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ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Anderson County

RECEIVED

G. Edward Welmaker, Circuit Court Judge JUL 08 2015

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

JAMEL D. WATT,

APPELLANT

APPELLATE CASE NO. 2014-001594

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err reversibly by instructing the jury that the offense of attempted murder does not require a specific intent to kill?

STATEMENT OF THE CASE

On May 21, 2013, the Anderson County Grand Jury indicted Appellant on two counts of attempted murder and one count of resisting arrest. R. (Indictments).

On June 16, 2014, Appellant proceeded to trial *in absentia* before the Honorable Edward G. Welmaker and a jury. Herverly B. Young represented Appellant, and Assistant Solicitor Rame Campbell represented the State.

The jury found Appellant guilty of one count of attempted murder and guilty of resisting arrest. Tr. p. 453, ll. 12 – p. 454, ll. 22. The jury found Appellant not guilty on the second count of attempted murder, but convicted Appellant of the lesser-included offense of assault and battery of a high and aggravated nature (ABHAN). *Id.*

On July 15, 2014, the Honorable J. Cordell Maddox unsealed Judge Welmaker's sentencing order. Appellant was sentenced to eleven years imprisonment for attempted murder, nine years for ABHAN, and one year for resisting arrest. Tr. Vol. II p. 5, ll. 10-24. All sentences were ordered to be served concurrently. *Id.*

STATEMENT OF FACTS

Introduction

On the night of February 15, 2013, Appellant and a group of friends were at a popular Anderson County bar and grille, T.J. Whispers. Tr. p. 143, ll. 14 – p. 144, ll. 10. Jumarl Starks and his girlfriend were also at T.J. Whispers. *Id.* The bar was crowded. After buying a round of drinks Starks bumped into Appellant on his way to the dance floor. Tr. p.126, ll. 17 – p. 127, ll. 25. Appellant asked Starks to apologize and to explain why he intentionally bumped into Appellant. *Id.* Starks refused to apologize and charged at Appellant. *Id.*

A brief scuffle ensued. Restaurant security determined that Starks was the aggressor. Tr. p. 128, ll. 7-25. Security forcibly removed Starks from the restaurant in a headlock and required that Starks sign a trespass notice prohibiting him from returning to T.J. Whispers. Tr. p. 129, ll. 10-14. After being removed from T.J. Whispers, Starks loitered outside, admittedly waiting for Appellant. Tr. p. 148, ll. 1-20. Rather than simply go home, Starks and his girlfriend went to Andrews, a bar next door to T.J. Whispers. Tr. p. 131, ll. 1-19. Starks continued drinking there until closing time at around three in the morning. *Id.*

Both T.J. Whispers and Andrews closed at the same time. At closing time, multiple Anderson County Sheriff deputies were present in the parking lot as they had responded to an earlier, unrelated incident. Tr. p. 84, ll. 6 – p. 85, ll. 21. As patrons were leaving both establishments, Appellant and Starks saw each other and a second confrontation began. Tr. p. 132, ll. 8 – p. 135, ll. 12.

Starks felt that Appellant had “called him out” and began to walk quickly towards Appellant with his fists clenched. *Id.* Starks admitted that he was the aggressor, “I was ready to fight. I don’t know about [Appellant]. I mean, personally I was ready to fight . . . I [was] ready to end it.” Tr. p.

134, ll. 20-25. Before Starks could reach Appellant and “end it,” Appellant pulled out a pistol and fired at Starks. Tr. p. 135, ll. 4 – p. 136, ll. 15.

Starks dove between two cars and lost sight of Appellant. *Id.* Starks then ran to a nearby Sheriff’s deputy. *Id.* Anderson County Sheriff’s Lieutenant Richard Payne was standing at the door of T.J. Whispers speaking with the owner about the earlier incident. Payne recalled at trial that he heard two gunshots. One of the bullets hit the door frame. A metal fragment from the door ricocheted into Payne’s bullet proof vest. Tr. p. 86, ll. 9-24. Fortunately, the impact only caused minor discomfort and bruising. Tr. p. 101, ll. 1-13.

