THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
APR 27 2016
SC Court of Appeals

Appeal from Greenville County
Court of General Sessions

Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2015-001648

THE STATE, Respondent,

v.

PERRY ROY EICHOR, Appellant.

FINAL BRIEF OF APPELLANT

STEPHEN J. HENRY
406 Pettigru St.
Greenville, South Carolina 29601
(864) 232-9700

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

1. THE TRIAL COURT ERRED BY REFUSING TO CHARGE THE JURY WITH RESPECT TO THE OBSTRUCTION OF JUSTICE AND MISCONDUCT OF A PUBLIC OFFICIAL INDICTMENTS THAT THE STATE HAD TO PROVE BEYOND A REASONABLE DOUBT THAT THE COMMUNICATION WAS MADE FOR THE PURPOSE OF ISSUING A THREAT OR THAT THE DEFENDANT KNEW THE COMMUNCIATION WOULD BE VIEWED AS A THREAT.

2. THE TRIAL COURT ERRED BY REFUSING CHARGE THE JURY THAT GOOD CHARACTER MAY IN AND OF ITSELF CREATE A DOUBT AS TO THE DEFENDANT'S GUILT.

3. THE TRIAL COURT ERRED BY REFUSING TO CHARGE THE JURY THAT WHERE A COMMUNICATION HAS BOTH A THREATENING AND A NONTHREATENING INTERPRETATION THAT THE STATE HAS THE BURDEN TO PRESENT EVIDENCE TO REMOVE THE AMBIGUITY.

4. THE TRIAL COURT ERRED BY REFUSING TO CHARGE THE JURY THAT THE STATE HAS THE BURDEN OF PROVING BEYOND A REASONABLE DOUBT THAT ANY THREAT MADE BY THE DEFENDANT HAD TO HAVE BEEN MADE WITH THE SPECIFIC INTENT TO EXECUTE IT.

5. THE TRIAL COURT ERRED BY NOT FULLY CHARGING APPELLANT'S JURY CHARGE REQUEST ON GOOD CHARACTER AFTER APPROVING IT DURING THE CHARGE CONFERENCE.

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err by refusing to charge the jury with respect to the obstruction of justice and misconduct of a public official indictments that the state had to prove beyond a reasonable doubt that the communication was made for the purpose of issuing a threat or that the defendant knew the communication would be viewed as a threat?

2. Did the trial court err by refusing to charge the jury that evidence of good character may in and of itself create doubt as to the defendant's guilt?

3. Did the trial court err by refusing to charge the jury that where a communication has both a threatening and a nonthreatening interpretation that the state has the burden to present evidence to remove the ambiguity?

4. Did the trial court err by refusing to charge the jury that the state has the burden of proving beyond a reasonable doubt that any threat made by the defendant had to have been made with the specific intent to execute it?

5. Did the trial court err by not fully charging Appellant's jury charge request on good character after approving it during the charge conference?

STATEMENT OF THE CASE

The Appellant, Perry Eichor, was indicted for the crimes of obstruction of justice, misconduct of a public official, and intimidation of a court official by the Greenville County Grand Jury. A jury trial was held on June 8-9, 2015, the Honorable Robin B. Stilwell presiding. The Appellant was represented at trial by Stephen J. Henry. The state was represented at trial by Assistant Solicitor Lisa Bentley. The jury returned verdicts of guilty on the charges of obstruction of justice and misconduct of a public official. The jury returned a verdict of not guilty on the charge of intimidation of a court official. The Appellant was sentenced to three years in prison suspended upon the service of one year probation. The Appellant filed a motion for a new trial which was denied. The Appellant thereafter filed a timely notice of appeal. The Appellant is represented by his trial counsel on this appeal.

ARGUMENT

1. THE TRIAL COURT ERRED BY REFUSING TO CHARGE THE JURY WITH RESPECT TO THE OBSTRUCTION OF JUSTICE AND MISCONDUCT OF A PUBLIC OFFICIAL INDICTMENTS THAT THE STATE HAD TO PROVE BEYOND A REASONABLE DOUBT THAT THE COMMUNICATION WAS MADE FOR THE PURPOSE OF ISSUING A THREAT OR THAT THE DEFENDANT KNEW THE COMMUNICATION WOULD BE VIEWED AS A THREAT.

