STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM BARNWELL COUNTY
Court of General Sessions
The Honorable Edgar Dickson

Appellate Case No.: 2011-202947

State of South Carolina,

Respondent,

vs.

Dexter Bernard Brown, II,

Appellant.

FINAL BRIEF OF APPELLANT

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II. WHETHER THE CIRCUIT COURT'S JURY CHARGE THAT MALICE CAN BE IMPLIED FROM THE USE OF A DEADLY WEAPON VIOLATES THE SOUTH CAROLINA AND UNITED STATES CONSTITUTION AND CONTRAVENES STATE V. BELCHER, WHICH FOUND IT IMPROPER FOR THE COURT TO MAKE SUCH AN IMPLIED MALICE CHARGE TO THE JURY UNDER CIRCUMSTANCES WHICH WOULD REDUCE, MITIGATE, EXCUSE OR JUSTIFY HOMICIDE CAUSED BY A DEADLY WEAPON.

STATEMENT OF THE CASE

On April 12, 2011 Mr. Brown was indicted on two counts of attempted murder under §16-3-29 (Indictments 2011-GS-06-0010 and 2011-GS-06-0011) and one count of possession of a weapon during a violent crime under §16-23-490 (Indictment 2011-GS-06-0120)(R pp. 239-246). He was subsequently tried by jury on May 11 and 12, 2011. Upon the close of the State's case, Mr. Brown's counsel made a motion for a directed verdict on the attempted murder charges and the charge for possession of a weapon during a violent crime. (R. pp. 151-154). As to the attempted murder charges, defense counsel asserted that the State had failed to present any evidence that the Defendant had committed a violent injury to another person. As to the possession of a weapon during a violent crime charge, counsel argued that no gun and no other evidence was presented linking Mr. Brown to the scene. (R. p. 152)

Judge Dickson denied defense counsel's motion for a directed verdict, noting that there was sufficient evidence presented to allow the case to go to the jury. (R. p. 154). Upon the close of all the evidence, Judge Dickson charged the jury stating Mr. Brown was found guilty of all three charges on May 12, 2011. Judge Dickson initially sentenced Mr. Brown to two concurrent thirty (30) year sentences, one for each of the two attempted murder offenses, and one consecutive five (5) year sentence for possession of a weapon during a violent crime (a total of thirty-five (35) years).

Following his initial sentencing, Mr. Brown had an outburst in the courtroom, and Judge Dickson re-sentenced Mr. Brown to two consecutive thirty (30) year terms for attempted murder along with a five (5) year consecutive sentence for possession of a weapon during a violent crime (a total of sixty-five (65) years) (R. pp.240-246). Mr. Brown's trial counsel entered a motion for reconsideration of the sentence, which Judge Dickson agreed to hear on September 22, 2011. (R.

p. 238). Following the motion hearing, on November 15, 2011 Judge Dickson reinstated Mr. Brown's original sentence of two concurrent thirty (30) year terms for attempted murder and one consecutive five (5) year term for possession of a weapon during a violent crime (a total of thirty-five (35) years). He is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Barnwell County Clerk of Court.

Mr. Brown filed a timely Notice of Appeal on November 15, 2011. This initial brief follows.

STATEMENT OF FACTS

On October 15th, 2010, shots were fired outside of a mobile home, the residence of Ms. Alice Thompson, located at 7390 Patterson Mill Road in Barnwell County, South Carolina. (R pp. 41, 134). Mr. Roger Benjamin testified that he and an unknown gentleman named "T" were riding with fellow alleged victim Brandon Parker in Ms. Lesley Morrisey's (Brandon's mother, not present at time of incident) burgundy Blazer. (R. p p. 87, 91)

