STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Roger M. Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RECO RAMONE FELDER,

APPELLANT

APPELLATE CASE NO. 2016-002483

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in denying appellant's motion to have the State elect between attempted murder and its lesser included offenses and criminal domestic violence of a high and aggravated nature ("CDVHAN") because the two indictments arose out of the same facts and CDVHAN is properly a lesser included offense of attempted murder?

STATEMENT OF THE CASE

On August 4, 2014, a Charleston County grand jury indicted appellant Reco Ramone Felder for attempted murder. R. 499 – 500. Almost two years later, the State sought and obtained in July 2016 an indictment for criminal domestic violence of a high and aggravated nature. R. 495 – 496. Appellant was also indicted on a weapons charge. On December 5, 2016, appellant was tried before the Honorable Roger M. Young and a jury. R. 1. Jessica Baldwin and Debbie Herring-Lash represented the State. R. 1. Megan Erlich and Ted Smith represented appellant. R. 1. The jury acquitted appellant of both attempted murder and its lesser included offense of ABHAN. R. 483, ll. 13 – 22.

The jury convicted appellant of the lesser included offense of second-degree assault and battery. R. 483, ll. 13 – 22. The jury also convicted appellant of CDVHAN and the weapons charge. R. 483, ll. 13 – 22. Judge Young sentenced appellant to concurrent terms of three years' imprisonment for second-degree assault and battery and ten years' imprisonment for CDVHAN. R. 493, ll. 10 – 22. Judge Young imposed a consecutive sentence of five years' imprisonment on the weapons charge. R. 493, ll. 10 – 22. This appeal follows.

ARGUMENT

The trial court erred in denying appellant's motion to have the State elect between attempted murder and its lesser included offenses and criminal domestic violence of a high and aggravated nature ("CDVHAN") because the two indictments arose out of the same facts and CDVHAN is properly a lesser included offense of attempted murder.

The State wrongfully prosecuted appellant for two offenses arising from the same set of facts. In August 2014, the State indicted appellant for the attempted murder of Chantelle Mitchell ("Mitchell"). R. 499 – 500. Then, almost two years later, the State indicted appellant for criminal domestic violence of a high and aggravated nature ("CDVHAN"). R. 495 – 496. Both indictments were simple "notice documents." State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). Neither indictment contained any facts and only recited the statutory elements. R. 495 – 500. Both indictments alleged crimes occurring on the same day, May 24, 2014. R. 495 – 500.

Prior to trial, appellant moved to dismiss the CDVHAN charge or to have the State "elect which charge to proceed [on] at trial." R. 9, ll. 6 – 19. Appellant argued that it was "prejudicial" to allow the State "to stack on charges before trial to try to make [appellant] look worse in front of the jury when it's the exact same set of allegations against him." R. 9, ll. 14 – 19. The trial judge denied the motions, stating it was "a jury question" and told appellant to make the argument again "at directed verdict stage." R. 10, l. 5 – 11, l. 8.

Appellant and Mitchell had a child together. R. 86, ll. 19 – 22. At the time of the incident, appellant and Mitchell were no longer romantically involved. R. 86, l. 19 – 87, l. 3. The evening before the alleged crimes occurred, appellant and Mitchell took their child to a pizza

restaurant to celebrate his first birthday party. R. 87, l. 14 – 88, l. 4. Everything was fine while they were at the restaurant. R. 88, ll. for – 6.

After taking her children home, Mitchell went to downtown Charleston to pick up her boyfriend, Montez Perry ("Perry"). R. 88, ll. 7 – 20. Mitchell saw appellant in another car downtown. R. 88, l. 21 – 89, l. 10. Mitchell claimed appellant shouted at her and called her a "bitch." R. 89, l. 14 – 90, l. 3.

Perry spent the night at Mitchell's house. R. 90, ll. 4 – 11. Appellant called Mitchell several times. R. 90, ll. 9 – 13. The next morning, Mitchell and Perry were leaving her apartment. R. 95, ll. 4 – 19. They were walking down the steps. R. 95, ll. 8 – 19. Mitchell claimed appellant came out from under the steps and pulled a gun. R. 95, ll. 11 – 23. Appellant cocked the gun and pointed it at Perry. R. 95, l. 20 – 96, l. 23. Discarding ancient notions of chivalry, Perry ran. R. 96, ll. 2 – 14.

