to steal his guns. R. p. 227, ll. 5-13; 228, ll. 10-21. Ray maintained that he did not know the decedent but appellant knew the decedent, and appellant was aware that the decedent had guns at his house. R. p. 229, ll. 3-23. Gene Elliott, the decedent's cousin, estimated the decedent "at any given time" had about thirty guns at his house. R. p. 13, l. 23 – 17, l. 5.

Ray testified that when it started to get dark the men executed the plan. Ray claimed that appellant told Little Charlie where to drive. When the men arrived at the decedent's

house "all four of us got out." Ray said he beat on the front door "a good five minutes." Ray was trying "to see if he was home . . . because, I mean, we wouldn't have went in if he was home." Ray maintained the men went to the decedent's house that evening with intention of stealing his guns. R. p. 230, ll. 23 – 232, l. 25.

Ray described how appellant allegedly went in the house first. The men took fifteen to twenty shotguns and rifles back outside, and put them on blankets in the backyard. R. p. 233, l. 1 – 235, l. 11. The men were making methodically making trips outside with the stolen guns, and they were not "trashing the house." They were looking for "rifles, shotguns and pistols." R. p. 235, ll. 1-22.

Ray told the jurors that the men finally reached a locked door to a bedroom. "We had been there probably twenty, twenty-five minutes, a good bit, and we figured that is probably where most of the guns were." R. p. 236, ll. 1-12. It was a "big wooden door, and it is locked." Ray claimed that appellant kicked at the bottom of the door but that appellant's foot got "stuck, he fell down and he went to pull the foot out, and seconds later Mr. Elliott comes out shooting." R. p. 236, ll. 3-22.

Ray testified that the decedent was naked and he had a pistol in his hand. Ray said that the decedent "was shooting . . . I tried to run for the door." "Brad [appellant] was there, and we took off running." Ray said the two men were trying to escape, and "Mr. Elliott comes out and has a gun pointed on him." "I had a little .22 rifle in my hand. I hold it up, screamed at him to put the gun down, put the gun down, when he points the gun at me, I shot him. He fell down, and Bradley goes on top of him. This is kind of behind the couch, but Brad--- by the time I got there, Brad shot him in the head." R. p. 238, ll. 1-16.

Ray claimed that he shot the decedent in the "shoulder, side area...because he pointed his gun at me." Ray maintained that it was appellant who shot the decedent in the head. R. p. 238, l. 1- 239, l. 4.

Ray claimed: "When I shot him in the shoulder, he fell down. Bradley shoots him in the head. I exited out of the back of the house. Bradley stays in there a minute. I run to the truck. Bradley eventually comes out with a sack of pistols . . . like a pillowcase full of pistols . . . we get in the truck and leave." R. p. 241, ll. 2-21. Ray said after the shooting "everybody was yelling at each other and it was - - I don't remember what we said..." R. p. 241, ll. 1-23.

Ray testified the men were wearing gloves during the burglary so they would not leave any fingerprints. Their plan was to steal anything valuable from the house, especially the guns. R. p. 251, ll. 11-14. Little Charlie was the driver and Arlie Mullins was also involved in the burglary. R. p. 251, l. 15 – 252, l. 7.

Horry County Police Officer Timothy Fike was doing a "welfare check" on September 14, 2008 when he discovered the decedent's body "in the living room area of the residence." The body was partially covered by a rug or some other material. R. p. 42, l. 12 – 47, l. 4.

Investigator Peter Cestare testified the broken glass and condition of the door indicated "a forced entry into the house commonly found in a burglary." R. p. 71, l. 8 – 72, l. 6. Charles Mullins Sr. testified that Anthony Ray confessed his role in the burglary, and he insisted appellant did the same although he was vague on when appellant allegedly confessed his role to him. R. p. 153, l. 15 – 162, l. 8.

Closing Argument

In his closing argument Assistant Solicitor Hucks told the jury "Brad Mullins and Anthony Ray went in Joe Elliott's house. **They didn't think he would be home.** They went in the nighttime to steal guns. Beat on the door. When he came out, they shot him, not one of them, both of them. They are both culpable for the burglary and murder of Joe Elliott." R. p. 369, ll. 17-23. (emphasis added).

Charge Conference

At the earlier charge conference the judge told the solicitors and defense counsel that he intended to give a jury instruction that one who "intentionally kills another during the commission *of a felony*, **then an implication of malice may arise** - - may arise." The judge also said he was going to instruct the jury that first degree burglary was a felony. R. p. 309, l. 13 – 310, l. 1.

Defense counsel objected to this instruction, stating the judge's charge on murder was sufficient, and further that the jury instruction was going to be confusing to the jury given the facts of this case. Defense counsel noted that although the case involved a burglary the state also maintained that appellant "cold bloodedly shot this man in the head and killed him." R. p. 310, l. 4 – 311, l. 14.

Defense counsel also argued if the facts involved a sudden struggle then appellant was entitled to a voluntary manslaughter instruction. R. p. 310, l. 4 – 311, l. 14. The judge stated that he was going to charge the jury as he proposed over appellant's objection, and

that he was not going to give a voluntary manslaughter instruction based on State v. Shuler. 344 S.C. 604, 545 S.E.2d 805 (2001).[1] R. p. 311, l. 15 – 313, l. 5.