Mr. Benjamin said Brandon pulled into the yard after having been followed by Mr. Dexter Brown and his co-defendant Mr. Kendrick Jacobs. (R. p. 86) Mr. Benjamin then said he heard shots fired after Brandon pulled into the yard, and that he, T, and Brandon exited the vehicle. (R p. 95) He identified the shooters as Mr. Brown and Mr. Jacobs and said that he could tell what type of gun Mr. Jacobs was shooting because he could hear that it had two eighty-round clips by its sound. (R. pp. 86, 100) Ms. Lesley Morrissey later testified that her vehicle's back passenger glass was shattered, both tires on the right-hand side of the vehicle were flattened, and that there was a bullet in a headrest. (R. p. 105)

Ms. Alice Thompson, who is Mr. Benjamin's grandmother, testified that she saw Mr. Brown and Mr. Jacobs drive by her home two times and that they "shot, they just shot" and "shot the van up." (R. pp. 135, 137). She said that the progression of events was as follows: 1) the Blazer stopped in her yard; 2) the victims exited the vehicle and ran; and 3) that at that point the alleged shooters stopped their car and shot only at the Blazer. (R. p. 150). Further, she said that she "didn't see them pointing at [anybody] but they [were] shooting..." (R. p. 149).

Mr. Brown was subsequently arrested and indicted on two counts of attempted murder and one count of possession of a weapon during the attempted commission of a violent crime. (See Indictments 2011-GS-06-0010, -0011, and -0120). Upon the close of the State's evidence, defense counsel made a motion for a directed verdict. (R. pp. 151-153). Judge Dickson denied the motion, pointing out that two witnesses placed a gun in Mr. Brown's hands and that while "[a]ll the evidence points that they were shooting at a van perhaps,...there were people in the van at one time." (R. p. 154) Thereafter the case was allowed to go to the jury. Judge Dickson charged the jury as follows on the implied malice requirement of attempted murder:

> Inferred malice may...arise when the deed is done with a deadly weapon. A deadly weapon is any article, instrument, or substance which is likely to cause death or great bodily harm. Whether an instrument has been used as a deadly weapon depends on the facts and circumstances of each case. (R. p. 195).

The jury found Mr. Brown guilty on two charges of attempted murder and one of possession of a weapon during the attempted commission of a violent crime. (R. pp. 210-211) Mr. Brown filed a timely notice of appeal on November 15, 2011, and this brief follows.

STANDARD OF REVIEW

On appeal from the denial of a directed verdict, an appellate court must view the evidence in the light most favorable to the State. State v. Walker, 349 S.C. 49, 562 S.E.2d 313 (2002). A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001). However, if there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, this Court must find the case was properly submitted to the jury. State v. Harris, 351 S.C. 643, 572 S.E.2d 267 (2002).

Erroneous jury instructions are subject to the harmless error standard. See Lowry v. State, 376 S.C. 499, 510-11, 657 S.E.2d 760, 766 (2008). To find harmless error, "the Court must 'find that error unimportant...in relation to everything else the jury considered...' [For] an unconstitutional presumption in a jury instruction,...the Court must [(1)] ask what evidence the jury actually considered in reaching its verdict, and (2)...weigh the probative force of the evidence...against [that] of the presumption...alone." Id. at 508. (quoting Yates v. Evatt, 500 U.S. 391, 403-404, 111 S. Ct. 1884 (1991).)

ARGUMENT

III. THE CIRCUIT COURT IMPROPERLY DENIED COUNSEL'S MOTION FOR DIRECTED VERDICT BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE ELEMENTS OF ATTEMPTED MURDER AND POSSESSION OF A FIREARM DURING THE ATTEMPT TO COMMIT A VIOLENT CRIME.

Section 16-3-29 says "[a] person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder." S.C. Code Ann. (2010). Defense counsel's Motion for a Directed Verdict was proper because the State failed to present enough evidence to place Defendant's actions within the purview of this statute. While the State presented testimony that Mr. Brown was shooting a gun, none of the State's proffered evidence shows that Mr. Brown aimed and fired a gun at either of the alleged victims.