Mitchell claimed that appellant then put the gun to the middle of her forehead. R. 96, ll. 15 – 23. Mitchell "tried to push the gun from off my forehead and that's when he pulled the trigger." R. 96, ll. 20 – 23. The gun fired and Mitchell thought she had been shot in the head. R. 96, l. 24 – 97, l. 4.

Mitchell was not shot in the head. R. 244, l. 2 – 245, l. 5. She had a broken nose and powder burns. R. 244, l. 2 – 245, l. 5. The emergency room gave Mitchell Tylenol mixed with hydrocodone and an antibiotic. R. 245, l. 21 – 246, l. 4.

Mitchell claimed that after the gun fired, appellant grabbed her by the shirt, pulled her to the side of the apartment, and pointed the gun at her head again. R. 97, ll. 5 – 9. Mitchell begged appellant not to shoot her. R. 97, ll. 5 – 13. She claimed her children came outside and

screamed "please don't shoot my momma." R. 97, ll. 10 – 13. Appellant left. R. 97, ll. 18 – 25.

Appellant testified in his own defense. R. 324, ll. 14 – 19. Appellant denied trying to kill Mitchell. R. 324, ll. 14 – 24. Appellant went to Mitchell's apartment that morning to pick up his son. R. 344, ll. 6 – 23. He called Mitchell, talked to her, and told her he was on the way to pick up his son. R. 344, ll. 12 – 23.

Appellant described Perry as "in shock" when he saw appellant. R. 363, l. 10 – 364, l. 3. Perry had his hand in his duffel bag. R. 364, ll. 1 – 3. Appellant told Perry that he should leave his business with Mitchell had nothing to do with him. R. 364, ll. for – 7. Appellant believed Perry had a gun in the bag. R. 364, ll. 12 – 22. Appellant took his gun out of his pocket and Perry ran. R. 365, ll. 1 – 6.

Appellant and Mitchell had a discussion after Perry ran. R. 366, l. 15 – 368, l. 9. Appellant was upset that Mitchell was exposing his son to her dalliance with Perry. R. 367, ll. 3 – 17. Appellant offered to let his son spend the summer with him. R. 367, ll. 3 – 17. Mitchell replied by saying, "if I wanted to fuck [Perry] I could fuck him on the couch, in the living room, on the dining room table, on the washer, on the dryer, on the kitchen floor, on the hallway and on the bed while [their son] was sleeping." R. 367, l. 21 – 368, l. 4. Appellant replied, incredulous, asking her what she had just said and she repeated that she would have sex with Perry on their son's bed while their son was asleep. R. 368, ll. 5 – 9.

Appellant admitted trying to slap Mitchell. R. 368, ll. 10 – 15. He slapped her and the gun was in his hand. R. 368, ll. 10 – 15. When appellant swung at Mitchell, the gun hit her and discharged. R. 368, ll. 11 – 15. After the gun discharged, appellant attempted to calm Mitchell down telling her that she had not been shot and offered to call EMS and the police. R. 369, l. 4

– 370, l. 9. Mitchell told appellant she did not want to see him get into trouble. R. 371, ll. 2 – 5. Appellant left. R. 375, ll. 3 – 23.

The jury acquitted appellant of attempted murder and assault and battery of a high and aggravated nature. R. 483, ll. 13 – 16. The jury convicted appellant of second degree assault and battery. R. 483, ll. 13 – 16. The jury also convicted appellant of criminal domestic violence of a high and aggravated nature. R. 483, ll. 17 – 19.