As seen above, solicitor argued the decedent surprised the men because they did not think "he would be home," and he argued they should be convicted of both murder and burglary in the first degree. R. p. 369, ll. 17-23. The judge charged the jury:

> If one intentionally kills another during the commission *of a felony, an implication of malice may arise*. If facts are proved beyond a reasonable doubt sufficient to raise an inference of malice, this inference is an evidentiary fact to be taken into consideration by the jury along with other evidence in the case.
>
> I further charge you that *the offense of first degree burglary is a felony*. The defendant is charged with first degree burglary.

R. p. 383, ll. 1-10. (emphasis added).

Defense counsel renewed his objection and exception. R. p. 390, ll. 1-13; R. p. 404, l. 18 – 406, l. 20. The assistant solicitor continued to maintain the charge on the inference of malice was proper. R. p. 406, ll. 22-25.

Discussion

The purpose of a jury instruction is to enlighten the jury and to aid it in arriving at a correct verdict. State v. Blurton, 352 S.C. 203, 573 S.E.2d 802 (2002). It is error to give instructions which are calculated to confuse or mislead the jury. State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). If a jury instruction is provided to the jury that does

[1] Shuler involved a defendant who attempted to steal an armored car. He asserted the guard in the back of the truck used excessive force in shooting at him while trying to make a citizen's arrest. The Supreme Court held that the guard shooting could not be a sufficient legal provocation for purposes of voluntary manslaughter. The inquiry here is more complicated since the solicitor acknowledged the burglars did not think the decedent was home, and there was evidence the decedent came out shooting unexpectedly while the burglars attempted to flee.

not fit the facts of the case, it may confuse the jury. State v. Hewitt, 205 S.C. 207, 31 S.E.2d 257 (1944). Only law applicable to the case should be charged to the jury. Instructions that do not fit the facts of the case may serve only to confuse the jury. State v. Fair, 209 S.C. 439, 40 S.E.2d 634 (1946).

Defense counsel correctly argued that the "inference of malice" jury instruction the judge gave over his objection in this case would confuse the jury. There was evidence that, and indeed the solicitor argued, the burglary occurred because the burglars believed that the decedent was not home. Anthony Ray testified that the burglary would not have occurred if they knew the decedent was home. Ray beat on the decedent's door for five minutes to be sure the decedent was not at home. The men were surprised when the decedent appeared with a gun from behind a locked door, and began shooting at them. Ray said they were attempting to escape when the decedent began firing, and he warned the decedent not to shoot again. Ray did claim that it was appellant who shot the decedent in the head, and Ray claimed it was done deliberately.

This was a very unusual fact scenario regarding the burglary that ended in a homicide, and defense counsel correctly argued that the judge's charge on murder and malice aforethought were sufficient to cover the subject of murder. By entering into the jury instructions language about a burglary in first degree being a felony and an implication of malice the judge's instructions became confusing to the jury as defense counsel argued. See See State v. Peterson, 287 S.C. 244, 246-248, 335 S.E.2d 800, 801-802 (1985).[2]

Although State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), involved the Supreme Court holding that the jury instruction that malice may be inferred from the use of

[2] *Overruled on other grounds,* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

a deadly weapon is no longer good law in South Carolina where there is evidence presented that would reduce, mitigate, excuse or the justify homicide, it also serves as a reminder that the use of "inferences" or "implications of malice" in jury instructions should be carefully used to be sure that the inference or implication naturally and fully follows the underlining conduct.

Here, again, the use of the implication of malice from a burglary where even the solicitor told the jury that appellant and Ray did not think the decedent was home was sure to be confusing. It also was unnecessary given the murder charge instruction. The judge erred by giving the instruction over appellant's objection.

The error was also not harmless. The judge gave an Allen[3] charge after the jury stated it was deadlocked after four-and-a-half hours of deliberations. The jury returned with a guilty verdict about an hour after the Allen charge. R. p. 390, l. 25 – 392, l. 16. If ever there was an interesting case if the jury believed the decedent was shot with returned gunfire after he surprised Ray and appellant, and where the escaping burglars only returned fire, it was this case.[4]

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[3] Allen v. United States, 164 U.S. 492 (1896).

[4] Appellant does not, in any manner, assert the decedent did not have a right to protect his home. The interesting question involves the extent of criminal liability of appellant where the solicitor admitted the burglars did not expect the decedent to be at home, and where the decedent came out shooting as they tried to escape but shot back to save their own lives. This is not a harmless error case.

CONCLUSION

By reason of the foregoing argument, appellant's conviction should be reversed and this case remanded to the Horry County Court of General Sessions for a new trial.

Respectfully submitted,

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of March, 2015.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final 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 Identifying Information and Other Sensitive Information in Appellate Court Filings."

March 5, 2015

Robert M. Dudek
Chief Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, SC 29211-1589

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APPELLATE CASE NO. 2013-002662

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 Donald J. Zelenka, Esquire, Office of the Attorney General, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 5th day of March, 2015.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 5th day of March, 2015.

Rhonda Denise Foxworth (L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021.