STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Honorable Paul M. Burch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOHN ERNEST PERRY,

APPELLANT

APPELLATE CASE NO. 2017-002107

FINAL BRIEF OF APPELLANT

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Whether the court erred by charging the jury that "when the intent to do an act that violates the law exists, motive becomes immaterial," since attempted murder was a specific intent crime, and defense counsel correctly argued this was essentially a general intent instruction, and this was highly prejudicial in this case where appellant told the police his gun "went off" accidentally as he attempted to dispose of the gun during a police chase?

STATEMENT OF THE CASE

Appellant was indicted by the York County Grand Jury for the offense of attempted murder. R. 243 – 244. His case was called to trial on September 18, 2017, before the Honorable Paul M. Burch, and a jury. Bill Nowicki represented appellant. Chris Epting and Jessica Holland were the assistant solicitors. R. 1.

On September 21, 2017, the jury found appellant guilty of attempted murder. R. 238, ll. 17-23. The state sought a sentence of life imprisonment without parole based on appellant's prior record, and the judge imposed that sentence. Supp. R. 1, l. 18 – Supp. R. 11, l. 25; R. 241, ll. 1-13.

This appeal follows.

STANDARD OF REVIEW

"In criminal cases an appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Id.

ARGUMENT

The court erred by charging the jury that "when the intent to do an act that violates the law exists, motive becomes immaterial," since attempted murder was a specific intent crime, and defense counsel correctly argued this was essentially a general intent instruction, and this was highly prejudicial in this case where appellant told the police his gun "went off" accidentally as he attempted to dispose of the gun during a police chase.

Introduction

SLED agent Melissa Wallace testified during the Jackson v. Denno[1] hearing about appellant's statement in this case. The police alleged this case involved a police chase on foot of appellant after a traffic stop, and a gunshot exchange between them. Appellant told Wallace that he was shot during the police chase on foot. It was undisputed he suffered "a gunshot wound to his lower left side." He was taken to the hospital in an ambulance and Agent Wallace rode with appellant in the ambulance. R. 3, l. 3 – 6, l. 2.

Appellant "said that he was involved in the shooting with Officer Taylor, that he fired a weapon during the interaction, and that the officer had fired back at him and shot him in the back." R. 6, ll. 3-8. Appellant told Wallace that he could not be caught with a gun in his possession, which was why he jumped the fence and attempted to throw the gun away when "it went off." The officers "proceeded to fire their weapons at him." R. 6, ll. 3-16.

Relevant Facts

Later, in the presence of the jury, SLED Agent Wallace repeated her testimony that she rode with appellant in the ambulance after he was shot by the police officer. R. 171, l. 8 – 173, l. 7. Wallace told the jury "he told me that he was involved in the shooting with the police, that he

[1] 378 U.S. 368 (1964).

had the gun, he ran because he had some unpaid warrants. He was jumping what he called the gate **and the gun went off while he was trying to get it out of his pants.**" R. 173, ll. 8-12 (emphasis added).

Dalton Taylor was the Rock Hill police officer involved in the shootout. The incident in this case happened on June 22, 2016. Taylor had been on the police force for only fourteen weeks at the time. R. 25, l. 11 – 26, l. 11.

Taylor remembered that he saw appellant "make an improper turn from Oakland Avenue onto Cherry Road without using a turn signal, when he did we initiated a traffic stop on him." R. 26, ll. 8-17. When Taylor turned on his blue lights, "he [Appellant] decided to jump out of the car without putting it in [park] and ran. He jumped the fence, I exited the vehicle, Officer Bailey went to the vehicle to secure the vehicle, I continued to pursue John Perry." R. 26, ll. 8 – 27, l. 13.

Taylor claimed that appellant intentionally fired at him, "and I proceeded to fire back at him. Unknown at the time I had struck him one time in the side and he ran off into the woods." R. 27, ll. 3-13. Taylor said he shot at appellant six times. R. 37, ll. 21-23.

On cross-examination, Taylor admitted he put in his report that appellant fired "a shot in the air." R. 44, l. 19 – 45, l. 5. Taylor continued to maintain that appellant shot at him intentionally and "in my mind, [he] had every intention of doing whatever it would take to get away from me." R. 45, ll. 15-23.

In moving for a directed verdict, defense counsel Nowiki argued there was no evidence appellant had a specific intent to kill the officer as required for the attempted murder charge. The solicitor argued the disputed evidence created a jury question, and the judge denied the motion for a directed verdict. R. 185, l. 18 – 186, l. 14.

During jury deliberations, the jury requested to be re-charged on the crime of attempted murder "and various degrees of assault and battery." R. 227, l. 4 – 229, l. 7.

The jury returned again, asking, "Is malice only associated on the attempted murder or is malice also associated to assault and battery?" The judge said: "[T]he defense and the state agree that malice was not an element of assault and battery and both sides agree." R. 229, ll. 8-21.

The judge also noted there was a question, "What is meant by intent? It was not charged." R. 229, l. 24 – 230, l. 4. The judge said he was inclined to charge "when the *intent* to do an act that violates the law exists, *motive becomes immaterial*." Defense counsel objected to this instruction, saying "I don't like the end of that with motive being in there." R. 230, l. 5 – 233, l. 1. (emphasis added).

