STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

Honorable J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JODY RAY THOMPSON,

APPELLANT

APPELLATE CASE NO. 2019-000313

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err by refusing to instruct the jury on the lesser included offense of second degree assault and battery when there was evidence upon which the jury could have found Appellant committed only the lesser offense instead of the indicted offense of attempted murder?

STATEMENT OF THE CASE

A Spartanburg County Grand Jury indicted Appellant on January 11, 2017 for four counts of attempted murder, possession of a weapon during the commission of a violent crime, and unlawful carrying of a pistol. R. *. His case was called to trial on February 11, 2019 before the Honorable J. Derham Cole, and a jury. Tr. 1. Assistant Solicitors Spenser Smith and Jennifer Jordan represented the state. Tr. 1. Clay Allen represented Appellant. Tr. 1.

On February 14, 2019, the jury found Appellant guilty of two counts of attempted murder, two counts of the lesser included offense of assault and battery of a high and aggravated nature (ABHAN), and both weapon offenses. Tr. 506, ll. 7-20. He was sentenced to twenty years for attempted murder, ten years concurrent for the second count of attempted murder, ten years concurrent for ABHAN, five years concurrent for possession of a weapon during the commission of a violent crime, and one year concurrent for unlawful carrying of a pistol. Appellant was also sentenced to ten years suspended to five years' probation for the second count of ABHAN to be served consecutively to his twenty year sentence for attempted murder. Tr. 514, l. 19 – 516, l. 13.

This appeal follows.

STANDARD OF REVIEW

"In reviewing jury charges for error, we examine the trial court's charge as a whole in light of the evidence and issues presented at trial." State v. Williams, 427 S.C. 148, 156, 829 S.E.2d 702, 706 (2019) (citing State v. Mattison, 388 S.C. 469, 478, 697 S.E.2d 578, 583 (2010)). "The trial court is required to charge a jury on a lesser-included offense if there is any evidence from which it could be inferred the lesser, rather than the greater, offense was committed." Id. (quoting Suber v. State, 371 S.C. 554, 559, 640 S.E.2d 884, 886 (2007)) (internal quotation marks omitted). "In determining whether the evidence requires a charge on a lesser-included offense, we view the facts in the light most favorable to the defendant." Id. (citing State v. Byrd, 323 S.C. 319, 321, 474 S.E.2d 430, 431 (1996)).

STATEMENT OF FACTS

During the early morning hours of June 26, 2016, a shooting occurred outside Playoffs, a bar in Lyman. Four people were injured, including Appellant, who was shot in the leg. Leading up to the shooting, there was significant tension between several patrons at the bar.

Ramone Smith testified that he was standing outside the bar when a man, who he did not know, began pouring beer at Smith's feet. Tr. 206, ll. 1-9. The unknown man was later identified as Stephone Anderson. Smith and Anderson were about to fight when Appellant stood in between them and "stopped it." Anderson ultimately walked away and Appellant followed. Tr. 206, ll. 10-20. Smith went inside the bar. About ten minutes later, Smith went back outside. Tr. 208, ll. 17-24. Once outside, Anderson approached Smith again and began asking, "What's going on? Why do you want to fight me?" Tr. 209, ll. 5-13. Appellant again intervened. He and Anderson ultimately walked off towards the right side of the bar where a convenience store and gas station was located. Tr. 209, ll. 5-14. Smith remained outside in the parking lot in front of the bar.

While tensions were high, Cassandra Rice, who knew both Appellant and Smith since childhood, attempted to "diffuse the situation." She told everyone to go home and "it ain't worth it" since they all had children. Tr. 187, ll. 1-7. Rice claimed she saw Appellant with a gun. She said while they were all outside, Appellant kept pulling his shirt up to reveal the pistol on his side. Tr. 187, l. 20 – 188, l. 1. Rice claimed she eventually saw Appellant take his gun out and shoot Corey Glenn, a friend of Smith. Tr. 188, ll. 2-25. Appellant then fired towards Smith and Rice. A bullet scraped Rice's right temple, which started to bleed. Tr. 189, ll. 1-13.