Appellant's request to charge number eight reads as follows:

> "The State must prove beyond a reasonable doubt that the communication in this case was made by the defendant for the purpose of issuing a threat or that the defendant knew that the communication would be viewed as a threat." (Request to Charge Number 8)

Appellant's request to charge number eight came from the United States Supreme Court decision of Elonis v. U.S., 135 S. Ct. 2001 (2015). Anthony Elonis was charged with violation of 18 U.S.C. §875 (c) which makes it a crime to transmit in interstate commerce any communication containing a threat to injure another. After his wife and children left him Elonis gave himself a new name and posted graphic and violent lyrics on his Facebook page. He included disclaimers and claimed his writing was therapeutic. He was indicted for making threats to people at work, his estranged wife, police officers, a kindergarten class and others. He asked for a jury instruction that the government had to prove that he intended to communicate a threat. That request was denied by the federal court trial judge. The prosecutor argued to the jury that what Elonis thought "doesn't matter".

On appeal the Third Circuit affirmed Elonis's convictions finding that the intent requirement under §875 (c) was the intent to communicate words that the defendant understands and that a reasonable person would view as a threat. U.S. v. Elonis, 730 F.3d 321 (3rd Cir, 2013). See also the recent Fourth Circuit case of U.S. v. White, ___ F. 3d ____ (4th Cir. January 7, 2016)

The Supreme Court found the jury charge given by the trial court and upheld by the court of appeals to be an unacceptable negligence standard. The Court said that the mental state requirement under §875 (c) could only be met "if a defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat."

This language from Elonis forms the basis of Appellant's request to charge number eight. In the present case the trial judge agreed with Appellant that the jury charge was correct and that it applied to all three offenses. He gave the charge word-for-word; but only for one of the three cases. He should have given the charge for all three indictments.

The trial judge gave instructions on each of the indictments separately. ROA. pp. 224-226. He first charged the jury on obstruction of justice. ROA. p. 224, line 12 – p.225, line 2. He did not charge request number 8.

Next the trial judge charged the jury on intimidation of a court official. He gave request to charge number 8 exactly as written:

> "The State must prove beyond a reasonable doubt that the communication was made by the Defendant for the purpose of issuing a threat or that the Defendant knew that the communication would be viewed as a threat." ROA. p. 225, lines 13-17

Finally, the trial judge charged the jury on the misconduct of a public official indictment. Again, he did not charge request number 8.

After the trial judge released the jury to review his jury instructions with the lawyers, Appellant's trial counsel took exception to the trial judge's failure to give request to charge number 8 with respect to two of the indictments:

> "MR. HENRY: The charge you gave on the Elonis charge, number eight that I submitted.
> THE COURT: Yes, sir.
> MR. HENRY: Which you did give.
> THE COURT: Yes, sir.
> MR. HENRY: I believe you isolated it to the second indictment only. I think it needs to be for all three indictments and made clear that it covers all the threats in all three cases. And that takes care of it." ROA. p. 230 lines 4-13

Following some discussion with the judge about other jury charge exceptions, Appellant's trial counsel came back to jury charge number eight:

> "MR. HENRY: You didn't address number eight being isolated to one of the indictments. Did you intend for it to just be the one case?
> THE COURT: Well, you know, I recognize your position in that regard and I think that I charged it generally. I recognized it as a placeholder in the entire charge that it came after the one particularized indictment." ROA. p. 231, line 25 – p. 232, line 7

At that point it appeared that the trial judge was considering bringing the jury back into the courtroom and recharging the jury, this time to include Appellant's request to charge number 8 for all three indictments. He asked the prosecutor if she had an issue with him correcting the charge. ROA. p. 232, lines 8-10.

The prosecutor objected saying that to recharge number 8 would "give it undo (sic) influence" and that she believed "the jury heard it" ROA. p. 232, lines 11-14. The trial judge then decided not to make the correction. ROA. p. 232, lines 15-18.

