STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Alison Renee Lee and Paul M. Burch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMIL OMIRE ALI,

APPELLANT

APPELLATE CASE NO. 2017-002044

ANDERS BRIEF OF APPELLANT

ROBERT M. DUDEK
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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by charging the jury -- in this failure to stop for a blue light, great bodily injury results case -- "the fact that other causes contribute to the injury does not relieve the defendant from responsibility," where the injured police officer was not wearing her seatbelt, and there was strong evidence the officer was driving in a negligent fashion when she hit another car after crossing the center line which caused her injuries, and this jury instruction improperly made the intervening causes irrelevant, and the blue light offense a strict liability offense on the great bodily injury element?

STATEMENT OF THE CASE

Appellant was indicted at the July 21, 2016, term of the York County Grand Jury for failure to stop for a blue light, great bodily injury results. R. 338 – 339. His case was called to trial on November 15, 2016, before the Honorable Allison R. Lee, and a jury. Mark McKinnon represented appellant. Assistant solicitors Aaron Hayes and Christopher Epting prosecuted the case. R. 1.

On November 17, 2016, the jury found appellant guilty of failure to stop for a blue light, great bodily injury results, rather than the lesser offense of simple failure to stop for a blue light. R. 323, ll. 8-15.

This was a trial in the absence, and the Honorable Paul M. Burch announced Judge Lee's sentence of seven years imprisonment on September 22, 2017. R. 335, ll. 10-18.

This appeal follows.

STANDARD OF REVIEW

"In criminal cases an appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Id.

ARGUMENT

The court erred by charging the jury -- in this failure to stop for a blue light, great bodily injury results case -- "the fact that other causes contribute to the injury does not relieve the defendant from responsibility," where the injured police officer was not wearing her seatbelt, and there was strong evidence the officer was driving in a negligent fashion when she hit another car after crossing the center line which caused her injuries, and this jury instruction improperly made the intervening causes irrelevant, and the blue light offense a strict liability offense on the great bodily injury element.

Relevant Facts

Prior to trial, the solicitor made a motion to prohibit the defense from referencing any fault on the part "of the victim officer in this case because that necessarily gets to the issue of proximate causation and proximate causation is omitted from the [blue light] felony -- well, failure to stop for a blue light with great bodily injury statute." R. 24, ll. 7-15. The solicitor argued this was significant because, in his opinion, the felony DUI statute, S.C. Code § 56-5-2945, did involve proximate cause on the great bodily injury element. R. 24, l. 16 – 25, l. 5.

The judge observed that the way the indictment read "there should be some connection between the act that was done or neglected . . . and the great bodily injury that resulted to the victim." R. 25, ll. 13-17. The indictment alleged that appellant failed to stop for a blue light, and/or "did an act forbidden by law or neglected a duty which resulted in great bodily injury to Marina Arbelo [the police officer]." R. 338.

Defense counsel would repeatedly complain that the solicitor's use of the term "getting the ball rolling" by running from the blue light meant that the state was arguing this was a strict liability crime. Meaning, if a defendant failed to stop for a blue light, he was responsible for the

great bodily injury to whatever victim regardless of how that injury came about. R. 26, l. 25 – 28, l. 16.

The solicitor continued to complain that the defense wanted to argue "intervening causation" but that it should not be allowed to "point the finger at the officer as at fault." While the judge seemed to be agreeing with the solicitor's argument, she said she was not going to "hamstring" the defense on how it wished to present its case on proximate cause. R. 29, l. 9 – 32, l. 10.

Trial facts

Marina Arbelo was the York County Sherriff's Deputy at issue. She had never testified in court prior to this case, and she had only been a deputy for two years at the time of the trial. R. 94, ll. 2-16. Arbelo had been a deputy for about a year and a half when the incident in this case occurred on April 5, 2016. R. 97, ll. 13-16; R. 338.

Arbelo was patrolling on Carowinds Boulevard that afternoon where the speed limit was apparently only 35 mph. Arbelo pulled over a blue sedan because its temporary paper tag from the dealer was improperly placed in the back window. Arbelo said there was only one person in the vehicle when she approached and spoke to the driver. Arbelo remembered that the driver identified himself as "Mr. Jamil Ali." She asked him for his driver's license, registration, and proof of insurance. "Mr. Ali at that point stated that he, he did not have a driver's license to provide me, but he could provide me his name and date of birth, of which he did." R. 111, l. 17 – 112, l. 12.

Arbelo returned to her police cruiser and was informed by dispatch that appellant's North Carolina driver's license was suspended. Arbelo walked back to the blue sedan and asked the

driver to step outside. "It was at that time that he placed his car in drive and sped off." R. 112, l. 17 – 113, l. 2.