Smith testified that while Rice was telling everyone to leave and "y'all don't need to do this," Smith "realized somebody was shooting." Tr. 209, l. 21 – 210, l. 1. When he turned

around, he allegedly saw Appellant with a gun shooting in Smith's direction. Tr. 209, l. 21 – 210, l. 2. Smith, who had a concealed weapons permit, reached for his gun and began firing back at Appellant while walking backwards. Tr. 210, ll. 11-21. After Smith shot about eight or nine times, Appellant took off running. Tr. 211, ll. 11-13. After Appellant ran, Smith heard Rice say she was "hit." Tr. 211, ll. 16-18. After checking on Rice, Smith walked around to the side of the building where Appellant had run and shot twice "to make sure he wasn't coming back." Tr. 211, ll. 16-25.

Smith then fled. He dropped Corey Glenn off at the hospital and then went home. Tr. 211, l. 22 – 212, l. 9. Rice tried to drive herself to the hospital but discovered one of the tires on her car had been shot and damaged. A friend named "Dang Dang" ultimately drove Rice to the hospital. Tr. 189, l. 18 – 190, ll. 3.

Renata Irby, who was at the bar that night, was also injured during the shooting. She did not know Appellant, Smith, Glenn, or Rice. Tr. 232, ll. 17-24. She testified that while she was playing pool inside the bar, she saw a group of men in white shirts walking out the front door followed by the owner of the bar. Tr. 235, ll. 19-25. She went to the window to see what was going on, but one of her friends told her to back away so she did. Tr. 236, ll. 1-3.

About ten minutes later, Irby decided to go home. Once outside, she walked directly to her car, which was parked next to a gas pump in front of the bar. As soon as she got into her car, Irby "just felt like something wasn't right." Tr. 236, ll. 3-11. She opened her glove compartment and removed her gun. Immediately thereafter, "gunshots started going off." Tr. 236, ll. 20-25. Irby felt a burning sensation in her leg and noticed she had been shot. Tr. 237, ll. 1-5. She turned her hazard lights on to try to get someone's attention to let them know she had been shot. Tr. 237, ll. 5-10. Eventually someone pulled her from her car and put pressure on her wound.

Tr. 238, ll. 5-11. At some point she lost consciousness. Tr. 238, ll. 16-19. She was ultimately transported to the hospital by an ambulance. Tr. 238, ll. 12-15. Irby did not see who fired the shots. Tr. 239, ll. 4-17.

After the shooting, two law enforcement officers found Appellant in the woods behind the establishment bleeding heavily from a gunshot wound to his left calf. Tr. 295, l. 12 – 296, l. 14; Tr. 305, l. 16 – 307, l. 12; State's Exhibit No. 42 (Body Camera Footage). Anderson was with him. When first questioned, Appellant said he did not have a weapon and did not know who shot him. Tr. 296, ll. 18-21; Tr. 297, ll. 18-25; State's Exhibit No. 42 (Body Camera Footage). After he was treated and released from the hospital, Appellant was questioned again. He admitted he fired a gun that morning in self-defense. State's Exhibit No. 59 (DVD of Defendant's Statement).

Appellant explained that the bar was "packed" and he knew "something was about to go down." He was trying to be a "peacemaker" and deescalate the situation. Out of nowhere, Appellant heard shots being fired. "There were so many people shooting." State's Exhibit No. 59 (DVD of Defendant's Statement). Appellant admitted to firing one or two shots behind him as he was running away. He ran around the right side of the convenience store into the woods behind the building. He did not realize he had been shot until he reached the woods. State's Exhibit No. 59 (DVD of Defendant's Statement). Appellant admitted to leaving his weapon in the woods near where the police found him. He was adamant that if he had not been paying attention that morning, "he wouldn't be here today." State's Exhibit No. 59 (DVD of Defendant's Statement).

Appellant's .40 caliber Taurus handgun, which was admitted as State's Exhibit No. 31, and Smith's .40 caliber Glock handgun, which was admitted as State's Exhibit No. 39, were

submitted for testing. Tr. 356, ll. 17-24. Of the twenty-three .40 caliber fired cartridge casings collected from the scene, thirteen were identified as being fired by the Glock Smith admitted to shooting and seven were identified as being fired by the Taurus Appellant admitted to shooting. Tr. 360, ll. 1-9; R. * (State's Exhibit No. 13). However, three were not fired by either the Glock or the Taurus meaning a third unidentified gun was fired that morning. Tr. 360, ll. 10-11; R. * (State's Exhibit No. 13). Additionally, while the fired bullets removed from Irby and Glenn bore "similar microscopic marks" and "rifling characteristics" to bullets fired by Appellant's Taurus, there were insufficient markings for identification. Tr. 359, ll. 2-25; R. * (State's Exhibit No. 13).

