STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

Alexander S. Macaulay, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAVAN F. MAYS,

APPELLANT

APPELLATE CASE NO. 2013-002530

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

In violation of Appellant's right to a jury trial pursuant to the Sixth and Fourteenth Amendments to the United States Constitution and Article I, section 14 of the South Carolina Constitution, did the trial judge err in failing to instruct the jury that in order to convict Appellant of attempted murder the jury must find that Appellant acted with a specific intent to kill?

STATEMENT OF THE CASE

On October 18, 2012, a Spartanburg County grand jury indicted Appellant for two counts attempted murder (2012-GS-42-5314 & 2012-GS-42-5315), armed robbery and possession of a firearm during the commission of a violent crime (2012-GS-42-5316). R. 296. The state, represented by Derrick Bulsa, called the case for trial on November 18, 2013 before the Honorable Alexander S. Macaulay and a jury. R. 35. Appellant represented himself. Roger Poole was stand-by counsel. R. 35. The jury found Appellant guilty as charged. R. 280, line 18 – R. 281, line 14. Judge Macaulay sentenced Appellant to twenty years' imprisonment on each count of attempted murder, to twenty years' imprisonment for armed robbery, and to five years' imprisonment for the firearm charge. He ordered all sentences to be served concurrently. R. 292, lines 8-25; R. 298.

Appellant filed a timely notice of appeal. This brief follows.

ARGUMENT

In violation of Appellant's right to a jury trial pursuant to the Sixth and Fourteenth Amendments to the United States Constitution and Article I, section 14 of the South Carolina Constitution, the trial judge erred in failing to instruct the jury that in order to convict Appellant of attempted murder the jury must find that Appellant acted with a specific intent to kill.

Relevant facts

On August 14, 2012, two men, Antron Oglesby and Christopher Scott, arrived in a car with two women at an apartment complex in Spartanburg. The women exited the car on the pretense of delivering keys to a resident of the apartment complex. R. 189, line 23 – R. 192, line 1; R. 205, line 24 – R. 206, line 24.[1] The foursome had been drinking alcohol earlier in the evening. R. 192, lines 14-19; R. 196, lines 10-16. Shortly after the women exited the car, two men, who were later identified as Appellant and Kendall Robinson, approached the car. Robinson was armed with an assault rifle; Appellant was unarmed. R. 193, line 3 – R. 195, line 3; R. 207, line 22 – R. 209, line 7; R. 211, lines 9-22; R. 219, line 21 – R. 220, line 19; R. 222, lines 3-4. Robinson opened the door of the car and began shooting. R. 193, lines 3-9; R. 195, lines 6-24; R. 209, lines 8-13. Oglesby and Scott managed to escape the car and run in opposite directions. R. 195, line 25 – R. 196, line 9; R. 196, lines 19-25; R. 209, line 14-24; R. 222, lines 10-16. However, Appellant and Robinson caught Oglesby. The two beat Oglesby and stole his clothes and money. R. 197, line 1 – R, 198, line 10; R. 199, lines 14-17; R. 222, lines 1-24; R. 225, lines 4-19. According to

[1] Robinson testified against Appellant. He claimed that he, Appellant, and the two women planned to rob Oglesby. R. 218, line 1 – R. 219, line 20.

Robinson, he dropped the rifle during the chase, and Appellant picked it up. R. 222, lines 17-24.

Oglesby then walked several miles to a residence where he was picked up by an ambulance. Oglesby claimed he was shot several times: "A shot, a shot, you know, grazed my head and a bullet still in my toe and got shot in my leg through - - came out the other side of my right leg. And my left toe had a bullet still in it." R. 198, line 17 – R. 199, line 13. Scott claimed he suffered two leg wounds as a result of the shooting. R. 210, lines 21-22.

