ORIGINAL

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LANCASTER COUNTY
Court of General Sessions

The Honorable Brian M. Gibbons, Circuit Court Judge

Appellate Case No. 2014-000083

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

MICHAEL E. HYATT,

APPELLANT.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial judge committed no error with respect to the jury charge where he re-charged the jury regarding precisely the matters the jury requested to re-hear.

STATEMENT OF THE CASE

Appellant was indicted in Lancaster County in December 2010 for attempted murder. On January 6-10, 2014, Appellant and his co-defendant were tried before the Honorable Brian M. Gibbons and a jury. The jury found Appellant guilty of the lesser-included offense of assault and battery of a high and aggravated nature, and Judge Gibbons sentenced him to nine years in prison. A timely notice of appeal was served and filed.

ARGUMENT

The trial judge committed no error with respect to the jury charge where he re-charged the jury regarding precisely the matters the jury requested to re-hear.

Relevant Facts

Appellant and his co-defendant (Appellant's son) were charged with attempted murder and tried jointly. At the end of the case, in addition to the standard charges on the burden of proof and the presumption of innocence, the trial judge charged the jury on attempted murder, assault and battery of a high and aggravated nature ("ABHAN"), assault and battery in the first degree, assault and battery in the second degree, and self-defense and defense of others. (R. p. 360-74). After deliberating for a period of time, the jurors sent out a note saying "[w]e need to hear you explain the charges again." (R. p. 375-77; p. 377, lines 12-13). The judge told the attorneys that he could "recharge the entire thing or I can ask them what specifically do you want me to charge you?" (R. p. 377, lines 13-15). Counsel for Appellant's co-defendant stated as follows: "I think we can inquire if there is a specific charge. I'm not saying that you can give whatever they're asking but --." (R. p. 377, lines 19-21). In response, the judge asked whether the attorneys wanted him to send a note back asking if there was a specific charge the jurors needed or whether he should bring the jurors into open court to inquire whether they needed a specific charge. (R. p. 377, lines 22-25). After hearing no preference from the attorneys, the judge stated he would respond on the piece of paper the jurors used, Court's Exhibit # 2. (R. p. 377, line 25 – p. 378, line 1). The judge wrote: "Do you want the entire charge or just a portion? If portion, what charge? Judge Gibbons." (R. p. 378, lines 2-3). There was no objection to this procedure. (R. p. 377-78).

Subsequently, the judge stated he had received a response from the jury. On Court's Exhibit # 2, at the top, someone wrote "Would you re-read the law?" (R. p. 378, lines 6-7). This was scratched out and the word "murder" was written below it. (R. p. 378, lines 7-8). The word "murder" was scratched out and "ABHAN" was written at the top. (R. p. 378, lines 8-10). However, the jury simultaneously sent out a separate note, Court's Exhibit # 3, clarifying its request. Court's Exhibit # 3 stated as follows: "We need the definition of attempted murder, assault and battery of a high and aggravated nature, assault and battery first degree, assault and battery second degree." (R. p. 378, lines 10-15). The judge stated, "[s]o it seems like all they want is for me to charge them the law of the offenses." Appellant's counsel did not object or respond on the record to the judge's comment. (See R. p. 378-79). Following an off-the-record debate regarding whether to provide the jury with a printed version of the charge or give a verbal re-charge, the judge stated that "[i]n response to the Court's Exhibit 3 I'm recharging the things that they requested which is attempted murder, ABHAN, A and B first, A and B second, that's all I'm going to charge, I'm going to do it verbally. They will not get my written charge." (R. p. 379, lines 3-7). The judge stated that "Ya'll's positions are in the record." (R. p. 379, lines 7-8).

Thereafter, the jury was brought into the courtroom and given a re-charge on attempted murder, ABHAN, and assault and battery in the first and second degrees. (R. p. 379-83). After sending the jury back to deliberate, the judge asked whether there were any objections to the charge. (R. p. 383, lines 3-6). At that point, Appellant's counsel stated that he wanted the jury to hear all of the charges they heard in the original jury charge "entirely and completely" to include self-defense. (R. p. 383, lines 9-14).

Counsel for the co-defendant stated he concurred in that objection and also renewed his objection to the exclusion of a charge on assault and battery in the third degree. (R. p. 383, lines 16-18). The judge responded that both positions were "protected" and denied the request to re-charge the entire jury charge, stating that "[the jurors] asked for those four elements and that's what I gave them." (R. p. 383, lines 19-21).

Discussion

Appellant contends the trial judge erred by refusing to re-charge self-defense when he re-charged the jury on attempted murder and three lesser-included offenses in response to the jury's question. This argument is without merit where the trial judge re-charged precisely what the jury asked of him.

In State v. Nichols, the defendant was charged with murder and criminal conspiracy. On appeal, the defendant contended the trial judge erred failing to include self-defense instructions in a re-charge to the jury. Our Supreme Court stated as follows:

> After deliberation began, the jury asked the court to clarify the law regarding murder, voluntary manslaughter and conspiracy. The court replayed the court reporter's tape of those portions of the charge, but did not include the self-defense instructions. Appellant's counsel objected to the limited recharge. The court declined to recharge self-defense since the jury did not specifically ask for clarification on the law of self-defense. When a jury requests an additional charge, it is sufficient for the court to charge only those matters necessary to answer the jury's request. We find no error here.