Arbelo returned to her patrol car "put the car in drive and pursued after him." Arbelo admitted the chase was "approximately eighty miles an hour at times" -- in this 35-mph zone -- and that she crossed the divided cement median into oncoming traffic and collided with another vehicle "that was not Mr. Ali, [it was] another individual." R 113, l. 4 – 115, l. 13. Arbelo was taken by ambulance to the hospital, and she had surgery to insert screws and a plate into her broken collarbone weeks later. That surgery was performed on April 21, 2016, by Dr. William Graham. R. 117, l. 1 – 119, l. 11. Arbelo estimated that she was out of work for about two and a half months following the surgery.[1] R. 119, ll. 12-21.

On cross-examination, Arbelo admitted that she "pulled" appellant's vehicle in this case because the paper tag was not in the proper place. Again, the paper tag was in the back window. R. 123, l. 12 – 124, l. 16.

Arbelo acknowledged that she never attempted to reach her supervisor by dispatch to get permission to continue an eighty-mile-an-hour search over an improperly placed paper tag infraction. R. 124, l. 17 – 126, l. 19. Arbelo did claim she told her supervisor over the radio she was going eighty miles an hour, but she did not tell him the underlying "offense that had been committed." Arbelo maintained it was her supervisor's "position to call off the pursuit," and she claimed to not have any discretion on the matter of, or mode of, pursuit. R. 126, l. 2 – 129, l. 13.

Sergeant James Brown, III, was the supervisor in this case. R. 130, l. 9 – 132, l. 6. Brown testified that he went to the scene of his officer's accident. Again, the accident did not

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[1] Dr. Graham would later testify that he inserted a plate and screws to "fuse the two bones back together." R. 219, l. 18 – 221, l. 8. Dr. Graham said surgery was not always required for this type of injury but "in a laborer or anyone who works with their arms in any kind of physical capacity it's useful to have a normal anatomy restored." R. 221, ll. 6-8.

involve appellant. R. 131, l. 22 – 132, l. 19. On cross-examination, Brown admitted he did not know if the temporary tag on the vehicle was a North Carolina or South Carolina temporary tag or what dealership it involved. R. 137, ll. 18-25. Brown admitted he had the power to stop the high-speed pursuit, that he was aware of the traffic conditions on Carowinds Boulevard, and he acknowledged that there were different standards for high-speed pursuits for different crimes. Meaning a homicide would be treated much differently than an ordinary traffic violation when the propriety of continuing a high speed case was involved. R. 141, ll. 1-4.

Brown admitted Arbelo was not wearing a seatbelt, in violation of Sherriff's Department policy, at the time of the accident. R. 141, ll. 5-15.

At the charge conference, defense counsel McKinnon objected to the judge's proposed proximate cause instruction. He argued the instruction that the "defendant's act may be regarded as a proximate cause if it is a contributing cause of the injury to the victim and . . . *the fact that other causes contributed to the injury does not relieve the defendant from responsibility.*" Counsel argued these instructions were confusing, prejudicial, and erroneous. R. 261, l. 15 – 262, l. 2. (emphasis added). The judge ruled these were correct statements of the law, and she overruled the defense objections. R. 261, l. 15 – 262, l. 16.

In his closing argument, the solicitor argued "in the bottom line, like I told you when we first started this case, Jamil Ali **set in motion a chain of events** that led to Deputy Arbelo on the operating table with a broken collarbone, and it's time to hold him accountable. And it's time to hold him accountable by finding him guilty of failure to stop for a blue light resulting in great

bodily injury and we ask that that's what your verdict be."[2] R. 282, ll. 11 – 18. (emphasis added).

Defense counsel attempted to argue that the "set in motion a chain of events," was "not the law of proximate cause." R. 282, l. 20 – 283, l. 16. The judge charged, over appellant's objection, that "the defendant's act may be regarded as proximate cause if it is a contributing cause to the injury of the victim . . . [and] the fact that other causes may also contribute to the injury of the victim does not relieve the defendant from responsibility." R. 308, ll. 5-14.

After the jury was charged, defense counsel noted his earlier objection to this instruction. The jury asked to be charged on proximate cause again, and the judge gave the same instruction on more than one proximate cause and the defendant not being relieved of responsibility if other causes also contributed to the injury. R. 319, l. 21 – 321, l. 16.

Discussion

Proximate cause requires proof of both causation in fact and legal cause. Oliver v. South Carolina Department of Hwys. and Pub. Transp., 309 S.C. 313, 422 S.E.2d 128 (1992). "The touchstone of proximate cause in South Carolina is foreseeability." Coster v. Carolina Rental Ctr. Inc., 313 S.C. 490, 443 S.E.2d 392 (1994).