Surveillance cameras at the convenience store and bar captured some of the altercation and shooting. The footage was admitted as State's Exhibit No. 57 and is on file with this Court. The footage shows at least one other person besides Smith and Appellant with a gun. Tr. 341, l. 1 – 343, l. 8. However, law enforcement was never able to identify this person. Tr. 342, ll. 9-14.

As far as injuries, Rice testified that the bullet "scraped" the skin near her temple. Tr. 189, ll. 1-4. The wound "burned" and immediately began bleeding. Tr. 189, ll. 9-15. Photographs of her wound taken at the hospital were marked and admitted as State's Exhibit Nos. 157 and 158. Tr. 196, ll. 1-10; R. *. Irby got shot in the right leg. Tr. 237, ll. 4-12. She claimed she lost consciousness at some point before she was transported to the hospital. Tr. 238, ll. 12-23. A bullet remained in her leg until July 20, 2016 when a specialist was able to remove it. Tr. 242, ll. 2-19; Tr. 253, l. 1 – 254, l. 10. Photographs of her injury were marked and admitted as State's Exhibit Nos. 159 and 160. Tr. 242, l. 25 – 243, l. 10; R. *.

Glenn, who did not testify, was shot in the foot. Sara Kruger, an officer with the Spartanburg County Sheriff's Office, photographed Glenn's injuries while he was in the hospital

shortly after the shooting. Tr. 279, l. 8 – 280, l. 17. Kruger testified that she observed two holes in Glenn's right shoe "on the toe end." Tr. 280, ll. 18-23. There was a black sock inside the shoe that appeared to have "small pieces of bone fragment." Tr. 280, ll. 7-11. Kruger photographed Glenn lying in a hospital bed with his right foot wrapped as well as the holes in his right shoe. She also photographed what appeared to be a "graze" wound to Glenn's right arm and the shirt he had been wearing with a dark mark on the right sleeve. These photographs were marked and admitted as State's Exhibit Nos. 163, 166, 167, and 168. Tr. 280, l. 24 – 281, l. 21; R. *. Glenn had surgery that same morning to remove the bullet in his foot. Tr. 287, ll. 1-21.

The jury ultimately found Appellant guilty of attempted murder as to Smith and Rice and the lesser included offense of assault and battery of a high and aggravated nature as to Irby and Glenn. Tr. 506, ll. 7-20.

ARGUMENT

The trial judge erred by refusing to instruct the jury on the lesser included offense of second degree assault and battery when there was evidence upon which the jury could have found Appellant committed only the lesser offense instead of the indicted offense of attempted murder.

Relevant Facts

During the charge conference, Appellant requested the trial judge instruct the jury on the lesser included offense of second degree assault and battery as to all four counts of attempted murder. Tr. 421, ll. 6-17; Tr. 429, ll. 18-20. Defense counsel explained that second degree assault and battery occurs when a person unlawfully "injuries or offers or attempts to injure [another person] with present ability [to do so] and moderate bodily injury to another person results or could have resulted." Tr. 421, ll. 18-22. After defining moderate bodily injury pursuant to S.C. Code Ann. § 16-3-600(A)(2), counsel argued the jury could find Appellant guilty of this lesser offense as opposed to attempted murder. Tr. 421, l. 23 – 422, l. 8.

The assistant solicitor did not object to the judge charging the jury with the lesser included offense of second degree assault and battery. The solicitor conceded the statute "does have the part about an unlawful injury or the offers or attempts" language. Tr. 424, ll. 13-15. He further admitted that there was little testimony about the significance of the injuries suffered by Rice, Glenn, and Irby. Tr. 424, ll. 16-17. The solicitor merely maintained that the state was "proceeding mostly under the ABHAN part of accomplished by means likely to produce great bodily injury or death, and attempted murder as well." Tr. 424, ll. 17-20.

The trial judge denied the request. He asserted, "I find that in this case it's undisputed that . . . any offense was committed by the use of a firearm, and therefore [second degree assault

and battery is] not applicable in this case." Tr. 429, ll. 21-24. In so ruling, the judge maintained, "[A]ny time you use a firearm, that clearly is likely to produce death or great bodily injury." Tr. 428, ll. 19-22; See Tr. 429, ll. 6-8. Essentially, the judge concluded that anytime one uses a firearm and strikes another person, moderate bodily injury could never result.