State v. Nichols, 325 S.C. 111, 188-19, 481 S.E.2d 118, 122 (1997) (citations omitted).

In State v. Anderson, a murder case, the judge charged the jury on murder and involuntary manslaughter. State v. Anderson, 322 S.C. 89, 470 S.E.2d 103 (1996). At the defendant's request, he also gave a King charge regarding resolving reasonable doubt in favor of the lesser-included offense. Id. After the jurors deliberated for about two

hours, they requested the judge re-charge them on the definitions of murder, malice, and involuntary manslaughter. Id. The judge gave the requested charges and, when asked whether or not he had an exception to the charge, defense counsel requested that the re-charge be supplemented with another King charge. Id. The trial judge pointed out that he had already provided the King charge in his initial instructions to the jury and denied defense counsel's request. Id.

On appeal, the defendant argued that the trial judge erred by refusing to give the jury a second King instruction during the re-charge. The South Carolina Supreme Court rejected the defendant's argument, stating as follows:

> It is well established in South Carolina that "[w]hen a jury requests an additional charge, it is sufficient for the court to charge only those matters necessary to answer the jury's request." State v. Barksdale, 311 S.C. 210, 216, 428 S.E.2d 498, 502 (Ct. App.1993); accord Corbin v. Prioleau, 260 S.C. 171, 194 S.E.2d 875 (1973); Rauch v. Zayas, 284 S.C. 594, 327 S.E.2d 377 (Ct. App.1985). Here, the trial judge gave the King charge as part of his original instructions. The jury requested a recharge only on the definitions of murder, malice, and involuntary manslaughter, and the recharge was properly limited to answering the jury's question. We find no error.

Anderson at 94, 470 S.E.2d at 106.

In State v. Barksdale, this Court stated as follows:

> The appellants also assert the trial court erred when it refused to recharge the jury with the definition of a mob after the jury requested the court to recharge them on the definitions of first degree lynching and self-defense. They claim that the definition of mob was essential to understanding the definition of lynching.
>
> After the trial court charged the jury and it began deliberations, the jury requested a recharge on lynching and self-defense. The court recharged the statutory definition of lynching and asked the jury if it needed to be read the statutory definition of a mob. The jury replied in the negative. Appellants claim the failure to recharge the definition of a mob placed emphasis on the act of violence without emphasizing that the act had to be

> done by an assemblage with the premeditated purpose and premeditated intent of committing the act.
>
> We find no error in the court's refusal to recharge the definition of mob. When a jury requests an additional charge, it is sufficient for the court to charge only those matters necessary to answer the jury's request. Corbin v. Prioleau, 260 S.C. 171, 175, 194 S.E.2d 875, 876 (1973); Rauch v. Zayas, 284 S.C. 594, 597, 327 S.E.2d 377, 378 (Ct.App.1985).

State v. Barksdale, 311 S.C. 210, 216, 428 S.E.2d 498, 502 (Ct. App. 1993).

Here, Appellant concedes that State v. Anderson and State v. Barksdale contain the relevant law on this issue, but asserts that his case is "easily distinguished" from these cases because the jury demonstrated "confusion regarding the matter" and "[t]his confusion could have been remedied by a proper re-charge on the criminal offenses and the affirmative defenses."[1] (Brief of Appellant, p. 9-10). Appellant's argument is without merit because the jury's final note, Court's Exhibit # 3, made it abundantly clear exactly what the jury was requesting. Moreover, none of the jury notes indicated any confusion whatsoever with regard to self-defense.[2]

Appellant also contends that the judge should have re-charged the jury regarding self-defense because "self-defense and defense of others become elements of the criminal offenses when the burden is placed on the state to disprove them beyond a reasonable doubt." (Brief of Appellant, p. 11). However, such an argument was rejected in State v. Nichols, where our Supreme Court held that it was not error for the trial judge to re-charge the jury on murder, voluntary manslaughter and conspiracy without re-charging self-defense. State v. Nichols, 325 S.C. at 188-19, 481 S.E.2d at 122. Here, the judge

[1] Appellant did not argue below that the jury notes indicated confusion. He also made no assertion below that the judge's failure to re-charge self defense violated his constitutional rights to due process of law and a jury trial. (See R. p. 377-83). See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("Issues not raised and ruled upon in the trial court will not be considered on appeal." (citation omitted)).

[2] Note that in Court's Exhibit # 2, the jury initially asked to hear "the charges" again. As the solicitor assumed, it is likely the jury meant the law regarding the offenses, i.e., the "charges" against the defendants, rather than the entire jury charge. (See R. p. 377, lines 16-17; p. 398).

properly inquired about specific charges needed by the jury and properly re-charged the jury only on those matters. The facts of this case do not support a departure from the well-established rule set forth in Nichols, Anderson, and Barksdale. Appellant's contentions are without merit and his conviction should be affirmed.

CONCLUSION

For the reasons discussed above, the State requests that this Court affirm Appellant's conviction and sentence.

Respectfully submitted,

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December 31, 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 April 15, 2014, order entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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PROOF OF SERVICE

The undersigned attorney hereby certifies that the **Final Brief of Respondent** in the above-referenced case has been served upon **Susan B. Hackett**, South Carolina Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, South Carolina, 29211-1589, this **31st** day of **December, 2014.**

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