Appellant believes that the jury did hear request to charge number 8 but only as to the intimidation of a court official indictment which is the only indictment for which the trial judge included that instruction.

The jury found Appellant not guilty for the crime of intimidation of a court official and guilty for the crimes of misconduct of a public official and obstruction of justice. ROA. p. 235, lines 9-19.

The jury acquitted Appellant on the only charge for which the trial judge gave jury charge number eight and convicted him for the other two charges where jury charge number eight was omitted.

The trial judge left out jury charge number eight on two of Appellant's three indictments. This initial omission was probably inadvertent. When given an opportunity to correct the jury instruction error, the trial judge chose not to do so. The failure to properly instruct the jury on this critical intent issue was error. Appellant was clearly prejudiced by the error and is entitled to a new trial.

2. THE TRIAL COURT ERRED BY REFUSING TO CHARGE THE JURY THAT GOOD CHARACTER MAY IN AND OF ITSELF CREATE A DOUBT AS TO THE DEFENDANT'S GUILT.

Appellant's request to charge number two reads as follows:

> "Evidence of the defendant's good character and good reputation may in and of itself create doubt as to guilt and should be considered by the jury, along with all of the other evidence, in determining the guilt or innocence

of the defendant." (Request to Charge Number 2)

The trial court gave the following charge as to the defendant's character:

> "Now, ladies and gentlemen, in your consideration of this case, you may consider evidence of the Defendant's character along with all the evidence in deciding whether or not the Defendant committed the crime." ROA p. 226, lines 20-24.

During his closing argument and based upon his understanding of the instructions the trial judge had agreed to give the jury following the charge conference ROA. p. 194, lines 5-7, including in particular request to charge number 2, trial counsel made the following argument to the jury:

> "... I'm expecting the Judge to give you a charge at the end of the case that Perry's good character alone is enough to justify a not guilty verdict." ROA. p. 210, lines 14-17.

After the judge charged the jury, Appellant objected to the trial judge's failure to give the good character charge as he had requested and as discussed in the charge conference:

> "... I think you left out the part on good character that says that evidence may in and of itself create doubt as to guilt. I would like that added." ROA. p.229, lines 17-20.

In response the trial judge said the following:

> "I think that the character charge was a direct recitation of the law outstanding in the State of South Carolina. I'm not going to change that. I respect your position on the same and I appreciate it, but I think my charge was a recitation of the law." ROA. p. 230, lines 16-22.

In State v. Green, 278 S.C. 239, 294 S.E.2d 335 (1982) the Supreme Court stated:

> "Generally where requested and there is evidence of good character, a defendant is entitled to an instruction to the effect that evidence of good character and good reputation may in

> and of itself create a doubt as to guilt and should be considered by the jury, along with all the other evidence, in determining the guilt or innocence of the defendant."

To warrant reversal a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial. State v. Hughey, 339 S.C. 439, 529 S.E.2d 721 (2000). The trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence. State v. Burriss, 334 S.C. 256, 515 S.E.2d 104 (1999).

The trial court determined correctly that the evidence in the record supported a jury charge concerning the defendant's good character. The trial judge simply, but importantly, failed to give the complete and correct good character charge to the jury. In this case the crimes charged were all based upon a single conversation between a city judge and a city mayor. Good character mattered in determining credibility. The trial judge's failure to give the whole charge, particularly given the facts of this case, was prejudicial error entitling Appellant to a new trial.

3. THE TRIAL COURT ERRED BY REFUSING TO CHARGE THE JURY THAT WHERE A COMMUNICATION HAS BOTH A THREATENING AND A NONTHREATENING INTERPRETATION THAT THE STATE HAS THE BURDEN TO PRESENT EVIDENCE TO REMOVE THE AMBIGUITY.

