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STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LAURENS COUNTY
The Honorable Frank R. Addy, Circuit Court Judge

Appellate Case No. 2017-002499

THE STATE, Respondent,

v.

HENRY KEVIN GRANT, Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial judge properly refused to instruct the jury using Appellant's requested jury instruction when the instruction given by the trial judge quoted directly from S.C. Code Ann. § 16-3-1040 and thus adequately covered the law, and where the trial judge's use of the words "knowingly" and "willfully" appropriately instructed the jury of the mens rea that Appellant was required to have when communicating his threats to law enforcement?

STATEMENT OF THE CASE

In August 2017, the Laurens County Grand Jury indicted Appellant for two counts of threatening the life of a public official. On November 28, 2017, a jury trial was held in the Laurens County Court of General Sessions with the Honorable Frank R. Addy, presiding. Appellant was represented by Joel Broome, Esq. Respondent (the State) was represented by Assistant Solicitors Margaret Boykin and Dale Scott of the Eighth Circuit Solicitor's Office. At the conclusion of trial, the jury convicted Appellant of both counts. The trial judge sentenced Appellant to a term of five years' imprisonment for one count of threatening the life of a public official and five consecutive years suspended upon the service of sixteen days' time served followed by three years of probation on the second count. Appellant's period of probation was tolled for the duration of his five year active sentence. Appellant timely filed a notice of appeal and an initial brief. This brief of Respondent now follows.

STATEMENT OF FACTS

On June 3, 2017, Officers Christopher Gambrell, Douglas Jones, and Billy Sellers of the Laurens City Police Department were dispatched to a residence in the city of Laurens in response to a 911 call regarding a trespasser. (R. 37-38, 64, 69). Upon arrival, the officers were unable to locate the person who made the 911 call. (R. 38-39). While searching the area for the caller, officers overheard Appellant yelling profanities at them. (R. 40-41). The officers asked Appellant to stop yelling profanities, but when Appellant continued to yell at the officers he was arrested for public disorderly conduct. (R. 41-42, 76). As Appellant was being placed under arrest, he began to threaten Sellers, Gambrell, and Seller's family. (State's Exhibit #1). Initially, Appellant encouraged the surrounding crowd to kill the officers. (R. 77). Appellant then addressed Sellers directly and threatened to rape Sellers' baby[1]. (R. 43, 79, State's Exhibit #1). Additionally, Appellant threatened to shoot Gambrell in the head the next time he saw him. (R. 44, State's Exhibit #1).

Appellant's threats towards Sellers' family particularly concerned Sellers because Appellant knew where he lived. Sellers saw Appellant on at least two occasions outside of Sellers' apartment building. (R. 82). Sellers testified that he carries his baby outside of the apartment building with him on a regular basis and that his wife and child are at home alone while he is at work. (R. 82-83). As Gambrell transported Appellant to the local jail, Appellant continued to threaten Gambrell and emphasized the sincerity of his threats with comments such as: "you think I'm playin?" and "I'll shoot through your f*****g window, you heard me, and tell them that cause I mean it, they know I mean it." (State's Exhibit #1). At the conclusion of trial, Appellant was convicted of both charges.

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[1] Sellers had an infant daughter who was a year and a half old at the time. (R. 79, 81).

STANDARD OF REVIEW

"To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010). "An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." Mattison 388 S.C. at 479, 697 S.E.2d at 584. "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

ARGUMENT

I.

The trial judge properly refused to instruct the jury using Appellant's requested jury instruction when the instruction given by the trial judge quoted directly from S.C. Code Ann. § 16-3-1040 and thus adequately covered the law. Specifically, the trial judge's use of the words "knowingly" and "willfully" appropriately instructed the jury of the mens rea Appellant was required to have when communicating his threats to law enforcement.

