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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Pickens County

Edward W. Miller, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LESTER DEVARIA MOSELY JR,

APPELLANT

APPELLATE CASE NO. 201-002064

ANDERS BRIEF OF APPELLANT

KATHRINE H. HUDGINS
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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in instructing the jury that malice can be inferred if one intentionally kills another during the commission of a felony?

STATEMENT OF THE CASE

On July 22, 2014, the Pickens County Grand Jury indicted Appellant Mosley for murder, two counts of attempted armed robbery, burglary first degree and possession of a weapon during the commission of a violent crime, indictments #2014-GS-39-1545, 1546, 1547 1548, 1597. On September 15, 2014, Appellant proceeded to jury trial before the Honorable Edward W. Miller. Scott Robinson represented Appellant at trial. Walt Wilkins and William Timmons prosecuted the case. The jury returned verdicts of guilty. Judge Miller sentenced Appellant to fifty (50) years for murder, fifty (50) years for burglary first, twenty (20) years for each of the attempted armed robberies and five (5) years for the weapons charge. A timely notice of intent to appeal was served on September 26, 2014. This appeal follows.

ARGUMENT

The trial judge erred in instructing the jury that malice can be inferred if one intentionally kills another during the commission of a felony.

The jury found Appellant guilty in the shooting death of Steven Grich. On the evening of December 8, 2012, Grich was at his apartment with friends at the Chimney Ridge Apartment complex located on Smoke Rise Drive in Clemson when three men charged in the back door and began demanding money and dope. (R. p. 103, line 17 – p. 104, 105, lines 1-17). One of Grich's friends in the apartment, Kevin Keck, testified that one of the men who entered was black and the other two were white. (R. p. 105, lines 13-17). According to Keck, the black male began hitting people with a gun. (R. p. 107, lines 2-11). Keck testified that Grich was taking the brunt of the pistol whipping by the black male when the gun went off. (R. p. 108, lines 4-25). One of Grich's roommates present on the night of the shooting testified, "And then all of a sudden, it just ended. They ran out. Turns out, gun went off and Steve's dead." (R. p. 128, lines 10-11).

One of Grich's other roommates, Robert McKinley, admitted that during the time of the shooting he was selling marijuana. (R. pp. 144-145). McKinley testified that prior to the shooting he smoked marijuana with Appellant at Winton Botchway's apartment. (R. p. 146, line 5 – p. 147, lines 1-24). According to McKinely, on the day of the shooting he called Botchway to let him know he had received a shipment of marijuana. (R. p. 148, line 14 – p. 149, lines 1-12). McKinley testified that on the evening of December 8, 2012, he was in his bedroom with friends Martin and Laura when he heard the commotion in the den and realized they were being robbed. (R. p. 137, line 2 – p. 138, lines 1-25). McKinley admitted that he and Martin were getting high. (R. p. 137, line 25 – p. 138, lines 1-5). An

officer who responded to the apartment after the shooting testified that there was a heavy odor of marijuana coming from the back bedroom. (R. p. 60, lines 17-19).

McKinley testified that upon hearing the commotion in the living room, he put two pounds of marijuana in a backpack and he, Laura and Martin climbed out a bathroom window. (R. p. 139, lines 1-23). McKinley hid the backpack in the woods and upon returning saw three shadows take off and jump in a Dodge Durango where another individual was waiting. (R. p. 140, line 15 – p. 141, lines 1-9). Surveillance video from the apartment complex showed the vehicle leaving at a high rate of speed. (R. p. 64, line 14 – p. 65, 66, 67, lines 1-6).

Police developed Kadeem Ramsey as a suspect. (R. p. 77, lines 4-20). After the police questioned Ramsey, he was arrested and charged with the murder of Grich as well as burglary first degree, attempted robbery and possession of a weapon during the commission of a violent crime. (R. p. 77, line 17 – p. 78, lines 1-24). While officers were questioning Ramsey, Jaron Dalton arrived at the Pickens County Sheriff's Office driving a black Dodge Durango. (R. p. 80, lines 5-13). A short time later Jaron's younger brother also arrived at the sheriff's office. (R. p. 81, lines 3-4). The Dalton brothers were interviewed and they led police to an area on their grandparents' property where they had buried two guns and some other items. (R. pp. 81-83). One of the guns found, a 9 mm, was determined to be the gun that fired the bullet killing Grich. (R. pp. 285-287). The Dalton brothers were arrested and charged in connection with the shooting.

Both Dalton brothers and Ramsey testified against Appellant at trial. Jaron Dalton testified that he, his brother, Ramsey and the Appellant went to the Chimney Ridge Apartment Complex to steal marijuana. (R. pp. 186-193). Jaron admitted that he brought

two guns with him, a 9 mm gun and a 380. (R. p. 190, lines 6-11). According to Jaron, when they went into the apartment, his brother had the 380 and Appellant had the 9mm. Jaron testified that Appellant was hitting people with the gun. "When he was coming up from hitting him, he come up and the gun just fired about halfway up." (App. p. 196, lines 22-23). Jordan Dalton testified, "I went back downstairs. And by the time I got right there, to the corner of the love seat right there, he [Appellant] came down and hit Mr. Grich one more time and the gun went off." (R. p. 233, lines 1-5).