Appellant's request to charge number four reads as follows:

> "When a communication contains language which is equally susceptible of two interpretations, one threatening, and the other nonthreatening, the state carries the burden of presenting evidence to remove that ambiguity. If the state does not remove that ambiguity beyond a reasonable doubt, you must find the defendant not guilty." (Request to Charge Number 4)

Appellant cited the Eighth Circuit Court of Appeals decision of U.S. v. Barcley, 452 F.2d 930 (8th Cir. 1971) for the proposed jury instruction. The trial judge rejected this request to charge. After the jury charge had been given Appellant objected to the trial court's refusal to give this instruction as follows:

> "I want to preserve my objection to charge number four, which is the charge on ambiguous. I think we've already discussed that. I just wanted to make that for the record. That's under U.S. v. Barkley. I won't put the whole instruction on there, but it's charge number four." ROA. p. 229, lines 20-25.

The trial judge responded to the objection as follows:

> "That specific case, I know that you had wanted me to charge, request to charge number four; is that correct?"
>
> "Okay. I want to make sure I referred to it correctly. About the ambiguous nature of the threat and how they must prove beyond a reasonable doubt, I don't take exception to that as being a proposition of law. However, as we discussed in chambers, that's from an Eighth Circuit case. That is not – that has not been recited as the law in the State of South Carolina. And I'm not saying that it's not, but I chose not to charge that because I felt like it was, perhaps a commentary on the facts and I wanted – I think it's important for the judge – for the Court to give a general charge on the law and avoid making particularized charges on the facts. That was my concern. So I'll deny your motion in that regard. But you're protected on the record, certainly." ROA p. 231, lines 1-22.

The trial judge did not disagree with the proposed ambiguous threat charge as a correct statement of the law but refused the request because the issue has not been decided by the South Carolina appellate courts. Other courts have cited the Barcley principle on ambiguous threats although in most of those

decisions the appeals courts determined that the threat at issue was not ambiguous. U.S. v. Malik, 16 F.3d 45 (2nd Cir 1994), cert. denied, 513 U.S. 968 (1994); Martin v. U.S., 691 F.2d 1235 (8th Cir 1982).

The facts alleged in all three indictments were the same: that Appellant told the city judge that the case would be tried in his (the judge's) court and "you work for the city council". ROA p. 148, lines 17-18; ROA p. 148, line 25-p. 149, line1.

The words spoken to the city judge by Appellant, according to the city judge himself, had more than one possible meaning.

The obstruction of justice indictment alleged "an implicit threat" and the misconduct of a public official indictment alleged "an implied threat". It was not a direct threat. And unlike most of the cases dealing with written or verbal threats, this was not a threat to do bodily harm.

The city judge's testimony about the implied threat was susceptible of more than one meaning, including a nonthreatening one. The city judge apparently did not even know he had been threatened when it first happened. He did not report it right away ROA p. 156, lines 4-6 and "mulled it around for days and days and days". ROA p. 156, lines 10-11. Then he consulted with people close to him about what had happened including his wife, his children, his brothers and his sisters. ROA p. 156, lines 23-24. He asked each of these people how they would perceive Appellant's statements. ROA p. 157, lines 1-2. The city judge testified that he could understand how Appellant's words could have been given different interpretations by others. ROA p. 170, lines 13-15.

Appellant gave the trial court a reasonable jury charge that fit the facts of this case and provided a sound legal basis for the jury instruction.

Given that factual background, for the trial judge not to give the jury legal guidance on what they should do if they found the alleged implied threat to be unclear or ambiguous was error requiring reversal of Appellant's convictions.

4. THE TRIAL COURT ERRED BY REFUSING TO CHARGE THE JURY THAT THE STATE HAS THE BURDEN OF PROVING BEYOND A REASONABLE DOUBT THAT ANY THREAT MADE BY THE DEFENDANT HAD TO HAVE BEEN MADE WITH THE SPECIFIC INTENT TO EXECUTE IT.

