

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Clifton Newman, Circuit Court Judge

RECEIVED
MAR 31 2015
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

OSCAR LEE DANTZLER,

APPELLANT

APPELLATE CASE NO. 2015-000192

INITIAL BRIEF OF APPELLANT

ROBERT M. PACHAK
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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in sending the forgery indictment back to the jury for deliberations when it contained language which was not relevant to appellant's case and it denied him a fair trial as the language included accomplice liability which was not involved in appellant's case?

STATEMENT OF THE CASE

Appellant was convicted of forgery after a jury trial held before the Honorable Clifton B. Newman on January 12 – 13, 2014, in Lexington County. A three year sentence was imposed. Erik Drylie, Esquire and Dayne Phillips, Esquire, were the trial attorneys. Sutania Radlein, Esquire, and Rhonda Patterson, Esquire, were the assistant solicitors.

This appeal follows.

ARGUMENT

The trial court erred in sending the forgery indictment back to the jury for deliberations when it contained language which was not relevant to appellant's case and it denied him a fair trial as the language included accomplice liability which was not included in appellant's case.

The indictment for forgery in this case alleged the following:

That Oscar Lee Dantzler did, in Lexington County, South Carolina, on or about October 23, 2013, falsely make, forge, or counterfeit, cause or procure to be falsely made, forged, or counterfeited; or willfully act or assist in the false making, forging, or counterfeiting of any writing or instrument of writing; utter or publish as true any false, forged, or counterfeited writing or instrument of writing; or willingly act or assist in any of the premises, with an intention to defraud any person, to wit: did utter a forged counterfeit check, such having a value of less than ten thousand (\$10,000) dollars, in violation of § 16-13-0010 of the South Carolina Code of Laws of 1976, as amended.

What appellant did was to present and cash a forged check on the business account of John Covert at First Citizens Bank in Cayce, South Carolina. (Tr. p. 40, lines 16-20.) After the trial court instructed the jury on the law, the following transpired:

MR. PHILLIPS: Your Honor, we have a matter just to put on the record real quick.

THE COURT: All right.

MS. RADLEIN: Your Honor, the State's okay with this, but the language of the indictment is the entire statute as well as it indicates the value of the forgery, less than ten thousand, and so if the Court's okay with this, can we simply send back a short verdict form instead of the indictment?

THE COURT: Why?

MR. PHILLIPS: Our objection is in sending the indictment back to the jury as it includes that assist language and the State's theory was that there wasn't, you know, an accomplice liability issue, that it was solely Mr. Dantzler who cashed the check. So if the indictment goes back, we would request that it be redacted, but the Solicitor's agreed not to send the indictment back and we are agreeing with that.

THE COURT: Well, I'm sending the indictment back.

MR. PHILLIPS: Okay. Well, then we would object to that and certainly need to have it redacted to make it nonprejudicial.

THE COURT: All right. It's not – a redacted copy is not going back. The indictment is the indictment. There's nothing prejudicial about the indictment and I don't see any point in preparing a new indictment. I told the jury that they will get the indictment and they will get the indictment.

MR. PHILLIPS: Yes, Your Honor. I do have to put on the record that

THE COURT: I understand.

MR. PHILLIPS: -- sending back the indictment as is with the assist language would deny Mr. Dantzler's his Fifth and Fourteenth Amendment rights to the United States Constitution. In Article I, Section 3, it would be fundamentally unfair to do that and it would be a violation of his due process rights.

THE COURT: Maybe we'll find the answer to that question at a later time.

MR. PHILLIPS: Thank you, Your Honor.

(Tr. p. 187, line 18 – p. 189, line 7.)

It should be noted that when the trial court instructed the jury on forgery, it did not include any language on accomplice liability. (Tr. p. 180, lines 8 – 22.)

In Bailey v. State, 392 S.C. 422, 709 S.E.2d 671 (2011) the question before the court was whether a trial attorney was ineffective in failing to object to supplemental jury instructions that allowed the jury to convict a defendant for an act that was not alleged in the indictment. The court held that trial counsel was ineffective in that regard.