Mr. Roger Benjamin, one of the alleged victims, testified that after pulling into his grandmother's yard, "gunshots went off" and "they started shooting" (R. p p. 86, 96). However, at no point did he state that either Mr. Brown or his co-defendant Mr. Kendrick Jacobs was pointing and shooting a firearm at either of the alleged victims. Also, Ms. Leslie Morrisey, the owner of the burgundy Blazer (R. p. 87) which Mr. Benjamin and Brandon Parker (the other alleged victim) rode in the day in question, testified that the back passenger glass was shattered, both tires on the right-hand side of the vehicle were flattened, and that there was a bullet in a headrest. (R. p. 105) Mr. Benjamin testified that he could tell the gun Mr. Jacobs was shooting had two eighty-round clips by its sound. (R. p. 100) However, he did not testify that he heard any bullets hit the vehicle while inside the Blazer or while exiting.

Further, Ms. Thompson testified that she saw Mr. Brown and Mr. Jacobs drive by her home two times and that they "shot, they just shot" and "shot the van up." (R.p p. 135, 137). She

testified that the Blazer stopped in her yard, the victims exited the vehicle and ran, and that at that point the alleged shooters stopped their car and shot only at the Blazer. (R. p. 150). Further, she said that she "didn't see them pointing at [anybody] but they [were] shooting..." (R. p. 149)

Therefore, even in the light most favorable to the State, the evidence at most showed that Mr. Brown discharged a firearm, but that while doing so he did not aim the firearm at any individual. As such, the State did not present sufficient evidence to establish an intent to kill, and the Motion for a Directed Verdict should have been granted.

As to the possession of a weapon during a violent crime, Judge Dickson denied defense counsel's motion on the grounds that two witnesses placed a gun in Mr. Brown's hands and that while "[a]ll the evidence points that they were shooting at a van perhaps, ... there were people in the van at one time." (R. p. 154) However, the evidence clearly showed that there was nobody in the Blazer at the time the alleged shooters shot at the vehicle, and that neither of the alleged shooters had pointed a gun at any individual. Having only established that Mr. Brown and Mr. Jacobs shot at the van (in the light most favorable to the state), this was not enough to establish that a violent crime had been committed.

Section 16-23-490 defines the crime of possessing a firearm during the attempt to commit a violent crime, and "violent crime" is defined under § 16-1-60. This section includes a list of offenses and says "[o]nly those offenses specifically enumerated in this section are considered violent offenses. " (2012). The closest related enumerated offense to this case is assault and battery of a high and aggravated nature under § 16-3-600(B). However, that offense requires a preliminary showing of an attempt to injure, and no evidence shows that Mr. Brown aimed a gun at any person in an attempt to harm. At most, shooting an unoccupied vehicle amounted to the

unlawful discharge of a firearm into a vehicle under § 16-23-440, a crime which was not charged in this case.

Further, Judge Dickson, by making the statement that there were people in the Blazer at some point, alluded that there was a possibility the alleged victims were inside the vehicle while it was being shot at, which was not supported by the State's evidence. As such this statement was improper in that "[j]udges shall not charge juries in respect to matters of fact, but shall declare the law." S.C. Const. art. V, § 21. Therefore Judge Dickson's statement, as inadvertent as it may haven, could conceivably have influenced the jury's ultimate finding of fact regarding whether the alleged victims were in the vehicle at the time of shooting.

In sum, in the light most favorable to the State, the evidence presented at trial showed that Mr. Brown discharged a firearm into an empty vehicle and did not point a gun at any individual. Therefore, based on the evidence, the elements of attempted murder and possession of a weapon during the attempt to commit a violent crime were not satisfied, and the defense counsel's motion for a directed verdict should have been granted.