Appellant's request to charge number seven reads as follows:

> "The state has the burden of proving beyond a reasonable doubt that any threat made by the defendant was made with the specific intent to execute it." (Request to Charge Number 7)

The trial judge did not charge this request. Appellant's trial counsel and the trial judge had the following discussion about the court's decision not to give this jury instruction:

> "MR. HENRY: "All right. There is one more, Judge that we talked about in chambers, which you said you were not going to charge. That was number seven.
> THE COURT: Yes, sir.
> MR. HENRY: On the burden of the State to prove beyond a reasonable doubt that any threat made by the Defendant was made with the specific intent to execute it. You rejected that. I just to make sure I'm protected on the record.
> THE COURT: Yes, sir, you are. ROA p. 232, line 19 to p. 233, line 4.

Appellant's request to charge number seven was an attempt to have the trial judge clarify for the jury the intent element applicable in threat cases. The key case is Elonis v. U.S., 135 S. Ct. 2001 (2015). Anthony Elonis was convicted

in federal court of violating 18 U.S.C. §875 (c) which makes it a crime to transmit in interstate commerce "any communication containing any threat ... to injure the person of another."

Elonis made many Facebook statements which formed the basis of the indictments against him for threatening patrons and employees of the amusement park where he had worked. He was also indicted for threats to his estranged wife, police officers, a kindergarten class and an FBI agent.

At trial Elonis moved to dismiss the indictments arguing that although he intentionally made the communications, he did not intend them as threats. The federal trial judge denied the motion. Elonis also requested a jury instruction that "the government must prove that he intended to communicate a true threat". The trial judge denied the request and charged the jury as follows:

> "A statement is a true threat when a defendant intentionally makes a statement in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an Intention to inflict bodily injury or take the life of an individual"

The government argued in its closing that it did not matter what the defendant thought about the communications he made. Elonis was convicted on four of the five counts. The Third Circuit Court of Appeals affirmed his convictions stating that the intent requirement of the federal statute at issue is the intent to communicate words defendant understands and that a reasonable person would view as a threat.

Chief Justice Roberts wrote the opinion for the Supreme Court reversing Elonis's conviction and remanded the case.

In Appellant's case both of the charges for which he was convicted were common law crimes. There is no statutory mental element upon which to rely. The judge charged the jury on the intent to obstruct justice and acting with dishonesty and corruption on the misconduct in office offense. In addition he gave a general charge on criminal intent.

The trial judge's full jury instruction on the obstruction of justice indictment was as follows:

> "The Defendant is charged with obstruction of justice. the State must first prove beyond a reasonable doubt that the Defendant committed an act which prevented, obstructed, impeded or hindered the administration of justice. The State must also prove beyond a reasonable doubt that the Defendant did the act with the intent to obstruct justice. The Defendant does not have to succeed in the effort to obstruct justice. It is enough that some act was done in furtherance of the attempt to obstruct justice. The State must prove beyond a reasonable doubt that the Defendant committed some act in furtherance of his endeavor to obstruct justice." ROA p. 224, line 14 - p. 225, line 2.

The trial judge's full jury instruction on the misconduct of a public official reads as follows:

> "Misconduct in office occurs when a person in public office fails to properly and faithfully discharge a duty owed by law. existence of a duty owed to public is essential to sustain a conviction of misconduct in office. Otherwise, if any behavior is merely a private misconduct of one who happens to be an official. Misconduct includes an act, the omission and the breach of duty of public concern by persons in public office provided it was done willfully and dishonestly. Public officers must be impervious to corrupting influences and they must transact their business frankly and openly in the light of public scrutiny so that the public may know and be able to judge them and their work fairly. To find the Defendant guilty of misconduct in office, you must find that he acted with dishonesty and corruption." ROA p. 225, line 20 – p. 226, line 11.

The trial judge also gave a general charge on criminal intent:

> "... with respect to all the charges, in order to establish Criminal liability, criminal intent is required. Criminal intent Must be proven by the State beyond a reasonable doubt. Now, criminal intent is a conscious wrongdoing. It is up to You to determine what the Defendant intended to do based On the circumstances shown to have existed." ROA p. 226, Lines 13-19.

These jury charges do not satisfy the requirement of Elonis. Appellant asks that his convictions be reversed.

5. THE TRIAL COURT ERRED BY NOT FULLY CHARGING APPELLANT'S JURY CHARGE REQUEST ON GOOD CHARACTER AFTER APPROVING IT DURING THE CHARGE CONFERENCE.