The court reasoned as follows:

“In South Carolina [i]t is a rule of universal observance in administering the criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment.” *State v. Gunn*, 313 S.C. 124, 136, 437 S.E.2d 75, 82 (1993) (quoting *State v. Cody*, 180 S.C. 417, 423, 186 S.E. 165, 167 (1936).) “A material variance between charge and proof entitles the defendant to a directed verdict, such a variance is not material if it is not an element of the offense.” *Id.* (citation omitted); see 41 Am. Jur. 2d *Indictments and Informations* § 252 (2005) (stating that one of the two ways an indictment can be improperly modified is through “a variance, whereby the charging terms of the indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment.”)

"[W]hile a conviction may be sustained under an indictment which is defective because it omits essential elements of the offense, such as not true when the indictment facially charges a complete offense and the State presents evidence which convicts under a different theory than that alleged." *Thomason v. State*, 892 S.W.2d 8, 11 (Tex.Crim.App. 1994) *434 (citations omitted.) "A conviction under the latter circumstance violates principles of due process...because the State has failed to prove beyond a reasonable doubt every fact necessary to constitute the crime with which a defendant was charged." *Id.* (citations omitted), see 41 Am. Jur.2d *Indictments & Informations* § 256 (2005). ("A material variance that violates a defendant's substantial right to be tried only on charges presented in an indictment constitutes fatal error and warrants a reversal on an appeal of a judgment of conviction of the offense not charged in the indictment.")

* * *

The judge's supplemental instructions, which were confusing and contradictory, resulted in the erroneous directive that the jury could find Bailey guilty of homicide by child abuse if it found an act of "abuse *or* neglect." Such an instruction was in direct contravention of the specific act alleged in the indictment and, thus, constituted a material variance or a "constructive amendment" to the indictment.

* * *

In terms of the merits, we hold trial counsel was deficient in failing to object to the supplemental jury instructions as the judge perpetuated the jury's confusion that they could convict Bailey of homicide by child abuse based on an unindicted allegation of neglect. We find that a confluence of the lone specific allegation of physical abuse in the indictment and the jury's expressed confusion about the necessity of evidence of physical abuse by Bailey with the insufficient jury instructions created a structural due process defect that deprived Bailey of a fair trial.

In *State v. Robinson*, 306 S.C. 399, 412 S.E.2d 411 (1991) the court wrote the following:

The trial judge must charge the jury with the "current and correct law" of the State. S.C. Const. art. V, § 17; *State v. Adams*, 277 S.C. 115, S.E.2d 582, 585 (1981). When an incorrect charge is given, the court must withdraw it "[m]erely superimposing a correct statement of law over an erroneous charge only fosters confusion and prejudice." *State v. Patrick*, 289 S.C. 301, 308, 345 S.E.2d 481, 485 (1986); *State v. Peterson*, 287 S.C. 244, 335 S.E.2d 800 (1985); *State v. Adams, supra*.

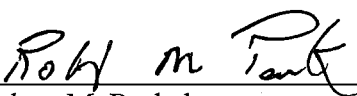
In the present case, the trial court instructed the jury correctly on the law of forgery as it pertained to the facts that were presented to the jury. The indictment, however,

incorrectly contained the word "assist" twice which was at a variance with the facts presented in the case as no other person was involved in the forgery. This was confusing to the jury as it was not contained in the original jury instructions and allowed them the freedom to speculate that other persons were involved through accomplice liability. This made it easier to convict appellant guilty. That is why trial counsel objected to the indictment going to the jury without redacting words that referenced accomplice liability. The assistant solicitor was also in agreement with trial counsel. The trial court even had some concerns.

CONCLUSION

Appellant's conviction should be reversed.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 31st day of March, 2015.

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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 Oscar Dantzler, Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 31st day of March, 2015.

Robert M. Pachak

Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 31st day of March, 2015.

Bruce Robinson Brown (L.S.)
Notary Public for South Carolina

My Commission Expires: December 9, 2024.