

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Newberry County

Honorable Donald B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KENNY OCTAVIS RUFF,

APPELLANT

APPELLATE CASE NO. 2017-000136

ANDERS BRIEF OF APPELLANT

RECEIVED

NOV 28 2017

SC Court of Appeals

ROBERT M. DUDEK
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by instructing the jury that malice could be inferred “when the deed is done with a deadly weapon” since there was evidence which mitigated the homicide, making the instruction improper under State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009)?

STATEMENT OF THE CASE

Appellant was indicted by the Newberry County Grand Jury for the offences of murder, armed robbery, and possession of a firearm during the commission of a violent crime. R. 863 – 868. His case was called to trial on January 9, 2017, before the Honorable Donald B. Hocker, and a jury. Charles Verner represented appellant. Solicitor David Stumbo, Deputy Solicitor Dale Scott, and Assistant Solicitor Taylor Daniel represented the State. R. 1.

On January 13, 2017, the jury found appellant guilty on each count. R. 849, l. 24 – 850, l. 13. The state had served appellant with its notice to seek a sentence of life without parole, pursuant to S.C. Code § 17-25-45 if he was convicted. R. 854, l. 17 – 855, l. 17. Judge Hocker sentenced appellant to life imprisonment without parole. R. 860, l. 24 – 861, l. 10.

This appeal follows.

ARGUMENT

The court erred by instructing the jury that malice could be inferred “when the deed is done with a deadly weapon” since there was evidence which mitigated the homicide, making the instruction improper under *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009).

Relevant Facts

This case involves a strange homicide committed at Leslie’s Hair Salon in Newberry. On August 26, 2015, Elitania Lopez was taking Roberto lunch at the hair salon which Roberto ran with his wife, Maria. R. 181, l. 12 – 182, l. 25. Lopez arrived at about 1:55 p.m.

Ms. Lopez went into the salon, looked for Roberto, and yelled out for him. She found him in the back room face down on the floor. She saw blood, she got scared, she got hysterical, “and I called 911.” R. 183, ll. 4-21.

Newberry police officer Michael Kennedy remembered arriving on the scene at 2:02 p.m. R. 185, l. 3 – 188, l. 7. Kennedy found the victim on the floor with “a decent amount of blood there and on the wall.” R. 188, ll. 13-22. He had been shot in the back of the head. R. 188, l. 18-22.

Captain Kevin Goodman also recalled the August 26, 2015, shooting. He went to the hair salon, and he said that videotapes were obtained from Kunkle Oil and a BP station “just up the street.” R. 478, ll. 2-7. An individual with a dark shirt “and dark skullcap” was seen on the BP video. Police believed this man was appellant. R. 479, l. 2 – 480, l. 11. Goodman spoke with appellant that night about 8:30. R. 481, ll. 12-15.

Goodman said he read appellant his Miranda warnings and told him “we had at least one witness that had positively identified him as the person going into the hair salon.” Goodman said appellant told him he went into the hair salon because he was “curious” about the type of

business it was. R. 485, l. 15 -487, l. 5. Goodman testified that appellant insisted the police “do a GSR kit on him” if they thought he was the shooter. Goodman told the jurors that he did not do a GSR kit on appellant because more than six hours had passed since the shooting. Goodman also said appellant admitted that he had changed clothes that afternoon. R. 488, l. 3 – 491, l. 21.

Appellant was arrested that night for the decedent’s murder. R. 492, ll. 17-19. Goodman offered that he did not believe that other people were involved in the crime. R. 499, ll. 9-16; R. 501, l. 15 – 502, l. 8.

Investigator Goodman admitted that appellant told him he should be investigating another black man, Dale Bailey. Goodman again related that he determined that appellant was the only person involved, and there were **not** three people involved in the shooting as suggested. R. 504, l. 19 – 508, l. 12.

A jailhouse snitch, Aaryon Dowdy, claimed appellant told him at the Alvin Glenn Detention Center in Columbia -- in this Newberry County murder case -- that he shot the decedent in back of the head in an execution style murder, and stole money from the hair salon. R. 446, l. 6 – 447, l. 20.

During his closing argument, the solicitor told the jury that appellant acted with a “high level of extreme indifference” for the decedent’s life. Defense counsel objected when the solicitor told the jury the judge was going to instruct them that “malice can be inferred from the use of a deadly weapon.” That objection was overruled. R. 789, ll. 10-24.

Jury Charge

The judge instructed the jury that “malice can be inferred from conduct showing a total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon. . . . A gun is a deadly weapon.” R. 834, ll. 2-9.

Defense counsel took exception to the judge's instruction on inferred malice from the use of a weapon. R. 838, ll. 21-23.

Discussion

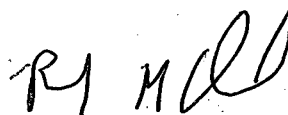
In State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), the Supreme Court held that a jury instruction that malice may be inferred from the use of a deadly weapon was longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse, or justify the homicide. In this case, the police ignored evidence that there were two or three people involved in the homicide – armed robbery. R. 446, l. 6 – 447, l. 20. Further, this other evidence that two other men were involved in the homicide, and that appellant was not the instigator mitigated appellant's role in the shooting pursuant to Belcher.

Meaning, the fact that appellant may only be guilty of murder by reason of accomplice liability – “the hand of one is the hand of all” -- mitigated or lessened his culpability under State v. Belcher. A defendant who has not actually committed a homicidal act must have aided, abetted, assisted, encouraged, or advised the killing, and acted with the intention of encouraging and abetting the mission of the homicide in order to be regarded as a participant in the homicide. See State v. Mattison, 388 S.C. 469, 697 S.E.2d 578 (2010).

Since there was evidence in this case mitigating or reducing appellant's culpability, the trial judge committed reversible error by charging that malice could be inferred from the use of a deadly weapon where it was undisputed that a deadly weapon killed the decedent. This Belcher error entitles appellant to a new trial.

CONCLUSION

By reason of the foregoing argument, appellant's convictions should be reversed, and this case remanded by the Horry County Court of General Sessions for a new trial.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 28th day of November, 2017.

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Honorable Donald B. Hocker, Circuit Court Judge

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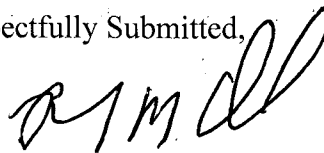
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Kenny Octavis Ruff states:

1. He is Chief 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 Donald B. Hocker, which was held on January 9 - 13, 2017, 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 Kenny Octavis Ruff.

Respectfully Submitted,



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

This 28th day of November, 2017.

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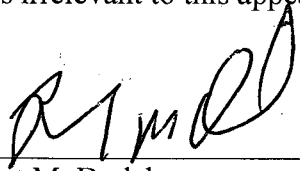
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictments;
- (2) Entire trial transcript.

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

November 28, 2017


Robert M. Dudek
Chief Appellate Defender

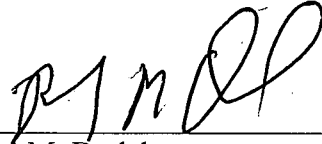
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CERTIFICATE OF COUNSEL

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."

November 28, 2017.



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