At the conclusion of the jury charge, defense counsel renewed his request for a charge on second degree assault and battery for all four counts of attempted murder. Tr. 504, ll. 19-22. The judge merely noted counsel's exception to the charge. Tr. 504, l. 1.

The judge ultimately charged the jury on attempted murder, assault and battery of a high and aggravated nature as to Irby, Rice, and Glenn, and first degree assault and battery as to Smith. Tr. 481, l. 2 – 487, l. 14; Tr. 497, l. 2 – 498, l. 10.

Discussion

The trial judge erred by refusing to instruct the jury on the lesser included offense of second degree assault and battery when there was evidence upon which the jury could have found Appellant committed only the lesser offense instead of the indicted offense of attempted murder.

"The trial court is required to charge a jury on a lesser-included offense if there is any evidence from which it could be inferred the lesser, rather than the greater, offense was committed." State v. Williams, 427 S.C. 148, 156, 829 S.E.2d 702, 706 (2019) (quoting Suber v. State, 371 S.C. 554, 559, 640 S.E.2d 884, 886 (2007)) (internal quotation marks omitted). "In determining whether the evidence requires a charge on a lesser-included offense, we view the facts in the light most favorable to the defendant." Id. (citing State v. Byrd, 323 S.C. 319, 321, 474 S.E.2d 430, 431 (1996)).

Appellant was indicted for four counts of attempted murder. This offense is codified in S.C. Code Ann. § 16-3-29, which states in relevant part, "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." The "degrees of assault and battery are, in descending order of severity, assault and battery of a high and aggravated nature (ABHAN), and assault and battery in the first, second, and third degrees." State v. Middleton, 407 S.C. 312, 315, 755 S.E.2d 432, 434 (2014) (citing S.C. Code Ann. § 16-3-600). "Under the statute, ABHAN is a lesser-included offense of attempted murder." Id. (citing § 16-3-600(B)(3)). "Assault and battery in the first degree is a lesser-included offense of both attempted murder and ABHAN." Id. (citing § 16-3-600(C)(3)). "Further, assault and battery in the second and third degree are each lesser-included offenses of every preceding offense." Id. (citing § 16-3-600(D)(3) and § 16-3-600(E)(3)).

Section 16-3-600(D)(1) states in relevant part, "A person commits the offense of assault and battery in the second degree if the person unlawfully injuries another person, or offers or attempts to injure another person with the present ability to do so, and: (a) moderate bodily injury to another person results or moderate bodily injury to another person could have resulted." Moderate bodily injury is defined as "physical injury that involves prolonged loss of consciousness, or that causes temporary or moderate disfigurement or temporary loss of the function of a bodily member of organ, or injury that requires medical treatment when the treatment requires the use of regional or general anesthesia or injury that results in a fracture or dislocation. Moderate bodily injury does not include one-time treatment and subsequent observation of scratches, cuts, abrasions, bruises, burns, slinters, or any other minor injuries that do not ordinarily require extensive medical care." S.C. Code Ann. § 16-3-600(A)(2).

Unlike the trial judge concluded, the fact that an individual suffered a gunshot wound does not make that injury *per se* "great bodily injury." Stated another way, a gunshot wound, although caused by a deadly weapon, is not *per se* "great bodily injury." In the light most favorable to Appellant, the jury could have found Irby, Rice, and Glenn's injuries merely constituted "moderate bodily injury." While there was not a great deal of testimony or other evidence concerning their injuries, it appears Rice suffered a superficial graze wound to her right temple and Glenn and Irby underwent a simple surgery to remove the bullet from their foot and leg respectively. Neither of them suffered any serious or lasting injury. As far as Smith, who was not injured, the jury could have found Appellant "offered or attempted to injure" Smith and "moderate bodily injury" could have resulted.

Accordingly, if the jury concluded Appellant acted without malice and without a specific intent to kill, it could have found him guilty of the lesser included offense of second degree assault and battery. Consequently, the trial judge erred by refusing to instruct the jury on this lesser included offense. Respectfully, this Court should reverse Appellant's convictions and sentence and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his convictions and sentence and remand for a new trial.

Respectfully Submitted,

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of March, 2020.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

Honorable J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

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APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon William M. Blitch, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Jody Ray Thompson, #346145, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 4th day of March, 2020.

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 4th day of March, 2020.

(L.S)
Notary Public for South Carolina
My Commission Expires: October 22, 2024.