Appellant contends the trial judge erred by refusing to instruct the jury that Appellant's threats to the officers and their families was intended as a true threat. Furthermore, Appellant argues the trial judge should have instructed the jury to consider the facts and circumstances surrounding Appellant's threats in determining whether they were true threats. Appellant's argument is without merit. The trial judge read directly from S.C. Code Ann. § 16-3-1040 when explaining to the jury what elements the State had to prove in order for them to find Appellant guilty of threatening a public official. The trial judge's instructions contained the correct statutory language crafted by our legislature and thus adequately covered the law. Appellant's convictions and sentences should be affirmed.

A police officer is a public official within the meaning of S.C. Code Ann. § 16-3-1040. State v. Carter, 324 S.C. 383, 478 S.E.2d 86 (Ct. App. 1996). S.C. Code Ann. § 16-3-1040 (A) provides:

> (A) It is unlawful for a person knowingly and wilfully to deliver or convey to a public official or to a teacher or principal of an elementary or secondary school any letter or paper, writing, print, missive, document, or electronic communication or verbal or electronic communication which contains a threat to take the life of or to inflict bodily harm upon the public official, teacher, or principal, or members of his immediate family if the threat is directly related to the public official's, teacher's, or principal's professional responsibilities.

S.C. Code Ann. § 16-3-1040 (A).

The purpose of a jury instruction is "to enlighten the jury and to aid it in arriving at a correct verdict." State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). "In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003). "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." Adkins, 353 S.C. at 318, 577 S.E.2d at 464. "A jury charge that is substantially correct and covers the law does not require reversal." State v. Mattison, 388 S.C. 469, 478, 697 S.E.2d 578, 583 (2010). "The trial court is required to charge only the current and correct law of South Carolina." Mattison, 388 S.C. at 479, 697 S.E.2d at 583. "Jury instructions must be considered as a whole and, if as a whole, they are free from error, any isolated portions which might be misleading do not constitute reversible error." State v. Jackson, 297 S.C. 523, 526, 377 S.E.2d 570, 572 (1989).

Here the trial judge gave the following instruction to the jury regarding what the State must prove:

> Now, ladies and gentlemen, [Appellant] is charged with two counts of threatening the life, person or family of a public official. In order to prove this crime the State must prove beyond a reasonable doubt [Appellant] knowingly and wilfully delivered or conveyed to a public official any verbal, written or electronic communication which contained a threat to take the life of or to inflict bodily harm upon the public official or members of his immediate family if the threat is directly related to the public official's professional responsibilities.

(R. 119-20, lines 23-7). The wording of the trial judge's instruction is derived directly from the language in S.C. Code Ann. § 16-3-1040. The only language from the statute that the trial judge omitted from his instruction was language that was not applicable to the charges against

Appellant[2]. It is hard to imagine how a trial judge could craft an instruction that would cover the correct law better than by quoting directly from a relevant statute. This is precisely what the trial judge did in this case. Therefore, the instruction given to the jury adequately covered the correct law and the trial judge did not abuse his discretion in rejecting Appellant's requested instruction.

The instruction requested by Appellant regarding a "true threat" would have done little more than advance the improper defense Appellant argued at trial, that his threats were not sincere because he was drunk. Voluntary intoxication is not a valid defense in South Carolina. "Voluntary intoxication, where it has not produced permanent insanity, is never an excuse for or a defense to a crime, regardless of whether the intent involved be general or specific." State v. Vaughn, 268 S.C. 119, 125, 232 S.E.2d 328, 330 (1977). Appellant's preferred instruction was a clever attempt to use a defense which the trial judge ultimately instructed the jury was not a proper defense in South Carolina. (R. 120). In other words, Appellant's preferred instruction was an attempt by Appellant to use a defense through the back door that could not go through the front door.