After the close of the evidence, appellant again asked the court to force the State to elect between attempted murder (and its lesser included offenses) and the CDVHAN charge. R. 418, l. 14 – 422, l. 18. Appellant argued that he been charged with two crimes for the same set of facts. R. 422, ll. 1 – 18. Appellant explained that the bare bones indictments did not provide notice of what offense they would be forced to defend. R. 422, l. one – 423, l. 13. The State argued that putting the gun to Mitchell's head and pulling the trigger was attempted murder and that dragging Mitchell to the side of the apartment and putting the gun back to her head was CDVHAN. R. 421, ll. 11 – 24. The trial judge denied appellant's motion. R. 423, l. 14 – 425, l. 1.

The trial court erred in refusing to force the State to elect between attempted murder and CDVHAN. Attempted murder, the more serious charge, contains all of the elements of CDVHAN. State v. Easler, 327 S.C. 121, 130, 489 S.E.2d 617, 622 (1997) *citing* Blockburger v. United States, 284 U.S. 299 (1932). Because, for purposes of a double jeopardy analysis, CDVHAN can be a lesser included offense of attempted murder, the State should have elected which charge to present to the jury. See State v. LaCoste, 347 S.C. 153, 166-67, 553 S.E.2d 464, 471-72 (Ct. App. 2001) (holding that simple assault is a lesser included offense of CDV).

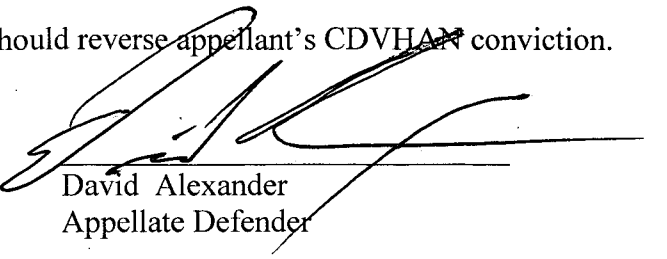
Attempted murder requires proof that a person, with specific intent to kill, attempts to kill another person with malice aforethought. S.C. Code Ann. § 16-3-29. See also State v. King, 412 S.C. 403, 772 S.E.2d 189 (2015). Attempted murder encompasses acts which result in injuries and which do not. State v. Middleton, 407 S.C. 312, 755 S.E.2d 432 (2014).

CDVHAN likewise does not require an injury. S.C. Code Ann. §§ 16-25-20 and 16-25-65. CDVHAN requires proof of a less culpable mental state than specific intent to kill: "extreme indifference." S.C. Code Ann. § 16-25-65. CDVHAN also requires that the victim be a "household member." S.C. Code Ann. § 16-25-20. Neither of these differences are different elements, but are lesser quantums of proof that what is required for attempted murder. Extreme indifference is a less culpable mental state and therefore, just like manslaughter lacks malice, does not distinguish the crime as anything other than a lesser included offense. Similarly, redefining a victim's status (as a household member) does not constitute a different element. Attempted murder includes all persons, therefore the victim's status is irrelevant and cannot be a different element under Blockburger and Easler.

Furthermore, the State's argument that the attempted murder and the CDVHAN were based on different facts is a red herring. The entire incident could not have taken more than a few minutes. Both alleged crimes arose from the exact same transaction or occurrence. If the State wanted to parse one crime into two, it was required to specifically describe its allegations in the indictments. Instead, relying on a too-broad reading of Gentry, the State got two crimes for the price of one. This Court should reverse appellant's conviction for CDVHAN.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's CDVHAM conviction.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 2nd day of August, 2017.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Reco Ramone Felder states:

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

2. He has reviewed the record of appellant's trial before Judge Roger M. Young, which was held on December 5 - 7, 2016, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He 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, He asks the Court to relieve him as counsel for Reco Ramone Felder.

Respectfully Submitted,

David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

This 2nd day of August, 2017.

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."

August 2, 2017.

David Alexander
Appellate Defender

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CERTIFICATE OF SERVICE

The undersigned 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 J. Benjamin Aplin, 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 have been served on Reco Ramone Felder, #250219, at Ridgeland Correctional Institution, PO Box 2039, Ridgeland, SC 29936, this 2nd day of August, 2017.

David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 2nd day of August, 2017.

Maria Lundock (L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023