An injury is foreseeable if it is a natural and probable consequence of the breach of duty. Foreseeability is determined by looking to the natural and probable consequences of the acts complained of in a case. Newton v. South Carolina Pub. Rwys. Comm'n., 319 S.C. 430, 462 S.E.2d 266 (1995); Goode v. St. Stephens United Methodist Church, 329 S.C. 433, 494 S.E.2d 827 (Ct.App. 1998).

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[2] The solicitor successfully got a simple failure to stop for a blue light instruction over defense objections. The state seemingly wanted this lesser-included offense charged based on its concern over proximate cause. R. 257, l. 1 – 258, l. 8.

In this case, the issue of proximate cause was for the jury. The jury was naturally going to find appellant failed to stop for a blue light in this case. The problem with the court's jury instruction was that it charged that other causes contributing to the injury of the victim did not relieve appellant from responsibility [a guilty verdict], and made this a strict liability case as defense counsel objected to all along. There were two elements to the offense: (1) Failure to stop for a blue light; and, (2) the defendant's failure to stop proximately caused the victim's great bodily injury. The jury instruction here relieved the state of having to prove prong two since appellant was still guilty (not relieved of responsibility) despite the officer's grossly irresponsibly action in giving chase at 80 mph in a 35 mph zone over an improperly placed paper tag. The "not relieved of responsibility proximate cause instruction" might have been proper in a civil negligence case, but here it relieved the state of its burden of proving element two of the criminal offense – much less beyond a reasonable doubt -- which was improper. See In re Winship, 397 U.S. 358 (1970).

The jury could have found that the officer engaging in an eighty mile an hour chase of appellant in a thirty-five mile an hour road over an improper displayed paper tag was unreasonable, and that it was a breach of due care to the motorists in York County. The jury could also have determined that the officer crossing a cement median to go into the other lane of traffic, and hitting another car was grossly negligent.

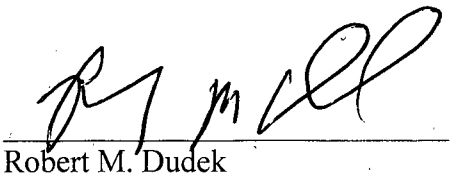
However, the solicitor's argument had great jury appeal in that it told the jury that if appellant "set the wheels in motion" by failing to stop for a blue light that he was guilty for the great bodily injury that followed regardless of the officer's failure to wear a seatbelt, her being involved in an eighty mile per hour chase over a paper tag, and the lack of foreseeability that the officer would go over a concrete median into the oncoming traffic and hit another vehicle.

Proximate cause, almost as always, was one of fact for the jury. McNair v. Rainsford, 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998). Here, the judge's jury instruction that appellant remained responsible for the officer's injuries regardless of other contributory causes -- the officer's own negligence and breach of her duty of safety to other motorists over a paper tag, no less -- charged the jury that appellant had to be held responsible [convicted] and this denied appellant his right to jury instructions which enlighten the jury and aid it in arriving at a correct verdict. See State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016). Moreover, criminal statutes are supposed to be strictly construed against the state, and in favor of the defendant. Hair v. State, 305 S.C. 77, 406 S.E.2d 332 (1991).

Appellant should be granted a new trial.

CONCLUSION

By reason of the foregoing argument, appellant's conviction should be reversed, and this case remanded to the York County Court of General Sessions for a new trial.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of October, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Alison Renee Lee and Paul M. Burch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMIL OMIRE ALI,

APPELLANT.

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jamil Omire Ali states:

1. He is Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. He has reviewed the record of appellant's trial before Judge Alison Renee Lee, which was held on November 15, 2016 and November 17, 2016, and appellant's sentencing hearing before Judge Paul M. Burch, which was held on September 22, 2017, and in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He 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, He asks the Court to relieve him as counsel for Jamil Omire Ali.

Respectfully Submitted,

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

This 17th day of October, 2018.

STATE OF SOUTH CAROLINA
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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) True-billed indictment
(2) Trial Transcript dated November 15, 2016
(3) Trial Transcript dated November 17, 2016
(4) Sentencing hearing dated September 22, 2017

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

October 17, 2018

Robert M. Dudek
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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."

October 17, 2018.

Robert M. Dudek
Chief Appellate Defender

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CERTIFICATE OF SERVICE

The undersigned 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 J. Benjamin Aplin, 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 have been served on Jamil Omire Ali, 374055, at Wateree River Correctional Institution, PO Box 189, Rembert, SC 29128-0189, this 17th day of October, 2018.

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 17th day of October, 2018.

(L.S)
Notary Public for South Carolina
My Commission Expires: July 26, 2028