Appellant relies almost exclusively on two cases in making his argument: Elonis v. United States, 135 S.Ct. 2001 (2015) and State v. Perkins, 306 S.C. 353, 412 S.E.2d 385 (1991). These cases are distinguishable from the facts of the current case. In Elonis the defendant was charged with transmitting threats in interstate commerce under 18 U.S.C § 875(c). 18 U.S.C § 875(c) provides that it is unlawful to: "transmit in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of

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[2] The trial judge stated: "I've cleaned up the wording a little but in section 1040 just to provide – I eliminated that part about the letter or paper writing, print missive, document or electronic communication. I just put verbal, written or electronic communication. That seemed to be more to the point, especially since this is an oral communication as opposed to anything that was written down." (R. 92-93, lines 25-7).

another." 18 U.S.C § 875(c). Elonis argued that the trial judge should have instructed the jury that the government had to prove he intended to communicate a true threat. Elonis, 135 S.Ct. at 2007. The trial judge declined to instruct the jury that Elonis was required to have a specific intent and instead instructed them that a threat would be a true threat if "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." Id. The Court held that while the language of 18 U.S.C § 875(c) doesn't specify any required mental state that a defendant must have, the government still had to prove that a defendant had a specific mental state rather than proving a defendant was merely negligent in making a threat. Elonis, 135 S.Ct. at 2011-2012. Notably, the Court's holding was a narrow one which focused merely on whether a specific intent is required under 18 U.S.C § 875(c), and not on broader first amendment implications. Elonis, 135 S.Ct. at 2012-2013. See also U.S. v. White, 810 F.3d 212, 220 (4th Cir. 2016). ("But importantly, the Court's holding in Elonis was purely statutory; and, having resolved the question on statutory grounds, the Court declined to address whether a similar subjective intent to threaten is a necessary component of a 'true threat' for purposes of the First Amendment.").

Here, the language of S.C. Code Ann. § 16-3-1040 adequately specifies that a defendant must have a specific intent to threaten a public official. The words "knowingly" and "wilfully" in S.C. Code Ann. § 16-3-1040(A) demonstrate that a defendant charged under this provision must have a specific intent both to communicate his or her threat and that it constitute a threat. Unlike in Elonis, the trial judge instructed the jury that the threat had to be knowing and wilfull by using our statutory language. (R. 120). Therefore, the trial judge did not abuse his discretion in declining to instruct the jury using Appellant's additional and unnecessary language.

Furthermore, the jury instruction used by the trial judge is not in conflict with the United States Supreme Court's holding in Elonis.

In Perkins, the defendant was charged with public disorderly conduct under S.C. Code Ann. § 16-17-530(a) for raising his voice at a sheriff's office employee. The South Carolina Supreme Court held that Perkins could not be punished under S.C. Code Ann. § 16-17-530(a) unless he used fighting words in his communication with the sheriff's office. Perkins, 306 S.C. at 355, 412 S.E.2d at 386. Fighting words were defined as "words that 'by their very utterance inflict injury or tend to incite an immediate breach of the peace.'" Perkins, 306 S.C. at 355, 412 S.E.2d at 386 (quoting City of Houston v. Hill, 482 U.S. 451, 461-462 (1987)).

Here, Appellant was charged with two separate offenses based on two separate acts. Appellant was initially charged with public disorderly conduct under S.C. Code Ann. § 16-17-530(a) for his boisterous conduct when Gambrell and Sellers were searching for the 911 caller. Appellant was not charged with threatening a public official until he was placed under arrest for public disorderly conduct. Appellant was charged with threatening a public official under S.C. Code Ann. § 16-3-1040 (A) for the specific threats he made to Seller's family, and to Gambrell after being arrested for public disorderly conduct. Thus the threats uttered by Appellant were not the basis of charging him under S.C. Code Ann. § 16-17-530(a), thereby making the "fighting words" requirement of Perkins inapplicable. However, even if this Court holds that Perkins requires Appellant to have used fighting words to be found guilty under S.C. Code Ann. § 16-3-1040 (A), the words used by Appellant meet the definition under Perkins. Indeed, threatening to rape an officer's infant child and threatening to shoot another officer in the head are not the "significant amount of verbal criticism" directed at police officers contemplated by Perkins.

Rather, the threats uttered by Appellant are words that inflict injury and tend to incite an immediate breach of the peace. Appellant's convictions and sentences should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgments and convictions of the lower court should be affirmed.

Respectfully submitted,

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January 9, 2019

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies the Final Brief of Respondent complies with Rule 211(b), SCACR.

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