Law enforcement immediately ordered the remaining patrons in the parking lot onto the ground. Tr. p. 87, ll. 1-18. Deputies then proceeded to individually check each person for weapons. *Id.* Appellant was among the people ordered to submit to a pat down. Before law enforcement reached him, Appellant fled. Tr. p. 88, ll. – p. 91, ll. 15. Deputies were unable to keep pace with Appellant and employed a K-9 tracking unit. *Id.*

The tracking unit eventually located Appellant hiding behind the dumpster of a nearby Red Lobster. *Id.* At this point Appellant was unarmed. Police cornered Appellant and ordered him to surrender. Law enforcement determined Appellant failed to comply quickly enough with their orders. *Id.* Deputies struck Appellant multiple times, tazered him, and then extracted him from behind the dumpster. Tr. p. 236, ll. 2 -22. Appellant received significant injuries, requiring hospitalization. Tr. p. 237, ll. 2-6.

While at the hospital Appellant told police that he and Starks struggled for the gun. Tr. p. 373, ll. 9-17. Appellant also provided the names and addresses of several people that he was with during the incident to corroborate his story. Tr. p. 366, ll. 15 – p. 369, ll. 7. At law enforcement’s

insistence, Appellant led them to the area where he dropped the pistol, which police were able to recover. Tr. p. 367, ll. 8-16.

Trial

Appellant was tried *in absentia*. Tr. p. 67, ll. 2 – p. 68, ll. 17. At trial, the State entered into evidence the video surveillance of both the first confrontation and the second confrontation.¹ R.* (State's Exhibit No.: 2). The video footage clearly showed Starks was the aggressor in the first confrontation and then lingered around the entrance to T.J. Whispers after being removed. Tr. p. 371, ll. 3 – p. 372, ll. 17. The video footage of the second confrontation in the parking lot only showed Starks running towards police, it did not show Appellant firing a pistol. Tr. p. 290, ll. 3-12; . R.* (State's Exhibit No.: 3).

In charging Appellant with the attempted murder of Lt. Payne, the State relied on the theory of transferred intent. Tr. p. 314, ll. 4 – p. 316, ll. 8. Law enforcement struggled with how to apply transferred intent when deciding what arrest warrants to seek against Appellant. Investigators originally sought to indict Appellant on numerous counts of attempted murder based on the large crowd of people present when the shooting took place. Tr. p. 356, ll. 6 – p. 358, ll. 14.

Interestingly, the magistrate **denied** most of the arrest warrants law enforcement presented despite police arguing that that the doctrine of transferred intent should allow arrest warrants for the attempted murder of every person at the scene of the shooting willing to press charges against Appellant. *Id.*; Tr. p. 314, ll. 4 – p. 316, ll. 8 (*emphasis added*). Eventually, law enforcement settled for two counts of attempted murder and one count of resisting arrest. *Id.*

¹ Both video tapes are on file for this Court's viewing. See State's Exhibit Nos.: 2 and 3.

Directed Verdict Motion

The applicability of transferred intent to attempted murder was also an issue during Appellant's directed verdict motion and during arguments on jury instructions. Defense counsel argued that there was **no evidence Appellant acted with the specific intent to kill Lt. Payne**. Tr. p. 383, ll. 5-25 (*emphasis added*). The trial court summarily denied Appellant's motion for a directed verdict. Tr. p. 390, ll. 15-19; Tr p. 404, ll. 9-24.

Nevertheless, the court allowed the State to respond to Appellant's already dismissed argument. Tr. p. 390, ll. 5-22. The State countered that *State v. Fennell*² allowed the doctrine of transferred intent to apply to an attempted murder charge. Tr. p. 390, ll. 23 – p. 394, ll. 14. The State specifically argued that “a person who is acting with malice unleashes a deadly force in an attempt to kill or injure, an unintended victim should anticipate that the law will require . . . [the accused] to fully answer for his deeds.” Tr. p. 392, ll. 4-19.