At the conclusion of the trial, the judge charged the jury concerning the elements of attempted murder. After the judge instructed the jury regarding expressed and implied malice, the judge charged the jury regarding intent as follows:

> A specific intent to kill is not an element of intent to murder. There must be a general intent to commit serious bodily injury. Intent means obtaining a result which actually occurs, not accidentally or involuntarily. Intent may be shown by acts or conduct of the defendant and to other circumstances which you may naturally and reasonably infer – – from which you may naturally and reasonably infer intent. Evidence of the character of the act, the character of the instruments use, the manner in which it was used, the purpose to be accomplished and the resulting wounds and injuries may be considered in determining the intent for which the act was committed. Intent may also be inferred if it is demonstrated that the defendant voluntarily and willfully commits an act, the natural tendency of which is to destroy another's life.

R. 259, line 13 – R. 260, line 4 (emphasis added).

Appellant, who was representing himself at trial, did not request a charge on specific intent. Further, Appellant did not object to the charge at the time it was given or after the completion of the jury charges.

Discussion

The Sixth Amendment to the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed...." U.S. Const. Am. VI. The Fourteenth Amendment forbids states to "deprive any person of life, liberty, or property, without due process of law." U.S. Const. Am. XIV. Pursuant to this Due Process Clause, the United States Supreme Court held an individual's right to a jury trial pursuant to Sixth Amendment is applicable to the states. Duncan v. Louisiana, 391 U.S. 145, 149-150 (1968); see also, State v. Warren, 273 S.C. 159, 255 S.E.2d 668 (1979). Additionally, South Carolina's Constitution provides that "Any person charged with an offense shall enjoy the right to a speedy and public trial by an impartial jury." S.C. Const. Art. I, § 14.

The South Carolina General Assembly recently created the crime of attempted murder. Lawmakers defined the offense as: "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. § 16-3-29 (emphasis added). The statute became effective on June 2, 2010. According to the Act, attempted murder replaced the common law crime of assault and battery with intent to kill: "wherever in the 1976 Code reference is made to the assault and battery with intent to kill, it means attempted murder as defined in Section 16-3-29." 2010 Act No. 273, § 7.C. Thus, the General Assembly was aware of the prior offense of assault and battery with intent to kill and the case law defining the common law offense.

Previously, assault and battery with intent to kill was defined as "an unlawful act of a violent nature to the person of another with malice aforethought, either express or

implied." State v. Hinson, 253 S.C. 607, 611, 172 S.E.2d 548, 550 (1970). Although assault and battery with intent to kill was a common law offense, a statute provided for its punishment: "The crime of assault and battery with intent to kill shall be a felony in this state and any person convicted of such crime shall be punished by imprisonment not to exceed twenty years." S.C. Code Ann. § 16-3-620 (2009).

In State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996), the South Carolina Supreme Court analyzed the offense of assault and battery with intent to kill and discussed the required elements of the offense. Based upon the traditional comparison of assault and battery with intent to kill to murder – that if the offense would have been murder had the victim died – and the lack of a specific intent requirement for murder, the Court held "the logical inference is that, likewise, a specific intent is not required to commit" assault and battery with intent to kill. Id. at 14-15, 479 S.E.2d at 51. The Court explained that although the offense required both an intent to kill and malice, the offense did not require a specific intent to kill. Id. at 15, 479 S.E.2d at 51. Thus, the Court held it sufficient "if there is some general intent, such as that heretofore applied in cases of murder in this state." Id.

In State v. Sutton, 340 S.C. 393, 398, 532 S.E.2d 283, 286 (2000), the South Carolina Supreme Court refused to recognize the offense of attempted murder. The Court explained that an attempt to commit murder requires a specific intent to kill. Specifically, the Court stated "[i]n general, '[a]ttempt is a specific intent crime.'" Id. at 397, 532 S.E.2d at 285 (citing 21 Am.Jur.2d Criminal Law § 176 (1998)). Further, the Court explained "'[t]he act constituting the attempt must be done with the intent to commit that particular crime.'" Id. (quoting 21 Am.Jur.2d Criminal Law § 176). "In the context of an 'attempt' crime, specific intent means that the defendant consciously intended the

completion of acts comprising the choate offense." Id. at 397, 532 S.E.2d at 285. The Court then distinguished attempted murder from assault and battery with intent to kill: "Attempted murder would require the specific intent to kill and conduct towards that end. ABIK requires an unlawful act of violence to the person of another with malice. Clearly, each offense has an element the other does not." Id.