Appellant requested a charge on good character that included the wording that "good character and good reputation may in and of itself create doubt as to guilt". (Request to charge Number 2).

The trial judge had a charge conference with the lawyers. ROA p. 194, lines 5-7.

Based upon that conference Appellant's trial counsel argued to the jury that "Another point, I'm expecting the Judge to give you a charge at the end of the case that Perry's good character alone is enough to justify a not guilty verdict." ROA. p. 210, lines 14-17.

The trial judge did not include this key language in the charge he gave to the jury. ROA. p. 210, lines 20-24.

After the jury charge Appellant's trial counsel asked that the portion of the good character charge that had been approved in the charge conference and left out in the instruction to the jury be added:

> "If I heard correctly, I think you left out the part on good character that says that evidence may in and of itself create doubt as to guilty. I would like that added." ROA. p. 229, lines 17-20.

In response to the objection and the request to add the language to the good character charge the trial court said:

> "I think that the character charge was a direct recitation of the law outstanding in the State of South Carolina. I'm not going to change that." ROA. p. 230, lines 16-19.

After Appellant was convicted on two of the three indictments, his trial counsel filed a motion for a new trial. In his motion for a new trial Appellant's counsel submitted the following:

> "The defendant submitted a correct jury charge on good character. The trial judge agreed during the charge conference. The judge then did not charge the jury on the key portion."
>
> "Adding to the prejudice to the defendant was the fact that following the charge conference and the judge's assurance that he would give the full charge on good character defense counsel argued to the jury that 'the judge will charge you' on good character and that good character alone is justification for a not guilty verdict."
>
> "Then the trial judge did not charge the full good character charge as he stated he would during the charge conference." ROA. pp. 286-287.

The state did not submit a response to Appellant's Motion for a New Trial and the trial judge denied the motion in a short order. ROA. p. 292.

In State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001) one of the issues on appeal the trial judge indicated that he intended to give the reasonable doubt charge from State v. Manning, 305 S.C. 413, 409 S.E.2d 372 (1991). In Manning

the South Carolina Supreme Court suggested that the jury should be charged that a "reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act."

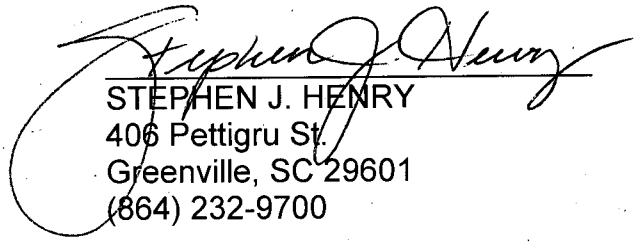
In his closing argument Jeffrey Jones's counsel told the jury, based on what he understand the trial judge had said he was going to charge, that the judge was going to tell them that a reasonable doubt was a doubt that would cause a reasonable person to hesitate to act; the Manning jury instruction. After the defense's closing argument the solicitor then asked the trial judge to remove the "hesitate to act" language from his jury charge. The solicitor had not objected during the defense's closing argument. The judge removed the "hesitate to act" wording from his reasonable doubt charge.

On appeal Jones argued that it was "fundamentally unfair" for the judge to change the charge after his trial lawyer had argued to the jury. In Jones the Court found the unfairness in spite of the fact that the Manning reasonable doubt charge was not mandatory, although it was a correct statement of the law.

Appellant argues that the same principal should apply here and that his convictions should be reversed on that basis.

CONCLUSION

Based on the foregoing, appellant's convictions and sentences should be set aside.



STEPHEN J. HENRY
406 Pettigru St.
Greenville, SC 29601
(864) 232-9700

ATTORNEY FOR APPELLANT

April 22, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
APR 27 2016
SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2015-001648

The State, Respondent,

v.

Perry Eichor, Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief of Appellant complies with Rule 211 (b) SCACR.

STEPHEN J. HENRY
406 Pettigru St.
Greenville, South Carolina 29601
(864) 232-9700

ATTORNEY FOR APPELLANT

April 22, 2016