During the jury charge the judge defined malice as " . . . [H]atred, ill will or hostility toward another person. It is the intentional doing or wrongful act without just cause or excuse **and with an intent to inflict an injury** or under circumstance that the law will infer an evil intent." (emphasis added) (R. p. 384, lines 19-24). The judge then instructed the jury on the felony murder rule:

> Now, if one intentionally kills another during the commission of a felony, the inference of malice may arise. If facts are proved beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, I again, tell you this inference would simply be an evidentiary fact to be taken into consideration by you along with all the other evidence in the case and you give it the weight you think it should receive. I would tell you that burglary first and attempted armed robbery are felonies.

(R. p. 385, line 21 – p. 386, lines 1-5). The trial judge erred. The bold portion of the malice charge combined with the instruction on the felony murder rule rendered the charge an improper statement on the facts and improperly diluted the State's burden of proving intent and malice.

In footnote #5 of State v. Belcher, 385 S.C. 597, 610, 685 S.E.2d 802, 809 (2009) the South Carolina Supreme Court provided the proper definition of malice writing:

> Under South Carolina law, "[m]alice is a legal term implying wickedness and excluding a just cause or excuse. The term malice indicates a formed purpose and design to do a wrongful act under the circumstances that exclude any legal right to do it." State v. Fennell, 340 S.C. 266, 275 n. 2, 531 S.E.2d 512, 517 n. 2 (2000); see also State v. McDaniel, 68 S.C. 304, 312, 47 S.E. 384, 387 (1904) (same). "It is something which springs from wickedness, from depravity, from a heart devoid of social duty and fatally bent on mischief." Arnold v. State, 309 S.C. 157, 163, 420 S.E.2d 834, 837 (1992); see also Singletary v. State, 281 S.C. 444, 446, 316 S.E.2d 369, 370 (1984) (same); State v. Kinard, 373 S.C. 500, 504, 646 S.E.2d 168, 170 (Ct.App.2007) (same).

In Belcher the Court held that that the "use of a deadly weapon" implied malice instruction has no place in a murder (or assault and battery with intent to kill) prosecution where evidence is presented that would reduce, mitigate, excuse or justify the killing (or the alleged assault and battery with intent to kill).

The implied malice charge given in the present case derives not from the use of a deadly weapon as in Belcher, but instead from the South Carolina common law felony murder rule. See Gore v. Leeke, 261 S.C. 308, 315, 199 S.E.2d 755, 757 (1973). In State v. Norris, 285 S.C. 86, 92, 328 S.E.2d 339, 343 (1985) overruled by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) overruled by State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) the South Carolina Supreme Court wrote:

> A proper charge on implied malice is:
>
> > The law says if one intentionally kills another during the commission of a felony, the implication of malice may arise. If facts are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive. See, State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983) (suggested charge on implied malice from use of a deadly weapon).

South Carolina Courts, however, have not addressed the felony murder rule since the decision in Belcher. The Supreme Court of Michigan addressed the felony murder rule writing:

> Felony murder has never been a static, well-defined rule at common law, but throughout its history has been characterized by judicial reinterpretation to limit the harshness of the application of the rule. Historians and commentators have concluded that the rule is of questionable origin and that the reasons for the rule no longer exist, making it an anachronistic remnant, "a historic survivor for which there is no logical or practical basis for existence in modern law."

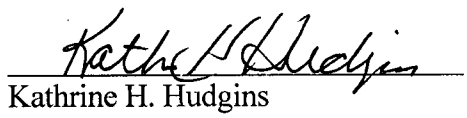
People v. Aaron, 409 Mich. 672, 689, 299 N.W.2d 304, 307 (1980).

This Court should reconsider the felony murder rule in light of the decision in Belcher. The felony murder charge given in the present case constituted an improper statement on the facts and improperly diluted the State's burden of proving intent and malice. The error is compounded by the charge on malice implying that an intent to inflict an injury constitutes malice. This is particularly confusing in the present case where there is testimony that Appellant was striking the deceased when the gun accidentally discharged. The error requires reversal.

CONCLUSION

Based on the above argument this court should reverse the conviction and sentence for murder and remand the case for a new trial.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 10th day of September, 2015.

STATE OF SOUTH CAROLINA

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Edward W. Miller, Circuit Court Judge

THE STATE,

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APPELLATE CASE NO. 201-002064

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Lester Devaria Mosley Jr.states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. She has reviewed the record of appellant's trial before Judge Edward W. Miller, which was held on September 15-17, 2014, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Lester Devaria MosleyJr..

Respectfully submitted,

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 10th day of September, 2015.

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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 indictments and sentencing sheets;
(2) Trial transcript.

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

September 10th, 2015

Kathrine H. Hudgins
Appellate Defender

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Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

Attorney for Appellant

CERTIFICATE OF COUNSEL

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

September 10th, 2015

Kathrine H. Hudgins
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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Lester Devaria Mosley, Jr., #361397 at Lee Correctional Institution, this 10th day of September, 2015.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 10th day of September, 2015.

Bailey Wallace (L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021.