Repeatedly, South Carolina's appellate courts have held that attempt crimes require specific intent to complete the acts comprising the principal offense. See State v. Green, 397 S.C. 268, 283, 724 S.E.2d 664, 671-672 (2012); State v. Reid, 393 S.C. 325, 329, 713 S.E.2d 274, 276 (2011); State v. Evans, 216 S.C. 328, 332, 57 S.E.2d 756, 758 (1950) (stating "[t]he law does not concern itself with the mere guilty intention, unconnected with any overt act"); State v. Quick, 199 S.C. 256, 19 S.E.2d 101 (1942) (same); State v. Atieh, 397 S.C. 641, 725 S.E.2d 730 (Ct. App. 2012); State v. Nesbitt, 346 S.C. 226, 231, 550 S.E.2d 864, 866 (Ct. App. 2001).

The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993). Under the plain meaning rule, the court should not alter the meaning of a clear and unambiguous statute. In re Vincent J., 333 S.C. 233, 235, 509 S.E.2d 261, 262 (1998) (citations omitted). Where the statute's language is plain and unambiguous, conveying a clear and definite meaning, the rules of statutory interpretation are not needed and the court should not impose another meaning. Id. (citing Paschal v. State Election Comm'n, 317 S.C. 434, 454 S.E.2d 890 (1995)). "What a legislature says in the text of a statute is considered the best evidence of the legislative

intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

The clear and unambiguous meaning of the statute concerning attempted murder is a requirement of specific intent: "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. § 16-3-29 (emphasis added). If this Court determines the statute is ambiguous, then a review of South Carolina's case law demonstrates the legislature intended to require a specific intent to kill when it created attempted murder. The Supreme Court had held repeatedly that attempted murder required a specific intent to kill. In fact, our appellate courts had long maintained that attempt crimes are specific intent crimes. The legislature was aware of South Carolina's case law concerning attempted murder specifically, and attempt crimes in general. Therefore, the legislature understood that by creating the crime of attempted murder, the legislature was requiring a showing of specific intent.

This Court should reverse Appellant's conviction and sentence for attempted murder based upon the trial judge's erroneous instruction. See State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010) ("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. Lee-Grigg, 374 S.C. 388, 405, 649 S.E.2d 41, 50 (Ct. App. 2007) ("A trial court has a duty to give a requested instruction that is supported by the evidence and correctly states the law applicable to the issues."); State v. Buckner, 341 S.C. 241, 247, 534 S.E.2d 15, 18 (Ct. App. 2000) ("In making a harmless error analysis, [the Court's] inquiry is not

what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered.").

Although the issue is not preserved for review, this Court should review the matter in the interests of justice. Appellant represented himself at trial; therefore, he will not have an opportunity to allege ineffective assistance of counsel in failing to raise this issue. The only opportunity to review this obvious and egregious error is on direct review. The law clearly requires a judge to instruct the jury that attempted murder, as codified, requires a specific intent to kill based on the plain meaning of the statute and South Carolina's jurisprudence governing "attempt" crimes. Thus, Appellant respectfully requests this Court reverse his convictions and sentences based on the trial judge's error in charging the jury that the crime of attempted murder does not require the state to prove a specific intent to kill.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and sentences and remand for a new trial.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of November, 2014.

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IN THE COURT OF APPEALS

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Javan F. Mays 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 Alexander S. Macaulay, which was held on November 18, 2013, 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 Javan F. Mays.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of November, 2014.

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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) Entire Transcript dated June 21, 2013
(2) Entire Transcript dated August 9, 2013
(3) Entire Transcript dated September 20, 2013
(4) Entire Transcript dated November 18, 2013
(5) Court's Exhibit # 1 (Note from Jury)
(6) True–billed indictments;
(7) Sentence sheets

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

November 12th, 2014

Susan B. Hackett

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Attorney for Appellant

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 12, 2014

Susan B. Hackett

Susan B. Hackett
Appellate Defender

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Javan F. Mays, #250287, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 12th day of November, 2014.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 12th day of November, 2014.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.