The solicitor said under the state's theory of the case "the motive of why he was shooting the officers is not an element of the case we have to prove and therefore charging the jury that would not be prejudicial in any way to the defendant. Motive versus -- intent to kill versus the motive of why he intended to kill." R. 230, l. 3 – 231, l. 20.

The judge then charged the jury that "while motive is the inducement to do some act, intent is the mental resolution or determination to do it. **When the intent to do an act that violates the law exists, motive becomes immaterial**." R. 231, l. 22 – 232, l. 17 (emphasis added).

Defense counsel took exception to this instruction: "Your Honor, I just renew my objection to the intent that you just read based on about the motive being immaterial. Also my concern is that **attempted murder with case law out there saying that it is a specific intent crime, I mean, in my opinion is what was read was more of a general intent type of thing so**

that's my -- I'm objecting to the charge." R. 232, l. 20 – 233, l. 1 (emphasis added). The judge refused to alter his instruction to the jury, noting the defense exception. R. 233, ll. 2-7.

After further deliberations, the judge gave the jury an Allen[2] charge. R. 233, l. 18 – 236, l. 10. The jury then informed the judge it wished to go home for the evening and come back in the morning. R. 236, l. 15 – 237, l. 7.

Appellant was ultimately convicted after these deliberations, and the Allen charge, and he received a sentence of life without parole based on his prior record, as seen above.[3]

Discussion

The crime of attempted murder requires proof that the defendant had a specific intent to kill the victim. See State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017). In this case, defense counsel told the jury that appellant did not intend to kill the police officer, and that attempted murder required a specific intent to kill. "He did not, he did not shoot to kill or attempt to hurt or anything for Officer Dalton, absolutely not." R. 209, l. 10 – 210, l. 13.

Thus, if the jury believed appellant that he did not intend to kill Officer Dalton Taylor, and that his gun "just went off," when he was running because he was a felon in illegal possession of a weapon or because of "unpaid warrants," then pursuant to a proper instruction on the law, appellant was entitled to be acquitted.

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[2] Allen v. United States, 164 U.S. 492 (1896).

[3] A miscellaneous, the record showed the defense and solicitor had reached a plea agreement during final jury deliberations. However, before appellant could sign the plea agreement, the assistant solicitor said, "After consultation with our elected solicitor, we have been told to accept the verdict of whatever the jury is." Defense counsel objected, noting a plea agreement had been reached "and we were in the process of filling out the paperwork, it shouldn't be held against my client and this has been worked out." R. 237, ll. 11-15. The judge said he had not accepted the guilty plea and that the court would receive the jury verdict, which was guilty. R. 237, l. 16 – 238, l. 23.

The jury continuously struggled to reach a verdict in this case and the judge finally instructed the jury "when *the intent to do an act that violates the law exists* **motive becomes immaterial**." R. 232, ll. 3-7. (emphasis added). Defense counsel correctly argued that attempted murder was a specific intent crime and that this instruction from the judge was confusing because it made it out to be more of a general intent crime, which was the reason for defense counsel's objection. R. 232, l. 20 – 233, l. 6.

The Supreme Court in State v. King wrote that it agreed with this Court that the legislature intended to require the state to prove specific intent to commit murder as an element of attempted murder, and that the trial judge erred inasmuch as he charged attempted murder as a general intent crime. State v. King, 422 S.C. 47, 55-56, 810 S.E.2d 18, 23 (2017).

Appellant's statement that the gun "went off" would seem at worst an admission that this was ABHAN rather than attempted murder. For example, in the context of a murder charge, evidence the gun "went off accidentally" would entitle the defendant to an instruction on involuntary manslaughter, essentially criminal negligence. See State v. Light, 378 S.C. 641, 664 S.E.2d 465 (2008); State v. Brayboy, 387 S.C. 174, 691 S.E.2d 482 (Ct. App. 2010); State v. Crosby, 355 S.C. 47, 584 S.E.2d 110 (2003).

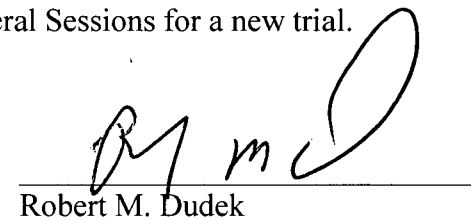
Moreover, the judge's erroneous instruction that "when the intent to do an act that violates the law exists, motive becomes immaterial," came after a long jury deliberation where the jury had focused its "critical attention" on the meaning between attempted murder, and ABHAN, and various other lesser counts of assault and battery. See State v. Blassingame, 271 S.C. 44, 46-47, 244 S.E.2d 528, 529-30 (1978).

The jury struggled long and hard to reach a verdict in this case, and the court's confusing instruction at a critical time which strongly implied attempted murder was a general intent and

not a specific intent crime was extraordinarily prejudicial. Motive to a reasonable juror equals the defendant's intent to an act, and here it should have been the specific intent to kill required for attempted murder. An instruction that motive is immaterial when the intent is to violate the law was the antithesis of a proper specific intent to kill charge. Appellant should be granted a new trial.

CONCLUSION

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



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This 2nd day of January, 2019.