Jury Instructions

Defense counsel objected to the proposed jury instructions from the court's charge book. Tr. p. 403, ll. 14 – p. 404, ll. 8. Citing to S.C. Code Ann. § 16-3-29, which provides the statutory definition of attempted murder, defense counsel argued that attempted murder is a specific intent crime, “it requires the specific intent to kill another person with malice. . . aforethought.” Tr. p. 403, ll. 14 – p. 404, ll. 8. The trial court rejected the defense's argument, “I believe the Legislature by saying, with the intent to kill,’ did not turn it into a specific intent crime.” Tr. p. 404, ll. 9-24. The trial court also decided to charge the jury on transferred intent. *Id.*

Accordingly, the jury was instructed that “**a specific intent to kill is not an element of attempted murder**, but there must a general intent to commit serious bodily injury. Intent means

² 340 S.C. 266531 S.E.2d 512 (2000)

intending the result which actually occurs...” Tr. p. 445, ll. 4-8 (*emphasis added*). The court also instructed that, when dealing with attempted murder, the intent to kill can be “merely transferred” from the target to another person who was killed or injured. *Id.* at ll. 9-17.

ARGUMENT

The trial court erred reversibly by instructing the jury that the offense of attempted murder does not require a specific intent to kill.

Discussion

Appellant requested that the trial court charge the jury that attempted murder requires a specific intent to kill. Tr. p. 403, ll. 14 – p. 404, ll. 8. The trial court did not instruct the jury that attempted murder requires a specific intent to kill. Tr. p. 404, ll. 9-24. Defense counsel objected to the trial court’s failure to charge the jury that they must find Appellant specifically intended to kill the victim before the jury could convict him of attempted murder. Tr. p. 403, ll. 14 – p. 404, ll. 25. The trial court noted his exception for the record. *Id.*

Attempted murder, as defined by statute, requires a specific intent to kill: “[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*). Contrary to the trial court’s ruling, the statute defining attempted murder requires a specific intent to kill. *See State v. King*, — S.C. —, 772 S.E.2d 189, 191-193 (2015)([l]egislature intended the State to prove specific intent to commit murder as an element of attempted murder, therefore trial court erred by charging that attempted murder is a general intent crime).

Obviously, Appellant is entitled to the benefits of *State v. King*. Nevertheless, even prior to the passage of statutory attempted murder in 2010, the South Carolina Supreme Court, while declining to recognize the offense of attempted murder, noted that 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. . . . ***Attempted murder would require the specific intent to kill and conduct towards that end.***

State v. Sutton, 340 S.C. 393, 532 S.E.2d 283 (2000) (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.

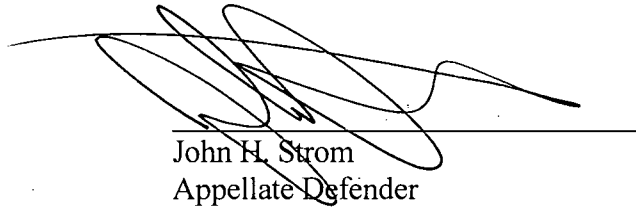
Appellant was prejudiced by the trial court’s failure to charge the jury that attempted murder requires a specific intent to kill because, while Appellant was acquitted of the attempted murder charge with respect to Lt. Payne, the jury continued to rely on the general intent charge when assessing whether Appellant attempted to murder Starks. Tr. 445, ll. 4-17. Further, there was evidence that Appellant acted in self-defense. Starks instigated the first confrontation, resulting in his removal from T.J. Whispers in a head lock. Tr. p. 128, ll. 4-25. In the second incident, Starks was shown on video charging towards Appellant. Tr. p. 162, ll. 17 – p. 166, ll. 20. Starks also admitted at trial that he was ready for a fight and “to end it.” Tr. p. 134, ll. 20-25.

Accordingly, it cannot be said, beyond a reasonable doubt, that a charge that Appellant must have specifically intended to kill Starks would not have made a difference in the outcome of the case. The failure to charge the jury that attempted murder requires a specific intent to kill requires reversal. *See State v. Lee-Grigg*, 374 S.C. 388, 414, 649 S.E.2d 41, 55 (Ct. App. 2007) (for harmless error, courts must determine beyond a reasonable doubt the error complained of did not contribute to the verdict”).

CONCLUSION

For the reason set forth above, Appellant Jamel Watt requests that this Court reverse his conviction and remand this case for a new trial.

Respectfully submitted,



John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

This 8th day of July, 2015.