IV. THE CIRCUIT COURT'S JURY CHARGE THAT MALICE CAN BE IMPLIED FROM THE USE OF A DEADLY WEAPON VIOLATES THE SOUTH CAROLINA AND UNITED STATES CONSTITUTION AND CONTRAVENES STATE V. BELCHER, WHICH FOUND IT IMPROPER FOR THE COURT TO MAKE SUCH AN IMPLIED MALICE CHARGE TO THE JURY UNDER CIRCUMSTANCES WHICH WOULD REDUCE, MITIGATE, EXCUSE OR JUSTIFY HOMICIDE CAUSED BY A DEADLY WEAPON.

In State v. Belcher the Court held "where evidence is presented that would reduce, mitigate, excuse or justify a homicide (or assault and battery with intent to kill) caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon." 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009). Further, "the prisoner is

entitled to the benefit of any doubt that may arise, and cannot be deprived of such benefit by any presumption of guilt arising by operation of law from the naked fact of homicide." Id. at 603, 805. (citing State v. Hopkins, 15 S.C. 153 (1881))(quoting State v. Coleman, 6 S.C. 185 (1875)). Where a jury charge creates a "mandatory presumption" and "impermissibly shifts the burden of proof to the defendant," there is a violation of the Due Process Clause of the Fourteenth Amendment. Id.at @ 608, 808 (citing Sandstrom v. Montana, 442 U.S. 510, 524, 99 S.Ct. 2450 (1979)).

An implied malice charge for "'the use of a deadly weapon' is confusing and prejudicial where evidence is presented that would reduce, mitigate, excuse or justify... A jury charge is no place for purposeful ambiguity." (R.pp. 611, 809) Attempted murder requires a showing of an intent to kill and malice aforethought, whether express or implied. S.C. Code Ann. § 16-3-29 (2010). In the case at bar Judge Dickson made the following charge to the jury:

> Inferred malice may...arise when the deed is done with a deadly weapon. A deadly weapon is any article, instrument, or substance which is likely to cause death or great bodily harm. Whether an instrument has been used as a deadly weapon depends on the facts and circumstances of each case. (Transcript, pg. 195).

While Belcher dealt with a homicide charge, its rationale can and should reasonably be applied to an attempted murder charge. As explained above, there was no evidence presented that Mr. Brown pointed a gun and fired it at any person. As such, even in the light most favorable to the State, there was at the very least a doubt as to whether Mr. Brown had an intent to kill with malice at the time of the shooting. Therefore, Judge Dickson's charge impermissibly put the burden on Mr. Brown to disprove malice, which violated Mr. Brown's rights under the Due Process Clause of the South Carolina and United States' Constitution. Further, the State's eye witness testimony indicating Mr. Brown did not aim a gun at any person is evidence which would excuse a charge of attempted murder.

As a final matter, this claim is properly brought on direct appeal as Belcher stated that "[o]ur ruling...will not apply to convictions challenged on post-conviction relief." (R.pp. 613, 810) (citing Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060 (1989). For the foregoing reasons, Mr. Brown respectfully requests that his convictions be reversed for attempted murder and possession of a firearm during the attempt to commit a violent crime.

CONCLUSION

For the above stated reasons, Appellant respectfully requests that this Court reverse his convictions.

Respectfully submitted,

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January 16, 2014

THE STATE OF SOUTH CAROLINA
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Honorable Edgar Dickson, Circuit Court Judge

Appellate Case No.: 2011-202947

THE STATE,

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Dexter Bernard Brown, II

APPELLANT.

CERTIFICATE OF SERVICE

I, Jacquelyn E. Miller, secretary to Tommy A. Thomas, Attorney for Appellant in the above action, hereby certify that I placed in the United States Mail, a copy of a Final Brief with postage prepaid, and the return address clearly shown on said envelope to Christina J. Catoe, Esq. at:

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January 17, 2014

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Respondent complies with Rule 211 (b), SCACR, and also complies with the South Carolina Supreme Court's August 13, 2007 Order on Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings.

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January 17, 2014