

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Pickens County

G. Edward Welmaker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TIMOTHY LEVERN COBB,

APPELLANT

ANDERS BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Appellate Defender

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Division of Appellate Defense
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ATTORNEY FOR APPELLANT

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SC Court of Appeals

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge commit reversible error, based on State v. Belcher, when, in charging the jury on the law of assault with intent to kill [ABWIK], he instructed the jury that “inferred malice may also arise when the deed is done with a deadly weapon” when evidence was presented that would reduce the AWIK to assault of a high and aggravated nature [AHAN] and the judge instructed the jury on the law of the lesser included offense of AHAN?

STATEMENT OF THE CASE

On September 14, 2010, the Pickens County Grand Jury indicted Cobb for assault with intent to kill, indictment #2010-GS-39-1804. On October 24, 2011, Cobb proceeded to jury trial before the Honorable G. Edward Welmaker. Attorney Steven Alexander represented Cobb at trial. The jury returned a verdict of guilty. Judge Welmaker sentenced Cobb to 10 years suspended upon the service of 33 months followed by 44 months of probation. A timely notice of intent to appeal was served on October 25, 2011. This appeal follows.

ARGUMENT

The trial judge committed reversible error, based on State v. Belcher, when, in charging the jury on the law of assault with intent to kill [AWIK], he instructed the jury that “inferred malice may also arise when the deed is done with a deadly weapon” when evidence was presented that would reduce the AWIK to assault of a high and aggravated nature [AHAN] and the judge instructed the jury on the law of the lesser included offense of AHAN.

The jury found Tim Cobb guilty of an assault upon his girlfriend, Rosetta Brown. Dara Murray, the Clemson 911 operator, testified that she received a 911 disconnect and then called the number back and spoke with a female. The operator testified, “She stated something about having gasoline poured on her, screaming for the police to hurry up, and there was a lot of background on the line.” (R. p. 124, lines 1-3). The operator admitted that her notes from the call indicated that a Mildred Black heard something about gasoline being poured on her son Tim Black. (R. p. 126, lines 15-16). Law enforcement failed to request a copy of this 911 call and the tape was cleared after three months. (R. p. 124, lines 10-16). Based on the 911 call, officers went to the house and after a brief confrontation, arrested Cobb.

Rosetta Brown testified that she called 911 because she was afraid Cobb was going to pour gasoline on himself and commit suicide. (R. p. 66, lines 1-25). Brown testified:

He went and got the gas, like I said, walked back inside the house. He kept saying he was tired, he was tired, tired. I said, tired of what, Tim? What you tired of? He just kept saying he was tired of living, you know what I’m saying? He was just going through some problems and stuff. And he said, look, I’m going - - he was going to ignite himself with in gas, he was going to pour gas on hisself and burn hisself up.

(R. p. 59, lines 17-24). In her written statement to the police on the night of the incident Brown told them that Cobb was trying to kill himself. (R. pp. 85 – 88). According to Deputy Chad Roper of the Central Police Department, Brown told him that Cobb was going

to burn them both up. (R. p. 146, lines 19-21). Brown specifically denied making the statement that Cobb was going to burn them both up. (R. p. 67, lines 7-9). Brown testified that Cobb never threatened to pour gas on her. (R. p. 103, lines 3-10).

The judge instructed the jury on the law of AWIK and the lesser included offenses of AHAN and simple assault. (R. pp. 218-221). The State agreed that the instruction on AHAN was appropriate. (R. p. 187, lines 1-14). When instructing the jury on the law of AWIK, the judge told the jury that malice aforethought was an element of AWIK. (R. p. 218, lines 7 -25). The judge told the jury that malice could be expressed or inferred. (R. p. 219, lines 6-7). The judge instructed the jury, “Malice may be inferred from the conduct, showing a total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon.” (R. p. 219, lines 15-17). The judge then defined deadly weapon as any article or instrument or substance which is likely to cause death or great bodily harm. (R. p. 219, lines 17-19). The judge then gave examples of instruments which may be deadly weapons. One of the examples provided by the judge was gasoline. (R. p. 219, lines 22-25). After deliberations began, the jury requested a recharge on the law of AWIK and AHAN. (R. p. 226, lines 17-23). The judge again instructed the jury that malice can be inferred from the use of a deadly weapon. (R. p. 228, lines 4-5). The judge erred in instructing the jury that malice could be inferred from the use of a deadly weapon.

In State v. Belcher, 385 S.C. 597, 610, 685 S.E.2d 802, 809 (2009), the South Carolina Supreme Court wrote, “Under our policy-making role in the common law, we hold that the ‘use of a deadly weapon’ implied malice instruction has no place in a murder (or assault and battery with intent to kill) prosecution where evidence is presented that would

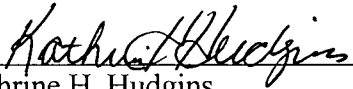
reduce, mitigate, excuse or justify the killing (or the alleged assault and battery with intent to kill).”

While the present case is an AWIK prosecution rather than an ABWIK prosecution, the reasoning of Belcher should apply because malice is an element of both offenses. The State agreed that there was evidence from which the jury could find Cobb guilty of the lesser included offense of AHAN. (R. p. 187, lines 1-14). The judge erred in instructing the jury that malice could be inferred from the use of a deadly weapon. The error was not harmless. The State failed to present overwhelming evidence of malice apart from the use of gasoline. See State v. Miller, 397 S.C. 630, 725 S.E.2d 724 (Ct.App. 2012). The error was further compounded by the Judge’s unconstitutional charge on the facts by including gasoline as an example of a deadly weapon. S.C. Const. art. V, §21.

CONCLUSION

Based on the above argument, the conviction and sentence should be reversed and the case remanded for a new trial.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 15th day of August, 2012.

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IN THE COURT OF APPEALS

Appeal from Pickens County
G. Edward Welmaker, Circuit Court Judge

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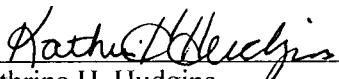
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Timothy Levern Cobb states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge G. Edward Welmaker, which was held on October 25, 2011, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She 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, she asks the Court to relieve her as counsel for Timothy Levern Cobb.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender


ATTORNEY FOR APPELLANT

This 15th day of August, 2012.

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 August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

August 15th, 2012



Kathrine H. Hudgins
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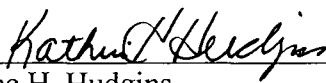
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CERTIFICATE OF SERVICE

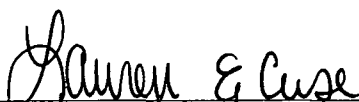
The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Record on Appeal have been served on Timothy Levern Cobb, # 220078 at Livesay Pre-Release Center, this 15th day of August, 2012.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 15th day of August, 2012.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: August 23, 2014.